



STATE OF NEW JERSEY

In the Matter of Kevin Maguire, Fire
Captain (PM2335C), Millburn

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

CSC Docket No. 2023-2615

Bypass Appeal

ISSUED: November 22, 2023 (HS)

Kevin Maguire appeals the bypass of his name on the Fire Captain (PM2335C), Millburn eligible list.

The appellant appeared as the first ranked veteran eligible on the subject eligible list, which promulgated on February 16, 2023 and expires on February 15, 2026. A certification, consisting of the names of three veteran eligibles, was issued on February 16, 2023 (PL230191) with the appellant listed in the first position. In disposing of the certification, the appointing authority bypassed the appellant and appointed M.A., the second listed eligible, effective May 16, 2023. The third listed eligible was retained.

On appeal to the Civil Service Commission (Commission), the appellant maintains that he was improperly bypassed based on arbitrary and capricious standards. Specifically, the appellant recounts that he was told that he did not show enough involvement in the Fire Department (Department), and serving on the Apparatus or Personnel Committees was offered as examples of how to be more involved. The appellant submits that appointment to these committees is not merit-based. Rather, they only exist at the Department's needs, and service on the committees is not offered to all. The appellant argues that there is no way for Department members to prove through merit their worthiness to serve on a committee if the member is never even considered. He maintains that merit and fitness principles are violated if the Department is able to arbitrarily appoint members to a committee, then use such committee service as a basis to determine

who should be promoted. The appellant also recounts that he was told that he gave an inadequate answer when asked why he wanted to be a Fire Captain. The appellant complains that this question was subjective and not merit-based. Further, the appellant recounts that he was told that selection came down to the interview as the candidates were otherwise close. The appellant contends that while the interview can be used to help determine the outcome, his higher examination score needed to be factored in as well.

In response, the appointing authority, represented by Anthony G. LoBrace, Esq., presents the following statement of reasons for M.A.'s selection. In response to a question asking the candidate why he took the Fire Captain examination, M.A. responded by advising that he had always wanted to advance through the ranks to become a Department leader, demonstrating his self-motivation and desire for leadership and responsibility within the Department. By contrast, the appellant responded by stating that he sat for the examination because other Department members told him that he should, thereby suggesting that the decision to become a Fire Captain was either an afterthought or not even his own thought or desire. Throughout the course of his interview, M.A. provided expanded and thoughtful answers to the questions asked of him, while the appellant's responses were short and sometimes appeared to indicate an unfamiliarity with the duties of Fire Fighters and, more importantly, supervisory officers. The appellant's answers to the interview questions were interpreted as a lack of integration with the Department and its membership and as a lack of preparedness for the interview generally. M.A.'s interview also emphasized the substantial opportunities he has availed himself of outside his normal firefighting duties. For example, M.A. is a certified Arson Investigator and CPR instructor and previously served as a Police Auxiliary to the Cranford Township Police Department. M.A. also volunteered to assist the Department in implementing its new policies and procedures for its High Water Rescue Vehicle. Further, M.A. was continuing to advance his education in fire administration by enrolling in the last course he required to obtain a Bachelor's Degree in Fire Administration with a concentration in Arson Investigation and has sought to utilize terms of the collective negotiations agreement to have the credits for these courses paid for by Millburn. Finally, M.A. stated during his interview that he was very interested in fire prevention and that he would one day like to see himself leading Fire Prevention for Millburn. M.A.'s efforts in this regard were indicative of his desire to better serve the Department and Millburn by acting on opportunities to improve himself as a Fire Fighter through his own motivation and initiative and his current integration into the Department and its membership. The appellant did not express any such aspirations or initiative.

The appointing authority maintains that the appellant's appeal is devoid of any contention or suggestion, let alone evidence, asserting or establishing that its decision to bypass him was based upon any unlawful or improper motive on its part. Rather, he solely and generally claims that the appointing authority's reliance upon

each candidate's involvement in the Department and their subjective responses to interview questions were arbitrary and capricious bases for the promotional decision. Thus, in the appointing authority's view, the appellant has failed to discharge his burden in this appeal. As for the appellant's specific substantive claims, the appointing authority insists that they likewise are without merit. Specifically, it rejects the contention that it improperly required candidates to be members of the Apparatus or Personnel Committees to be promoted, emphasizing instead that the metric by which the appointing authority assessed the appellant was his "involvement in the Department," not his participation on any particular committee. The examples provided to the appellant were simply examples; there was no requirement that a Fire Fighter be a member of any specific committee to receive a promotion and, indeed, M.A.'s eventual promotion was not based upon his membership on these or any other such committee. The appointing authority insists that under established legal precedent, a candidate's involvement within the workforce above-and-beyond performance of regular work duties is a proper consideration to be taken into account by an appointing authority when selecting a successful candidate for promotion under the "Rule of Three."

Regarding the appellant's claim that the appointing authority's decision to bypass him was improper because it relied upon his and other candidates' subjective responses to interview questions in making the promotional decision, the appointing authority maintains that the claim is unavailing. In this regard, the intended purpose of the "Rule of Three" is to permit a limited amount of discretion in choosing the best candidate for a given promotional opportunity based upon the candidates' objective and subjective qualifications and characteristics, so long as the promotional decision is not tainted by an unlawful or improper motive. To the extent that the appellant contends that his score on the promotional examination entitled him to the position he sought, relevant decisional law is clear that an individual's examination score and placement on an eligible list does not grant the candidate a vested right to eventual appointment or promotion.

In reply, the appellant argues that he does not see in the appointing authority's response what weight his higher examination score and what weight the interview questions and personnel information carried in the decision-making process. Regarding the question asking the candidate why he took the Fire Captain examination, the appellant states that his full answer was that he had many of his colleagues tell him to take the examination; he always wanted to move up to the position; and that while this was sooner than he was expecting to do so, he was excited for the opportunity. Nevertheless, the appellant insists that the question was improperly subjective. The appellant also argues that the appointing authority ignored all of the substantial opportunities of which he has availed himself outside of his normal firefighting duties, such as serving as the FMBA Executive Delegate; being one of the Department's Scott Air Supplied Products Specialists; his continued education in the fire service and fire service administration through a variety of

FEMA courses; and continued education with various National Fire Academy courses. Additionally, concerning M.A.'s status as a certified Arson Investigator, the appellant relates that when the opportunity arose to be sent to the requisite training, he was told that the slots had been filled and that he would be able to be sent to the next class. The appellant proffers that the selection of who was sent and who was not was not determined on the basis of merit and fitness. Allowing the Department to hand out positions and assignments arbitrarily, then later using those positions and assignments as the basis for a bypass on a promotional list, was improper in the appellant's view.

In reply, the appointing authority rejects the appellant's suggestion that it was required to establish or explain what weights were ascribed to the examination and other factors. Rather, the appointing authority insists, the law provides it with the discretion to select any of the three highest-ranking eligibles and to bypass higher-ranked eligibles in favor of those with lower examination scores, so long as the decision to bypass is not based upon an unlawful motive. The appointing authority maintains that it has the discretion to consider a wide range of subjective factors, and interview procedures that are not strictly structured is not cause to find that a candidate's bypass was improper where the ultimate hiring decision is in accordance with the "Rule of Three." Regarding the appellant's claim that the appointing authority failed to properly consider his own substantial outside activities and services aside from his firefighting duties, the appointing authority contends that the appellant's affirmative burden in this appeal is to put forth some evidence showing that its decision to bypass him was based upon an unlawful motive. Simply suggesting that his qualifications were such that he would have been the successful candidate if the appointing authority had fully considered them fails to discharge this burden. Further, concerning the appellant's argument regarding M.A.'s status as a certified Arson Investigator, the appointing authority reiterates that M.A.'s selection was not based upon his service in any particular role but rather was based upon his cumulative qualifications, his promotional examination score, the appointing authority's review of his personnel information, and his interview performance. Further, absent an allegation that M.A.'s selection or the appellant's non-selection as an Arson Investigator was based upon some improper motive, it is unclear, in the appointing authority's view, how the appellant's argument in this regard could have any impact on the propriety of the bypass.

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. If a veteran heads the list, then a non-veteran may not be appointed. No distinction is made between disabled veterans and veterans in promotional examinations, and both are referred to as

veterans. *See N.J.A.C. 4A:5-2.2(a)*. 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)*.

Since only 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. The appointing authority indicates that the appellant was bypassed in favor of M.A. because M.A. had a better interview performance and availed himself of substantial opportunities, beyond his normal firefighting duties, such as certification as an Arson Investigator and CPR instructor; service as a Police Auxiliary to the Cranford Township Police Department; volunteering to assist the Department in implementing its new policies and procedures for its High Water Rescue Vehicle; and continuing to advance his education in fire administration by enrolling in the last course required to obtain a Bachelor's degree in Fire Administration with a concentration in Arson Investigation.

The appellant counters that the appointing authority needed to ascribe relative weights to his higher examination score and the interview. However, this contention is not in accord with the discretion afforded appointing authorities. In this regard, all three eligibles on the certification were reachable for appointment, and it should be emphasized that 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 Fire Captain. 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.

The appellant also complains that the interview question asking why the candidate took the examination was subjective. However, that an appointing authority made a subjective judgment does not render the judgment infirm if it "relate[s] to the [appointing authority]'s assessment of the candidates' compatibility with managerial objectives." *See In the Matter of Zoraida Rosa*, Docket No. A-0901-20 (App. Div. December 20, 2021). As such, the Commission has no basis to second guess the appointing authority's preference for M.A.'s answer over the appellant's. In this regard, the appointing authority noted that M.A. advised that he had always wanted to advance through the ranks to become a Department leader, demonstrating his self-motivation and desire for leadership and responsibility. The appellant notes

that his full answer was that he had many of his colleagues tell him to take the examination; he always wanted to move up to the position; and that while this was sooner than he was expecting to do so, he was excited for the opportunity. There is no evidence in the record that the appointing authority's judgment was anything but related to its assessment of compatibility with managerial objectives.

Further, the appellant objects to the appointing authority's noting service on the Apparatus or Personnel Committees as examples of how to be more involved in the Department and its reliance on M.A.'s status as a certified Arson Investigator. However, the record reflects that service on the Apparatus or Personnel Committees was simply offered as an example. There is no evidence in the record that service on any particular committee was a requirement to be promoted or that committee service played any actual role in M.A.'s promotion. Similarly, there is no evidence that Arson Investigator certification was a requirement for promotion. Although the appellant states that when the opportunity arose to be sent to the requisite training, he was told that the slots had been filled and that he would be able to be sent to the next class, this is far from suggesting that selections for the opportunity were based on any improper reason. Further, the record reflects that M.A.'s selection was based on a totality of factors, which also included certification as a CPR instructor, previous service as a Police Auxiliary, and pursuit of a Bachelor's Degree in Fire Administration with a concentration in Arson Investigation.

Additionally, the appellant alleges that the appointing authority ignored all the substantial opportunities of which *he* has availed himself outside his normal firefighting duties. But 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 22ND DAY OF NOVEMBER, 2023



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