

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of Michael Barbato-Buckley, Fire Fighter (M1514T), Deptford Township

CSC Docket No. 2017-2217

List Bypass Appeal

ISSUED:

AUG 1188 2017/

(SLK)

Michael Barbato-Buckley, represented by Carl N. Tripician, Esq., appeals the bypass of his name on the Fire Fighter (M1514T), Deptford Township (Deptford) eligible list.

By way of background, on May 3, 2016 the subject list was certified (OL160544) and the appellant was listed in the 5th position. The eligible in the 1st position (Ward) was removed, the eligibles in the 2nd (Cooke), 3rd (Tull), 4th (Brickner), and 6th (Covely) positions were appointed, and the appellant was bypassed.

On appeal, the appellant presents that he has been a volunteer Fire Fighter for Deptford for 17 years. He states that in this position, he has advanced and served in leadership positions since 2011 and has attended many firefighting related trainings and earned related awards and certifications. The appellant indicates that he is currently employed as a Public Safety Telecommunicator for Gloucester County and is a part-time Fire Fighter for Harrison Township. He asserts that his 17 years of volunteer Fire Fighter service with Deptford, his leadership positions in this role, and his part-time employment as a Fire Fighter provide him the type of background where he should not have been bypassed and he has not been given an adequate explanation as to why he was bypassed for a lower ranked candidate. The appellant highlights that the lower ranked candidate, Covely, has only been a volunteer Fire Fighter with Deptford since 2013 and she lives in West Deptford while he lives in Deptford. He notes that Brickner and

Covely are both volunteers at the same firehouse, which is part of Battalion 9-3, which is the same Battalion as four of the five Fire Commissioners who were involved in the hiring process, and the appellant has never served in Battalion 9-3. Therefore, the appellant believes that Brickner and Covely were hired based on "nepotism."

In response, the appointing authority, represented by Laura Link, Esq., presents that the 2nd ranked candidate, Cooke, a veteran, was appointed to the first vacant position. Thereafter, it indicates that since the remaining eligible candidates all had volunteer experience with Deptford and impressive experience and qualifications, it emphasized their interviews to determine who to appoint to the three remaining positions. The appointing authority states that Ms. Link and the Fire Commissioners interviewed the candidates based on a list of uniform questions that this group prepared. It asserts that it appointed Tull, Brickner, and Covely as their responses to the questions were more comprehensive and articulate than the appellant's responses, they demonstrated a more inquisitive nature and greater passion for learning, and their answers reflected greater leadership qualities than the appellant's answers. The appointing authority denies the appellant's allegation that there was a special relationship between the Fire Commissioners and the chosen candidates and highlights that, in addition to working with the appointed candidates, the Fire Commissioners worked with the appellant. It contends that the appellant has not presented any evidence to support his claim and therefore has not met his burden of proof.

In reply, the appellant reiterates that Brickner and Covely were volunteer Fire Fighters serving in Battalion 9-3, which is the same battalion as four of the five Fire Commissioners, and the appellant never served in that battalion. He presents that two Fire Commissioners, Sheairs and Nilsen, who conducted the interviews with him, were affiliated with Battalion 9-3. The appellant certifies that one of the Fire Commissioners, White, mostly excluded himself from the hiring process because he felt there was a conflict of interest since he is a Captain in Battalion 9-3. He claims that, other than the submitted questions that the interviewers asked, the appointed authority has not presented any documentation to support its claim that he was bypassed based on merit and fitness. The appellant questions how Brickner and Covely could have demonstrated greater leadership qualities than him when he has served in leadership positions for over six years and neither of them have served in leadership positions. He asserts that since there has been no indication that the candidates' responses were numerically rated, it is impossible to tell if objective standards were used and the appointments were based on merit as required under Civil Service. The appellant questions how the other candidates being characterized as being "more articulate" in the interview makes them more qualified to be Fire Fighters. He reiterates that, other than at a meeting or a

¹ It is assumed that the appellant meant to use the word "favoritism" as nepotism is most generally defined as referring to relatives or kin.

special event such as a parade, he has not worked with any of the Fire Commissioners.

In further response, the appointing authority presents that for the majority of Covely's volunteer service, she worked in the same fire station as the appellant. Thereafter, when she moved approximately six months prior to her interview, she requested to move to a fire station closer to her new home, which was granted and located in Battalion 9-3. It notes that two of the five Fire Commissioners, Nilsen and MacKay, never met Covely prior to her interview, and three of the Fire Commissioners, White, Nilsen and Frank, never served in the same fire station as Covely. Further, the appointing authority indicates that only MacKay and Sheairs are assigned to Covely's fire station; however, MacKay rarely reports to the station. Thus, only Sheairs served with her prior to her interview and that was only for six months. Ms. Link states that she was present for each interview and, regarding the four Fire Commissioners that were interviewing, not all of them were at every interview. However, Ms. Link and each interviewing Fire Commissioner each took handwritten notes in response to the questions. Thereafter, the entire Fire Commissioner Board met, discussed the performance of each candidate, and rendered a decision.

The appointing authority reiterates that the other candidates' responses were more comprehensive and articulate than the appellant's responses, demonstrated a more inquisitive nature and a greater passion for learning, and reflected greater leadership qualities. For example, a review of the interview notes indicates that Covely graduated from the top of her Fire Academy class, "likes learning" and always "wanted to learn," demonstrated curiosity and is often "asking why," "wants to resolve issues even if [they are] not hers" and showed initiative in coming up with an idea to have women who do not feel comfortable training with men to do separate training, which was successfully implemented. In comparison, the notes indicate that the appellant did not demonstrate enthusiasm, never mentioned a desire to learn or improve, and failed to articulate any examples of conduct that he engaged in that reflected the same type of initiative and superior leadership qualities that Covely demonstrated. The appointing authority submits certifications from Link, MacKay, and Nilsen that state that the candidates' battalions were not discussed and that there was no favoritism in the decisionmaking process. It emphasizes that the appellant's bypass was merit-based and within their discretion under the Rule of Three. The appointing authority contends that it did use a standardized process as all the candidates were asked the same questions and each interviewer noted the responses although it did not reduce responses to a numerical score, which is not required. Accordingly, it argues that there is no evidence that its decision was based on invidious motivation and the appellant has not met his burden of proof.

In further reply, the appellant asserts that the appointing authority's disclosure that three of the candidates were interviewed by three people, one candidate was interviewed by four people, and that there were three different interviewing panels makes it clear that the interview process was not standardized, fair and even-handed, uniform, and objective. Therefore, he argues that the process was arbitrary, capricious and unreasonable and not based on merit criteria. The appellant states that the appointing authority's process was not carefully constructed as there were no score sheets, no indications that interviewers compared notes or had objective discussions, and there is a lack of proofs to the assignment of numerical scores in a number of categories related to the position. Instead, he asserts this faulty process enabled a lower-ranked candidate to bypass a candidate who has far greater experience, background, and credentials. appellant states that the appointing authority has failed to explain how providing a "more articulate answer" or having a "more inquisitive nature" or a "greater passion for learning" make for a better Fire Fighter. He argues that the appointing authority has failed to provide proof that his bypass was based on merit and fitness as the reasons proffered are not relevant to the position sought. The appellant submits a letter of recommendation that explains that he is able to work under stress as a Public Safety Telecommunicator and he believes that the appointing authority does not know the difference between being an animated interviewee and a dedicated, experienced Fire Fighter. He counters the appointing authority's statement that he does not have a passion for learning based on the numerous training sessions he has attended. The appellant believes that since all the interviewers were not present for each interview and therefore votes were based on hearsay and there was no scoring methodology, even if the appointing authority was well intentioned, its method was arbitrary, capricious and unreasonable and therefore his bypass should be reversed.

CONCLUSION

N.J.S.A. 11A:4-8, N.J.S.A. 11A:5-7 and N.JA.C. 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on a promotional list provided no veteran heads the list. Additionally, 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 from an eligible list was improper.

In cases 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 action is warranted. See Jamison v. Rockaway Township Board of Education, 242 N.J. Super. 436 (App. Div. 1990). In Jamison, supra at 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.

If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, after the removal of the candidate in the 1st position and the appointment of the candidate in the 2nd position, Tull was in the 1st position, Brickner was in the 2nd position, the appellant was in the 3rd position, and Covely was in the 4th position on the subject certification and the appointing authority sought to make three appointments. However, it was within the appointing authority's discretion to select any of the top three eligibles for each appointment and therefore all of the aforementioned candidate were reachable for potential appointment. Nevertheless, the appellant alleges that he was bypassed for improper reasons. Specifically, the appellant initially contends that Brickner and Covely were appointed based on "nepotism" as their volunteer service as Fire Fighters was in the 9-3 Battalion where four of the five Fire Commissioners serve and the appellant does not.² Subsequently, the appellant contends that the interview and appointment process was arbitrary, capricious and unreasonable since there was no scoring methodology to rate responses, there were different interview panels for the candidates, and hearsay was proffered in support of candidates since not all interviewers interviewed candidates. He contends that since he had greater years of volunteer service as a Fire Fighter with Deptford compared to Covely and served as a leader in this position while Covely did not, he was a superior candidate. He argues that the appointing authority's proffered reasons as to why Covely was a superior candidate, that she was more articulate in demonstrating her leadership qualities, showed more enthusiasm, was more inquisitive, and showed more passion for learning do not demonstrate that she was a better Fire Fighter candidate as compared to his actual experience and only show that she was better at interviewing.

² It is noted that the appellant cannot challenge his non-appointment in favor of Brickner's appointment. Brickner was a higher-ranked eligible on the certification. An individual can only challenge his or her bypass in favor of **lower-ranked** eligibles. Thus, his contentions regarding Brickner will not be discussed further.

With respect to the appellant's initial claim of "nepotism," the records indicates that only one of the Fire Commissioners had actually met Covely prior to the interview and that Fire Commissioner only had worked with her for six months. Regardless, the appellant has not submitted one scintilla of evidence demonstrating reasons that the other candidates were chosen were based on any relationships that they may have had with the Fire Commissioners and mere speculation is not sufficient to demonstrate that their appointments were based on an invidious reason. Further, the appointing authority had discretion as to the how the hiring process was conducted. There is no requirement under Civil Service laws and rules that interview panels be the same for each candidate. Additionally, there is no requirement that the candidates' answers be rated with a scoring system. See In the Matter of William Ippolitto (CSC, decided June 26, 2013) (Since interviews are discretionary, lack of documentation or structure in the appellant's interview did not establish his bypass was improper as the hiring determination was made in compliance with Civil Service law and rules). Moreover, the appointing authority has provided legitimate business reasons why it bypassed the appellant. Specifically, it indicated that the other candidates interviewed better by greater leadership qualities, showing more enthusiasm, and articulating demonstrating a greater passion for learning. See In the Matter of Nicholas R. Foglio (CSC, decided February 22, 2012) on temporary remand (CSC, decided November 7, 2012). While the appellant may feel he is a superior candidate based on his greater years of volunteer Fire Fighter service and leadership positions and may feel that the appointing authority's criteria were not objective, standardized, and relevant, the appellant has not submitted any substantive evidence regarding his bypass that would lead the Civil Service Commission (Commission) to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three." See In the Matter of Chirag Patel (CSC, decided June 7, 2017). 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). Moreover, the Commission will not interfere in an appointing authority's discretion in the selection process absent such evidence.

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 16th DAY OF AUGUST, 2017

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