

STATE OF NEW JERSEY

In the Matter of Algenoria Simpson, Police Sergeant (PM4108N), East

Orange

CSC Docket No. 2019-253

FINAL ADMINISTRATIVE
ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for Reconsideration

ISSUED: OCTOBER 10, 2018

Algenoria Simpson, represented by Wolodymr P. Tyshchenko, Esq., requests reconsideration of the attached decision rendered on May 23, 2018, which upheld the bypass of his name from the eligible list for Police Sergeant (PM4108N), East Orange.

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By way of background, the petitioner, a non-veteran, was certified to the appointing authority on September 28, 2017 and he was listed in the 16th position on the certification. In disposing of the certification on January 17, 2018, the appointing authority bypassed the petitioner, indicating that he was not available for the current positions, and appointed the eligibles in the 1st through 12th, 15th, 18th and 19th position on November 8, 2017. In his initial appeal, the petitioner argued that he was listed in the 16th position on the certification, but he was bypassed in favor of lower ranking candidates. In a subsequent submission, he provided a copy of his DD-214 and asserts that he was the only veteran on the certification. The Civil Service Commission (Commission) found that the petitioner was unavailable for appointment on November 8, 2017 and his bypass was proper. It also found that although the petitioner served in the military, he did not serve during one of the qualifying periods necessary to establish veterans preference. See N.J.A.C. 4A:5-1.1 et seq.

On reconsideration, the petitioner states that the decision to bypass him violates the provisions of the Family Medical Leave Act (FMLA) and is improper. In this regard, he states that the FMLA prohibits interference with an employee's

rights under the law and that employers cannot take using FMLA leave as a negative factor in employment actions. Thus, notwithstanding his co-appellant's assertion that past practice of the appointing authority was to promote officers who were unavailable for work who were out on FMLA leave, the petitioner argues that the Commission erroneously discounted this argument because he did not provide any documentation or evidence to substantiate that assertion. He also states that the Commission accepted that appointing authority's pretextual assertion that it needed to move forward and promote to ensure public safety without authentication and it should be rejected. Therefore, the petitioner requests that he be retroactively appointed to Police Sergeant and receive the appropriate back pay. In the alternative, the petitioner requests that this matter be referred to the Office of Administrative Law for a hearing to resolve "the factual disputes regarding appellant-petitioner's disabled veteran's status, the issue of past practice, and whether the appointing authority's necessity and public safety claims" are merely pretextual arguments.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

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.

Initially, in the prior consolidated matter, the petitioner did not raise the argument that the past practice of the appointing authority was to promote officers who were unavailable for work that were out on FMLA. Rather, he only argued that he was listed in the 16th position on the certification, but he was bypassed in favor of lower ranking candidates. In a subsequent submission, he provided a copy of his DD-214 and asserts that he was the only veteran on the certification. Nevertheless, as the FMLA issue was addressed since it was raised by another appellant in the prior matter, the petitioner is claiming on reconsideration that the Commission's analysis regarding the FMLA is in error. However, in his petition for reconsideration, the petitioner has not provided any arguments or documentation demonstrating that he in fact served during one of the qualifying periods necessary

to establish veterans preference. Therefore, the Commission finds no error regarding the establishment of veterans preference.

Concerning the matter of his bypass, 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.

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 discriminatory or retaliatory 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 it was required to make appointments due to business necessity at a certain time or that other candidates had better qualifications than the complainant.

In the instant matter, the petitioner, for the first time, argues that the appointing authority used his taking of FMLA leave as a negative factor in its promotional decisions. The appointing authority contended that the petitioner was unavailable for work and that it needed to move forward to promote to ensure public safety and to manage the officers in various capacities. In this case, the record indicates that the motivating factor behind the petitioner's bypass was the fact that he was unavailable for work at the time the appointing authority needed to staff Police Sergeant positions. In this regard, the appointing authority explained that needed to make appointments in order to ensure public safety and to manage officers in various capacities. As such, the appointing authority provides a legitimate business reason as to why the petitioner was not appointed. Other than claiming that the appointing authority's assertion is pretextual and should not be considered because it was not authenticated by certification, other than his mere speculation, the petitioner has not provided any evidence, in the prior matter or on reconsideration, to show that the proffered reason was pretextual. He also did not demonstrate that it was not necessary to appoint all 12 Police Sergeants on November 8, 2017 for public safety and operational reasons. While the Commission agrees that use of FMLA cannot be used as a negative factor in promotional actions, the petitioner still has the burden of proof to demonstrate that the appointing authority's explanation was mere pretext. *See N.J.A.C.* 4A:2-1.4(c) and *N.J.A.C.* 4A:4-4.8(b)4. He has simply not done so in this case.

Additionally, even assuming arguendo, that the petitioner is better qualified for the position at issue, the appointing authority still has selection discretion under the "Rule of Three," to appoint a lower-ranked eligible. See N.J.A.C. 4A:4-4.8(a)3. There is nothing in the record to indicate that petitioner's non-selection was based on an unlawful motive rather than an exercise by the appointing authority of its selection discretion. See N.J.A.C. 4A:4-4.8(a)3. 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). Furthermore, it is noted that the petitioner did not possess a vested property interest as a Police Sergeant solely because he was on FMLA. 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. Accordingly, a thorough review of the record indicates that the Div. 1990). appointing authority's bypass of the petitioner was proper and he has failed to meet his burden of proof in this matter.

ORDER

Therefore, it is ordered that this request for reconsideration 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 3RD DAY OF OCTOBER, 2018

Derdre' L. Webster Cabb

Deirdre L. Webster Cobb

Chairperson

Civil Service Commission

Inquiries Christopher S. Myers

and Director

Correspondence Division of Appeals

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P.O. Box 312

Trenton, New Jersey 08625-0312

Attachment

c: Algenoria Simpson

Wolodymr P. Tyshchenko, Esq.

Monica Reed Kelly Glenn Records Center



STATE OF NEW JERSEY

In the Matter of Stephen Rochester and Algenoria Simpson, Police Sergeant (PM5108N), East Orange

CSC Docket Nos. 2018-1440 and 2018-1506

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Bypass Appeals

ISSUED: MAY 31, 2018 (CSM)

Stephen Rochester and Algenoria Simpson appeal the bypass of their names on the Police Sergeant (PM5108N), East Orange eligible list. These appeals have been consolidated due to common issues presented.

The appellants, non-veterans, took the subject promotional examination, achieved passing scores, and their names appeared the resultant eligible list. The appellants' names were certified to the appointing authority on September 28, 2017. Rochester's name was listed in the 3rd position on the certification and Simpson's name was listed in the 16th position on the certification. In disposing of the certification on January 17, 2018, the appointing authority bypassed the appellants, indicating that they were not available for the current positions, and appointed the eligibles 1st through 12th, 15th, 18th and 19th position on November 8, 2017.

On appeal to the Civil Service Commission (Commission), Rochester states that he was given 30 minutes notice to be at Police Headquarters for his interview. During his interview, he states that he was asked the timetable for his return to work from Family Medical Leave Act (FMLA) leave. Rochester indicates that he responded he had three options, physical therapy, minor surgery, or major surgery, which would determine his plan of action. He states that minor surgery would have returned him to work on January 2, 2018, but his actual return date of February 7, 2018, was not determined until after the promotions were made. Rochester claims it has been past practice of the appointing authority to promote officers who were unavailable for work that were out on FMLA leave. Further, he contends that the appointing authority violated the Rule of Three, that he has superior qualifications

than some of the others who were promoted, and that since the promotions occurred, one of those individuals has resigned and another was demoted. In support, he provides copies of his performance evaluations. Therefore, Rochester contends that he should be retroactively appointed from the subject list and receive back pay.

Simpson presents that he was listed in the 16th position on the certification, but he was bypassed in favor of lower ranking candidates. In a subsequent submission, he provides a copy of his DD-214 and asserts that he was the only veteran on the certification.

In response, the appointing authority states that based on the appointment date of November 8, 2017, both appellants were unavailable to work. With respect to Rochester, at the time it needed to fill the positions, it states that his expected return to work date from FMLA leave was January 3, 2018. Regarding Simpson, his expected return to work date was also January 3, 2018, but he actually returned on January 6, 2018. Therefore, since it had to move forward with the promotions to ensure public safety, it made 12 permanent appointments from the certification all effective November 8, 2017.

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.

N.J.A.C. 4A:4-7(a)3 states that an eligible may be removed from an eligible list for inability, unavailability or refusal of eligible to accept appointment.¹

Initially, since the appellants were non-veterans, it was within the appointing authority's discretion to select any of the top three eligibles on the certification. Although Simpson served in the military, he did not serve during one of the qualifying periods necessary to establish veterans preference. See N.J.A.C. 4A:5-1.1 et seq.

¹ Although the appellants could have been removed from the list, when it returned to certification, the appointing authority opted to request that their names be retained on the list due to their unavailability.

In the present matter, there is no dispute that the appellants were unavailable for appointment to the positions available on November 8, 2017 as they were on FMLA leave until January or February 2018. Further, the appointing authority indicated that due to public safety reasons, it needed to make all the appointments from the certification effective November 8, 2017. While Rochester claims that it has been past practice to appoint individuals who are out on FMLA leave from prior lists, other than his mere allegation, he has not provided any documentation or evidence to substantiate this assertion. Additionally, the FMLA only requires that an employee who returns from an authorized leave to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. In this regard, the FMLA specifically states that an employee utilizing such leave, upon return, is not entitled to any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave. See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2614 (1993). Similarly, the appellants do 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 their mere allegations, the appellants have not presented any substantive evidence regarding their 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 appellants' bypass which have not been persuasively refuted.

Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellants name was proper and the appellants have failed to meet their burdens of proof in this matter.

ORDER

Therefore, it is ordered that these appeals 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 23^{RD} DAY OF MAY, 2018

Derdre' L. Webster Cabb

Deirdre L. Webster Cobb

Chairperson

Civil Service Commission

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