



STATE OF NEW JERSEY

In the Matter of P.S., Administrative
Analyst 3 (PS2510N), Department of
Labor and Workforce Development

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2022-1866

List Bypass Appeal

ISSUED: JUNE 20, 2022 (SLK)

P.S., represented by Robert K. Chewning, Esq., appeals the bypass of his name on the Administrative Analyst 3 (PS2510N), Department of Labor and Workforce Development eligible list.

By way of background, the appellant, a nonveteran, appeared on the PS2510N eligible list, which promulgated on July 1, 2021, and expires on June 30, 2024. A total of 10 names, including the appellant, were certified on September 17, 2021, (PS211041) for a position in the subject title. The appointing authority returned the certification on February 7, 2022, indicating that the appellant, the first ranked candidate, was bypassed, the second ranked candidate was appointed, the third ranked candidate was bypassed, the fourth, fifth, and sixth ranked candidates were appointed, the seventh ranked candidate was removed, the eighth and ninth ranked candidates were appointed, and the 10th ranked candidate was removed.

On appeal, the appellant presents that he has worked for the appointing authority for over 19 years as an Auditor 3, Accountant 3, and Accountant 2 and was the first ranked candidate on the subject list. He asserts that he was wrongly bypassed six times on the subject certification as he clearly has superior merits, the interview was not objective or neutral, and he was discriminated and retaliated against based on his disabilities. Specifically, the appellant indicates that he has been diagnosed with Tourette Disorder, profound/severe hearing loss, anatomical disfigurement of ears, and Obsessive-Compulsive Disorder (OCD). He requests that

the decision to bypass him be reversed, he be promoted to the subject title, he receive back pay, seniority, and counsel fees, and other equitable relief. In the alternative, he asks that this matter be referred to the Office of Administrative Law (OAL) for a hearing.

In response, the appointing authority presents that the interviews were conducted on November 15, 2021, by four interview panelists and the appellant was one of nine candidates considered for six promotional openings. It indicates that the panelists asked the appellant the same questions presented to the other candidates, and the panelists reviewed the appellant's and the other candidates' responses independently from one another. The appointing authority states that all candidates' scores, including the appellant's, were based solely on their performance in response to the interview questions asked. It indicates that the appellant's score, 309, was the lowest score, the scores for the other candidates ranged from 337 to 468, and the second lowest scoring candidate was also not appointed. The appointing authority presents that the panelists found that the appellant's answers did not demonstrate experience or knowledge with budgeting, forecasting, approving expenses, financial reporting, accrual-based accounting, cost allocations, and federal reporting. In contrast, it states that the highest scoring candidates demonstrated experience and knowledge in the aforementioned areas and they were selected based on their high scores in accordance with the Rule of Three. The appointing authority notes that the appellant did not ask for an Americans With Disabilities Act (ADA) accommodation for the interview process. Therefore, it indicates that the panel followed standard interview practices and there was no indication that his scores were based on his disability rather than his responses to the interview questions.

In reply, the appellant highlights that his score on the Civil Service test was significantly higher than the second ranked candidate's score. He indicates that he was not informed of the details of the interview process including what questions would be asked during the interview, whether the questions would be graded, and if so, how, and how his interview performance would be weighed against his score on the list. The appellant presents that there were several technical issues that arose during the interview. Specifically, he indicates that he was sent to a small conference room where the WiFi did not work so he was unable to connect to the Microsoft Teams meeting. The appellant explains that he was then told to go to the library, but he misheard, and he thought he was supposed to go to the lobby. He indicates that after a 20-minute delay, he was interviewed while in the library. The appellant states that there were transmission issues throughout the interview that caused the panelists' questions to be cut off at times, which caused him to experience anxiety symptoms associated with his OCD and his performance during the interview suffered. He notes that at the end of the interview, he was not provided any information regarding his interview performance, including his alleged score of 309. The appellant emphasizes that even in response to his appeal, the appointing authority has not provided all of the candidates' interview scores, how they were graded, and/or how their grades were weighed against their overall ranking in the list.

The appellant asserts that the interview process was a pretext to allow the appointing authority to select who it wanted rather than the most qualified candidates. He presents J.Z., who was the 10th ranked candidate, had an in-person interview. The appellant submits a certification from J.Z. where she states that R.N., one of the panelists, allegedly stated to her that the appointing authority had already made up its mind about who it was going to promote to the subject title and the interviews were only done because human resources required it. In response, J.Z. states that she sought and obtained a position in the subject title with the Department of Children and Families, effective January 2022.¹ He reiterates that several of the candidates had in-person interviews, while the appellant had to interview virtually despite his well-known disabilities and technical/transmission issues. Therefore, the appellant believes that the interviews were not objective. He states that this is not the first time that the appointing authority discriminated against him as he indicates that, in May 2019, he was bypassed for an Accountant 2 position despite being the top ranked candidate, which led to him filing an appeal that was withdrawn after he received the promotion following a classification review. Further, the appellant presents that in 2020, he made a reasonable accommodation request for himself and his coworkers to use face shields in lieu cloth masks since his disfigured ears made it nearly impossible for the cloth mask's ear loops to anchor his ears. Also, the face shields would have made it easier for him to communicate with his co-workers due to his known hearing impairments. While the appellant claims that other similarly situated employees not within the appellant's unit could wear face shields in lieu of a mask, his request was denied, and he was instead allowed to use see-through masks. However, the appointing authority was unwilling to supply him and his co-workers within his unit these masks. The appellant believes that the appointing authority set him up to fail by forcing him to proceed with the interview process virtually because it did not want to promote him due to his disabilities. Therefore, he argues that the appointing authority's interview process was arbitrary, capricious, and conducted in bad faith. The appellant contends that his bypass was based on discrimination. The appellant asserts that the appointing authority has a pattern of discriminating against him as the interview process was a "sham."

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)3i allow an appointing authority to select any of the top three interested eligibles on an open competitive or 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.

¹ Based on J.Z. no longer being employed by the appointing authority, she was removed from the list on the subject certification.

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 actions 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 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 would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In this matter, the appellant appeared as the first ranked eligible on the certification. The appellant argues that even though he has superior merits, he was bypassed in favor of six lower-rated due to disabilities. Specifically, he indicates that he was diagnosed with Tourette Disorder, profound/severe hearing loss, anatomical disfigurement of ears, and OCD. He also argued that the interview was not objective or neutral. In response, the appointing authority indicates that the panelists asked the appellant the same questions presented to the other candidates, and the responses were reviewed independently from one another. It asserts that the appellant had the lowest interview score, not because of his disabilities, but because his answers did not demonstrate the same level of experience or knowledge in the various accounting areas that the candidates were questioned. Further, as the appellant did not ask for ADA accommodation in the interview process, his interview followed standard interview practices.

In reply, the appellant submits a certification from J.Z., who was the 10th ranked candidate, who states that one of the panelists allegedly stated to her that the appointing authority had already made up its mind about who it was going to promote to the subject title and the interviews were only done because human resources required it. The appellant also indicates that other candidates had in-person interviews, while his was virtual despite his well-known disabilities. To demonstrate this his disabilities were well-known, he presents a prior reasonable accommodation request that he made. Additionally, he describes several technical issues that took place during interview, including transmission issues throughout the interview that caused the panelists' questions to be cut off at times, and caused him to experience

anxiety symptoms associated with his OCD. However, the appointing authority has not refuted his claim that one of the panelists stated that the interviews were only conducted because human resources required it and the appointing authority already made up its mind about who it was going to promote. Additionally, it has not explained why the appellant's interview was remote, while others were conducted in-person. Further, the appellant asserts that technical issues impacted his interview performance and the appointing authority has not disputed his claim that there were technical issues during his virtual interview.

Therefore, as the appellant has presented allegations that the selection process was predetermined, and at minimum, the appointing authority has not refuted that technical issues occurred during the appellant's interview which may have impacted his performance, the Commission cannot be certain that the selections were made in compliance with Civil Service guidelines. Consequently, the Commission finds that this matter should be remanded back to the appointing authority to re-interview, in-person, the eight² employees currently employed by the appointing authority on the subject certification. If the appellant is again bypassed and he feels that his subsequent bypass was improper, he may file a subsequent appeal at that time. The appointing authority is also directed to advise the appointed candidates that their appointments are conditional, subject to the results of the re-interviews and selections, as well as any subsequent appeals.

ORDER

Therefore, it is ordered that this matter be remanded to the appointing authority to re-interview the candidates and redispense of the certification.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

² The seventh and 10th ranked candidates are no longer employed by the appointing authority.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JUNE 2022

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