



STATE OF NEW JERSEY

In the Matter of Makhosini Dhlamini,
County Correctional Police Sergeant
(PC2926W), Hudson County

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

CSC Docket No. 2023-1460

Bypass Appeal

ISSUED: November 1, 2023 **(ABR)**

Makhosini Dhlamini appeals the bypass of his name on the promotional list for County Correctional Police Sergeant (PC2926W), Hudson County.

By way of background, the subject examination was announced with a closing date of November 21, 2018. The subject eligible list, containing 109 names, promulgated on December 12, 2019, and expired on December 20, 2022. The appellant, a nonveteran, was ranked 13TH on the subject eligible list. A certification was issued on September 16, 2022, (PL221315) with the appellant’s name listed in the fourth position. In disposing of the certification on December 1, 2022, the appointing authority, among other things, bypassed the appellant and appointed the eligibles listed from the third position through the seventh positions.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority’s decision to bypass him was improper.

In response, the appointing authority, represented by Georgina G. Pallitto, Esq., Assistant County Counsel, maintains that it appropriately bypassed the appellant on the basis of his extensive disciplinary history. In particular, it submits that the appellant’s disciplinary records includes two suspensions in August 2014 and May 2016 for five working days for failing to report to work; a 17 working day suspension in September 2016 for a criminal arrest; a 125-day suspension in October 2019 for bringing a loaded firearm into the Hudson County Correctional Facility; and

a 180-day suspension in January 2023 for engaging in an altercation with an inmate and multiple improper deployments of chemical spray. It avers that these five disciplinary actions within the span of 10 years, including three involving major discipline, one of which was in progress at the time of his appeal, support its decision to bypass the appellant, particularly as the lower-ranking eligibles it promoted from the subject certification did not possess disciplinary histories similar to or as severe and repetitive as the appellant.

In reply, the appellant argues that his disciplinary history does not support his bypass with the disposition of the subject certification, particularly as the appointing authority has a history of promoting other officers with a history of suspensions. The appellant alleges that the appointing authority has shown favoritism and applied selective discipline in the department. The appellant further suggests that racial bias is involved. He avers that the August 2014 suspension resulted from his missing a work shift “by mistake without any progressive discipline, while others were given 3 days for the same offense.” He also alleges that the May 2016 suspension resulted from an “honest mistake of oversleeping.” The appellant further claims that the September 2016 suspension stemmed from a wrongful arrest where plainclothes officers mistook him for another person and he adds that while the criminal charges against him were subsequently dropped, the appointing authority refused to drop the disciplinary charges against him. He proffers that with the October 2019 suspension, upon realizing that he had accidentally brought a firearm into the Hudson County Correctional Facility, he brought it into a restroom and fully disassembled it. He maintains that other staff members had made similar mistakes in the past and that his 125-day suspension for this incident shows that the appointing authority has a history of excessively suspending certain people. As to the January 2023 suspension, the appellant avers that his use of force was a proper response to an inmate failing to follow verbal commands and spitting in his face. The appellant maintains that he signed documentation related to that suspension under duress without a representative and claims that he is in the process of appealing it. The appellant also alleges there was a conflict of interest because the person who brought disciplinary charges against him was one of the people who conducted the interview for his promotion. Further, the appellant submits the names of three County Correctional Police Sergeants who he claims were promoted despite histories of suspensions and/or pending criminal charges. He also alleges that a Caucasian County Correctional Police Sergeant used the “N-word” to refer to someone else in his presence on February 16, 2023.

In further reply, the appointing authority asserts that the appellant has made numerous inaccurate statements. Specifically, it presents that the appellant did not appeal the five working day suspensions he received in August 2014 on May 2016. It proffers that its failure to impose major discipline in May 2016 was a deviation from progressive discipline principles, but one that benefitted the appellant. As to the underlying incident involved with the appellant’s September 2016 suspension, the

appointing authority states that the appellant ignored numerous commands from police to leave a bar he was patronizing and after being advised that he was being placed under arrest, he resisted, causing injury to an officer. It submits that the appellant later executed a settlement agreement dated December 9, 2016, for a suspension of 30 days, of which only 17 were to be served. It further states that in Section 6 of that agreement, the appellant acknowledged that he had time to consult with a union representative or attorney and that pursuant to Section 11 thereof, he acknowledged that he was entering into it freely and without any pressure or coercion. It also notes that both the appellant and his union were served with the corresponding Final Notice of Disciplinary Action (FNDA), dated December 13, 2016, and that no appeal was filed thereafter. As to the October 2019 disciplinary action, the appointing authority states that the appellant entered into a settlement agreement with the assistance of counsel provided by his union and that both the appellant and counsel were served with a FNDA, but did not appeal. The appointing authority further indicates that the subject settlement agreement contained the same acknowledgements in Sections 6 and 11 as the agreement in the September 2016 suspension. As to the January 2023 suspension, the appointing authority indicates that the appellant was captured getting up from his desk and approaching an inmate face-to-face on closed circuit television. It further shows the inmate turning and walking away before o.c. spray was deployed. As with the prior major disciplinary actions, the appellant entered into a settlement agreement with the same acknowledgments in Sections 6 and 11. Moreover, the appellant, his attorney and his union were served with a FNDA, dated December 7, 2022, and no appeal was timely filed thereafter. As such, the appointing authority maintains that the appellant's assertion that he "is working on appealing" is without merit. Finally, the appointing authority contends that the appellant's claims about other officers' disciplinary histories is based on nothing more than hearsay. It adds that because none of the officers named by the appellant were part of the subject certification, his claims have no merit.

CONCLUSION

Consistent with *N.J.A.C. 4A:4-4.8(a)3*, an appointing authority has selection discretion under the "Rule of Three" to appoint a lower ranked eligible absent any unlawful motive. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). 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).

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 436, 445, the

Court outlined the burden of proof necessary to establish discriminatory and 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 complainant sustain this burden, the complainant 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 this motive.

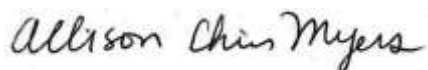
In the instant matter, the appellant alleges that his disciplinary record does not support the bypass of his name on the subject certification and that racial bias was a factor in his bypass. Even assuming, *arguendo*, that the appellant made a *prima facie* showing of discrimination, which he has not, the appointing authority has clearly articulated a legitimate non-discriminatory reason for the bypass of the appellant's name, *i.e.*, his extensive disciplinary record. The appellant's disciplinary history at the time of the disposition of the subject certification, including multiple attendance-related infractions and his bringing a loaded weapon into a secured facility, clearly raised reasonable questions about his suitability for the title of County Correctional Police Sergeant and supported his bypass. The other disciplinary actions in the appellant's record add further support for the appointing authority's action. Moreover, the record does not suggest that the appointing authority's citation of the appellant's disciplinary history as the basis for its bypass of the appellant was pretextual or that racial bias more likely motivated the appointing authority.

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 1ST DAY OF NOVEMBER, 2023



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