



STATE OF NEW JERSEY

In the Matter of Raymond
Donnerstag, Police Sergeant
(PM4554C), Hackensack

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

CSC Docket No. 2023-2385

Bypass Appeal

ISSUED: November 1, 2023 (HS)

Raymond Donnerstag, represented by Robert K. Chewning, Esq., appeals the bypass of his name on the Police Sergeant (PM4554C), Hackensack eligible list.

The appellant appeared as the second ranked non-veteran eligible on the subject eligible list, which promulgated on October 20, 2022 and expires on October 19, 2025. A certification, consisting of the names of five non-veteran eligibles only, was issued on January 24, 2023 (PL230098) with the appellant listed in the first position. In disposing of the certification, the appointing authority bypassed the appellant and appointed J.B. and F.C., the second and third listed eligibles respectively, effective April 24, 2023. The fourth and fifth listed eligibles were retained.

On appeal to the Civil Service Commission (Commission), the appellant maintains that he was improperly bypassed.

In response, the appointing authority, represented by Steven W. Kleinman, Esq., maintains that it has easily met its burden of presenting a rational basis for bypassing the appellant: he was the only one of the three highest-ranking eligibles to have a history of sustained internal affairs matters at the Hackensack Police Department (HPD), all of which occurred recently, and he gave answers regarding his performance history during his interview that gave management an abundantly clear reason to question whether he understood the considerable responsibilities inherent with being a supervisor. Specifically regarding that latter point, during the

course of the appellant's interview, he made numerous statements of a negative or derogatory nature while describing his experiences with the East Orange Police Department (EOPD). When asked a standard question about his handling of prior performance issues, the appellant referenced serving a one-day suspension arising from an incident where he apparently improperly handled the processing of a juvenile suspect. The appellant described the EOPD's decision to impose this disciplinary action as petty in nature and claimed his discipline reflected an attitude by EOPD leadership of being overly harsh with the rank-and-file. The appointing authority explains that it wanted to make a fuller assessment of whether the appellant's judgment that the disciplinary action imposed against him at the EOPD was unjustified had some basis in fact, or instead reflected an attitude where the appellant seeks to avoid responsibility for his own misconduct. Thus, the appointing authority requested that the appellant authorize the release of records relating to his performance at the EOPD for further review, particularly including his disciplinary history.¹ However, the appellant declined to execute the release form. In support, the appointing authority submits, among other things, the contemporaneous interview notes from the appellant's interview and documentation of the eligibles' internal affairs matters. The internal affairs documentation indicates that J.B. and F.C. had no sustained internal affairs complaints, while the appellant received internal affairs complaints dated August 10, 2021, which was sustained and resulted in a verbal reprimand; December 6, 2021, which was sustained and resulted in training; and January 2, 2022, which was sustained and resulted in a written reprimand. Agency records confirm that the appellant received a one-day suspension in November 2012 while employed in the title of Police Officer at the EOPD.

In reply, the appellant presents his certified statement and contends that he was bypassed in retaliation for his lawful objections to the Police Director's seeking to implement the CompStat program at the HPD in or around October 2022, based on his experience with CompStat at the EOPD. The appellant states that CompStat and related policies caused EOPD Police Officers to stop taking the actual necessary steps to investigate a particular crime and instead take actions that would solely prevent the analysis of the CompStat program. Such actions, per the appellant, went against all of his prior police training when it came to investigating a crime and lawful stop and searches of individuals. In the appellant's telling, the Police Director "took exception to [his] objections to implementation of the CompStat program – and determined that the best way to retaliate against [him] for making [his] lawful objections was to prevent the advancement of [his] career." The appellant states that to his knowledge, no other candidate prior to his bypass had ever been bypassed, asked to go through an interview process, or forced to sign a release of information and documents related to one's former employer. He maintains that the appointing

¹ The record reflects that the appellant had authorized a release of records in 2016 in connection with his candidacy for the title of Police Officer with the appointing authority. The appointing authority apparently has not been able to locate those records.

authority dramatically changed its promotional process to hide the Police Director's motivation to retaliate for the appellant's lawful objections.

The appellant further argues that the alleged legitimate reason for bypassing him is pretext. Specifically, according to the appellant, the Police Director had stated that the interview was not formal, that his interview performance would not affect his chances of being promoted, and that it was simply for the Police Director and City Manager to get to know the candidates. Although the appellant admits that he disclosed his one-day suspension at the EOPD, he disputes the appointing authority's characterization of his statements being negative or derogatory related to his experience at the EOPD. The appellant maintains that he stated something to the effect that he felt that certain supervisors at the EOPD would not view officers with the same respect as their fellow supervisors or did not lead by example – and the appellant wanted to ensure that he did not make that same mistake if he were promoted. However, the appellant insists that he was in no way making derogatory statements towards his past supervisors or not taking accountability for his actions that led to discipline. He contends that the interview process was nothing more than a subjective process, lacking in any sort of standardized grading system, to hide the appointing authority's true reasons to bypass him – the Police Director's intention to retaliate against the appellant for his lawful objections. As further evidence of pretext, the appellant points to the appointing authority's request that he authorize the release of records relating to his performance at the EOPD. In the alternative, the appellant requests that this matter be referred to the Office of Administrative Law for a hearing.

In reply, the appointing authority argues that the appellant failed to offer any competent evidence in support of his claims in his response, which can best be described as “rank speculation.” The appointing authority contends that although the appellant states that the Police Director took exception to his objections, while failing to describe exactly how or when that supposedly occurred, he has boldly claimed that the Police Director was so incensed by these unspecified and apparently undocumented objections that he would violate the law to retaliate against the appellant by denying an otherwise deserved promotion. Additionally, the appointing authority maintains that the appellant's argument that candidates had not been bypassed or interviewed in the past, even if true, is meaningless given that the “Rule of Three” is not a “use it or lose it power” and it is legitimate for management to conduct interviews and bypass a candidate based on interview performance. The appointing authority posits that the appellant's claim that the Police Director went through the trouble of instituting an interview process, involving five eligible candidates, so that he could improperly bypass the appellant for promotion, in the absence of any corroborating evidence and given the available facts, represents a groundless conspiracy theory. Further, the appointing authority states that the appellant was never told that the interviews were some sort of *pro forma* exercise that were not going to be considered in making promotional decisions.

Concerning the appellant's claim that he did not make derogatory statements regarding his EOPD employment, the appointing authority highlights that the contemporaneous interview notes reflect that the appellant described disciplinary action taken against him as "petty," described his employment as a "numbers game" where officers were "fudging numbers," and that his former departmental leadership "hammers everyone." In the appointing authority's view, the appellant can dispute its characterization of his interview statements or why exactly he received disciplinary action, but that is not pertinent. Rather, what is essential is that on its face, the appointing authority had legitimate and ample reasons to inquire further about the appellant's prior work experience and whether his description of that experience was accurate. The appointing authority maintains that the appellant has badly misperceived what actually happened as it only requested documentation from the EOPD when it became concerned about the nature of his responses regarding his prior employment experience during his interview.

The appointing authority adds that no hearing is required in this case as there are no material issues of fact and the appellant has provided no probative factual evidence of retaliation. Specifically, he provided no evidence connecting his objection to a proposed departmental program with his bypass, while the appointing authority has provided a valid business reason as to why he was not promoted.

CONCLUSION

Initially, bypass appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists that can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

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. Moreover, it is noted that the appellant has the burden of proof in this matter. *See N.J.A.C. 4A:2-1.4(c)*.

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.

Since only non-veterans were listed on the certification, it was within the appointing authority's discretion to select any of the top three interested eligibles on the certification for each appointment made. Nevertheless, the appellant alleges that he was bypassed for an improper retaliatory reason. The appellant has, however, not provided any substantive evidence beyond mere allegations that his bypass was motivated by or connected to such an improper reason. The appellant's claim, that the Police Director determined that the best way to retaliate against him for making his lawful objections to the proposed implementation of CompStat in October 2022 was to prevent the advancement of his career, is speculative. The appellant offers no sufficiently particularized factual allegations tending to demonstrate any connection between the objection apparently voiced in October 2022 and the bypass that occurred several months later in April 2023. Moreover, the appointing authority has presented a legitimate reason for bypassing the appellant and selecting J.B. and F.C. In this regard, the appointees had no sustained internal affairs matters, while the appellant had three such matters as well as a one-day suspension at his prior employment with the EOPD.

Neither has the appellant shown that the appointing authority's proffered reason was pretextual. In this regard, the appellant contends that no previous candidate was asked to interview; the interview itself was subjective and lacked a standardized grading system; the Police Director had stated that the appellant's interview performance would not affect his chances of being promoted; and no previous candidate was asked to sign a release of information and documents related to one's former employer. Appointing authorities are permitted to interview candidates and base their hiring decision on the interview. This is within the appointing authority's discretion and may apply to all positions, including Police Sergeant. However, interviews, whether structured or not, are not required. *See In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012). It is within the appointing authority's discretion to choose its selection method, *i.e.*, whether or not to interview candidates. *See e.g., In the Matter of Angel Jimenez* (CSC, decided April 29, 2009); *In the Matter of Abbas J. Bashiti* (CSC, decided September 24, 2008); *In the Matter of Paul H. Conover* (MSB, decided February 25, 2004); *In the Matter of*

Janet Potocki (MSB, decided January 28, 2004). Thus, since conducting interviews is discretionary, any purported lack of structure in the interview is not cause to find that the appellant's bypass was improper. So long as the hiring decision is in compliance with *N.J.A.C.* 4A:4-4.8(a)3, the Commission cannot find that the interview was conducted inappropriately. Here, even assuming that this was the first time that the appointing authority used an interview process for a police promotion, the Commission lacks any substantive basis to conclude that the appointing authority instituted such process for any improper reason. Further, even assuming that the Police Director had represented to the appellant that his interview performance would not affect his chances of being promoted, there is no substantive evidence that the appointing authority's later choice to accord weight to the interview was more likely due to improper retaliation as opposed to the appellant's comments during the interview. Regarding the appointing authority's request that the appellant authorize a release of records, there is similarly no substantive evidence that improper retaliation, as opposed to the appellant's interview comments – coupled with the appointing authority's apparent inability to locate the records from the 2016 release – more likely was the motivating factor behind the request.

Additionally, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under the "Rule of Three" to appoint a lower-ranked eligible absent any unlawful motive. See *N.J.A.C.* 4A:4-4.8(a)3; *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D)*, *Ocean City*, 207 *N.J.* 38, 49 (2011). 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 appellant does not possess a vested property interest in the position. In this regard, 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). The appellant has not presented any substantive evidence regarding his 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 appellant's bypass that have not been persuasively refuted. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name was proper, and the appellant has not met his burden of proof in this matter.

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

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Raymond Donnerstag
Robert K. Chewning, Esq.
Vincent J. Caruso
Steven W. Kleinman, Esq.
Division of Human Resource Information Services
Records Center