



STATE OF NEW JERSEY

In the Matter of Victor Denis,
Supervisor, Information Technology
(C0757D), Essex County

CSC Docket No. 2023-1320

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

List Bypass Appeal

ISSUED: May 3, 2023 (SLK)

Victor Denis appeals the bypass of his name on the Supervisor, Information Technology (C0757D), Essex County eligible list.

By way of background, the appellant, a nonveteran, appeared on the C0757D eligible list, which promulgated on September 1, 2022, and expires on August 31, 2025. The appellant’s name was certified on September 7, 2022 (OL221007) for a position in the subject title. A total of three names were certified, and the three candidates had the same rank. The first positioned candidate was appointed, the appellant, the second positioned candidate was bypassed, and the third positioned candidate was bypassed.¹

On appeal, the appellant states that when he spoke with the appointing authority’s human resources department about the position, he was advised that it hired the provisional. He asserts that it is “nonsense” and “dishonest” that the subject announcement was posted on this agency’s website when there was already a provisional serving in the subject position and he had to pay to apply. He contends that because he was required to pay when there was already a provisional serving, this was an attempt by the government to collect money from the public. Additionally, the appellant presents that his non-appointment was unfair as the subject announcement indicated that eligibility would be based on education and

¹ As the candidates had the same rank, the candidates were positioned on the subject certification based on alphabetical order of their last names.

experience, and provisional experience was not listed as one of the criteria for appointment. Further, he believes that based on the requirements as set forth in the announcement, he is the most qualified candidate and he describes his experience.² Additionally, the appellant claims that his non-appointment was based on “Favoritism, Discrimination, and Sentiment.” He argues that the “Rule of Three” is racist and was put in place by a racist white public administration to prevent black people from getting hired in public administration. He presents case law which he claims supports his position that bypassing a higher-ranked candidate is inconsistent with the principles of merit and fitness, which is why an appointing authority must provide a specific reason when it bypasses a candidate. The appellant suggests that the “Rule of Three” be replaced by a panel who can impartially determine the best candidate based on merit and fitness. He states that he is not going to accept any argument that the appointing authority has in response to his appeal as any arguments should be based on education, experience, and knowledge as mentioned in the subject examination job announcement. The appellant believes that the appointing authority’s human resources department is not qualified to hire for an information technology position. He also claims that his case was held by this agency for four months because the appointing authority is the spouse of an employee in the Governor’s Office.

In response, the appointing authority presents that under the “Rule of Three,” it can select any one of the top three interested eligibles for appointment. It provides that the Department of Economic Development, Training and Employment selected the provisional who has been serving in the subject title because of a position classification review, effective November 13, 2017. The appointing authority highlights that all the candidates had the same rank so that appellant was not bypassed in favor of a lower ranked candidate.

In reply, the appellant claims that in response to his appeal where he demonstrated that the appointing authority does not have the competence to make an information technology hire and has political influence, which is why he alleges that both the appointing authority and this agency held his case for four months, human resources is now indicating that the hire was made by another department. Therefore, the appellant questions the honesty of the response and states that he now understands that the appointing authority’s hiring system is designed to block anyone from the outside to gain employment in Essex County. He presents that he is going to go to the State Legislature to challenge Essex County’s favoritism and discriminatory practices.

CONCLUSION

² The appellant also complains that he was not hired off the Supervisor Information Technology (S0872D), Statewide open competitive eligible list. It is noted that no candidates have been hired off this list as the test administration date for this examination has not been announced and, therefore, the list has not promulgated.

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.

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 this matter, the record indicates that the appointed candidate, the appellant, and another candidate were all tied as the first-ranked candidates. Therefore, under the "Rule of Three," it was within the appointing authority's discretion to appoint the candidate who was provisionally serving in the subject title. Further, while the appellant claims that he was the most qualified candidate, as all the candidates had the same rank, there is nothing in the record to suggest that he was more qualified. Additionally, as there is nothing in the record that indicates that the appellant has any knowledge of the appointed candidate's qualifications, the appellant is not in position to opine that he was the most qualified candidate. Moreover, the appellant's mere statement that he was more qualified than the same ranked eligible who was appointed is insufficient to show that his bypass was improper. *See In the Matter of Jerrold Jacobson* (CSC, decided October 31, 2018). Regardless, even if it was true that the appellant was the most "qualified" candidate, under the "Rule of Three," the appointing authority could have appointed any reachable candidate based on a legitimate business reason. The appointing authority's choice to appoint a candidate based on successful provisional service is considered a legitimate business reason and not considered "favoritism" or "discrimination" under Civil Service law or rules. Regardless, other than his mere allegations, the appellant has presented no evidence of any discriminatory practices by the appointing authority in this matter.

Regarding the appellant's comments that it was "nonsense" and "dishonest" for this agency to have posted the subject announcement when a provisional was already serving in the subject position, the method by which a provisional employee can achieve permanent appointment in the competitive division is by the individual applying for and passing an examination, then being appointed from an eligible list, and, finally, satisfactorily completing a working test period. Additionally, this agency determines eligibility. Therefore, before there was an examination, there was no determination by this agency that the provisional candidate was eligible. Further, before there was an examination, the number of applicants was unknown. Therefore, even if the provisional was eligible, it was also possible that the provisional could have been ranked outside of the top three candidates and not reachable for appointment. Moreover, a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. Therefore, the appointing authority could have chosen a non-provisional for permanent appointment. In other words, prior to the examination, there was no way to determine which candidate

would be appointed. Therefore, it was appropriate for this agency to have announced an examination for the subject title and the appellant's assertion that the examination application fee was an attempt by this agency to collect money has no basis.

Concerning the appellant's belief that his non-appointment was unfair as the subject announcement indicated that eligibility would be based on education and experience, and provisional experience was not listed as one of the criteria for appointment, an examination announcement lists the minimum criteria to be eligible for consideration for potential appointment and is not meant to be the sole criteria that an appointing authority can use in making its decision for appointment. Further, the "Rule of Three" was implemented in recognition that other factors outside the minimum Civil Service requirements may be used to determine the best candidate for a position and it is within an appointing authority's discretion to choose its selection method. In other words, the current system is designed as a balance where this agency can ensure that potential candidates at least possess minimum qualifications, but allows appointing authorities the flexibility to choose from the reachable candidates based on its determination as to who is the best candidate based on its unique needs. Additionally, there is nothing unfair in allowing an appointing authority to determine that a reachable candidate who is currently successfully performing the duties of the position is the best candidate for it to permanently appoint to the position.

Regarding the appellant's contention that the "Rule of Three" is "racist," it is noted that the appointed candidate was also African-American. As such, there is nothing in the record to suggest that race played any role in the subject appointment.³ Moreover, allowing an appointing authority the flexibility to appoint a reachable candidate based on its determination as to who fits its needs best is not inherently racist. Additionally, the Supreme Court of New Jersey in *In re Foglio*, 207 N.J. 38 (2011) did not find that the "Rule of Three" was contrary to merit and fitness as the appellant suggests, rather it simply indicated that an appointing authority must justify its selection of a lower-ranked candidate with a specific reason, which in this case was done, namely its reliance on the appointed candidate's provisional service. It is also emphasized that that the appellant was not bypassed in favor a lower-ranked candidate as the appellant was the **same** rank as the appointed candidate.

Referencing the appellant's statements that the appointing authority and its human resources are not qualified to make an information technology hire, the appointing authority presents that the Department of Economic Development, Training and Employment made the decision based on the appointed candidate's provisional service. Further, the fact that the provisional was appointed, who the

³ It is noted that a bypass of a candidate in favor of another candidate who is a different race than the bypassed candidate is not evidence of discrimination without other evidence confirming that race was an improper motivating factor in the bypass.

appointing authority could have removed from provisional service at any time as a provisional appointee, but chose not to, is evidence that those superiors who did have information technology knowledge believed that the appointed candidate was performing the job well. Also, the fact that a human resources employee was the “front” person who spoke with the appellant as to why he was not hired, does not mean that those with information technology knowledge were not involved in the hiring decision.

Concerning the appellant’s belief that this agency held his appeal for four months due to the appointing authority’s alleged political connections, this has no basis in fact. A review of the record indicates that his appeal was inputted into this agency’s system on November 2, 2022. Thereafter, on November 9, 2022, this agency informed the appellant that his appeal was premature as the subject certification’s disposition had not been recorded. After the subject certification’s disposition was recorded on December 8, 2022, and this agency’s internal processes, the matter was assigned to an analyst on January 13, 2023. From that point forward, it followed normal processing procedures. In this regard, in February 2023, both parties were informed that the matter would be submitted to the Commission for a determination. It is noted that this agency receives thousands of appeals per year, and there is nothing in the record that indicates that there was any inordinate delay in this agency’s handling of the subject appeal, or that the appointing authority was aware of the subject appeal prior to February 2023 or in any way tried to influence this agency’s handling of the subject appeal.

Regarding the appellant’s statement that the appointing authority’s hiring system is designed to block anyone from the outside to gain employment in Essex County, this is a speculative statement by the appellant without evidence. However, it is noted that it is not a violation of Civil Service law or rule to choose to hire a reachable candidate who has already demonstrated that they can successfully perform the duties of a position as opposed to hiring an outside candidate who it does have any history.

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 3RD DAY OF MAY, 2023

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