



STATE OF NEW JERSEY

In the Matters of Michael Moticha
and Kurt Kuhlman, Supervisor,
Construction Plans Approval Section
(PS6902D), Department of
Community Affairs

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

CSC Docket Nos. 2023-2435
and 2024-81

Bypass Appeals

ISSUED: August 14, 2024 (JET)

Michael Moticha and Kurt Kuhlman appeal the bypasses of their names on the Supervisor, Construction Plans Approval Section (PS6902D), Department of Community Affairs, eligible list. Since these matters involve similar issues, they have been consolidated herein.

By way of background, the appellants took the promotional examination for Supervisor, Construction Plans Approval Section (PS6902D), achieved a passing score, and were ranked on the subsequent eligible list, which promulgated on February 16, 2023 and expires on February 15, 2026. Three names, including the appellant's names, were certified on February 17, 2023 (PS230245). In disposing of the certification, the appointing authority bypassed Moticha and Kuhlman, the first and second ranked candidates, respectively on the certification, and recorded them as, "retained, interested others appointed," and appointed James Strang, the third ranked candidate.

On appeal to the Civil Service Commission (Commission), the appellants assert that the appointing authority did not provide a proper statement of reasons to justify the bypasses. In addition, the appellants assert that they were not interviewed for the subject position, despite sending a letter of interest to the appointing authority. The appellants contend that the appointing authority had already decided to select Strang for the subject position, as he was provisionally appointed to the subject position, effective, March 1, 2023.¹ The appellants maintain that, although three

¹ Moticha specifies that he would not have taken the examination for the subject position, if he had known that it would be filled by the provisional employee.

vacancies existed at the time the examination was announced, only one candidate was appointed. The appellants contend that, when they asked why the other positions were not filled, their supervisor responded, “we appointed within the Rule of Three, and the appointing authority did not want to fill the other positions.” Moreover, the appellants also state that their supervisor, E.S., a Division Director, Department of Community Affairs, and K.L., an Assistant Director, Codes Standards and Housing Development, dictate to the appointing authority who would be appointed. Additionally, the appellants assert that there was more than one vacancy for the title of Supervisor, Construction Plans Approval Section, as the appointing authority posted three different “announcements” for the title. The appellants add that there are currently four vacant supervisory positions available, which E.S. and K.L. do not want to fill. The appellants also contend that multiple vacancy postings exist for the other titles, and they were not provided with the opportunity to apply for them.²

In response, the appointing authority explains that Strang was selected because he was the most qualified candidate. Specifically, Strange demonstrated expert knowledge of the Uniform Construction Code; possessed superior plan review experience and communication skills; and a strong work ethic. The appointing authority adds that the individual who selected Strange stated:

Strang was the only candidate that actually worked in the Education Plan Review team and as such was more qualified to interpret and implement . . . the Educational Facilities Act pursuant to *N.J.A.C. 6A:26*; Best Practice Standards for Schools under Construction; and Public Schools Plan Review Procedures. . . Mr. Strang has spent his entire State service (over 10 years) in the Education Review Unit,

Moreover, the appointing authority asserts that Strang served provisionally in the subject title since May 8, 2021. The appointing authority maintains that Strang was reachable on the current certification, and as such, the appellants’ bypasses were consistent with the Rule of Three.

In response, the appellants maintain that the appointing authority inaccurately states that Strang was the most qualified candidate, and they provide a summary of their qualifications. In this regard, the appellants assert that they each utilize three to six different reference manuals and code materials, while Strang does not. The appellants contend that each employee in their unit is cross trained to perform different reviews, and to cover for each other at work. Moticha also argues that he possesses 34 years of experience, including 17 years of management experience, and three years of college education, more than Strang. Moticha adds

² Although the appellants claim retaliation, they provide no specifics. However, such claims were referred to the EEO/AA and the State Ethics Committee by the appointing authority, and therefore, will not be discussed in this matter.

that he served: as an Assistant Supervisor and was responsible for overseeing 10 inspectors; as an Assistant Supervisor in the Code Administration Unit where he supervised 12 employees; and as a Supervisor of the Code Administration Unit where he supervised 26 employees. Kuhlman contends that his experience includes over 20 years of management experience; and he possesses a Bachelor's degree; some graduate education; college teaching experience; and various educational licenses. Kuhlman also contends that he has completed sophisticated projects, where he was responsible for troubleshooting problems and brainstorming solutions for various scenarios.

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 (known as the Rule of Three) allow an appointing authority to select any of the top three interested eligibles from a promotional list, provided that a veteran does not head the list. Moreover, the Rule of Three allows an appointing authority to use discretion in making appointments. See *N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3ii. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned. 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). *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 on an eligible list was improper.

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 retaliation by a preponderance of the evidence. Once a *prima facie* case showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-retaliatory reason for the decision. For the reasons set forth below, the appellants have not presented a *prima facie* case in this matter.

In this matter, the appellants argue that the appointing authority did not provide a proper "Statement of Reasons" to justify the bypasses. Although the appointing authority, in its initial response to the appeal, indicated that the most qualified candidate was appointed as it's "Statement of Reasons," it subsequently provided specific information with regard to Strang's qualifications as to why he was selected. Moreover, the appointing authority was not obligated to provide the

appellants a reason why the lower-ranked eligibles were appointed until specifically requested or upon appeal. See *Local 518, New Jersey State Motor Vehicle Employees Union, S.E.I. ii; AFL-CIO v. Division of Motor Vehicles*, 262 N.J. Super. 598 (App. Div. 1993). Therefore, as the appointing authority provided detailed reasons for Strang's selection, the appellants were provided sufficient opportunity to learn the reasons for the bypasses and to dispute those reasons.

With respect to the appellants' claims that they applied for more than one "position" for Supervisor, Construction Plans Approval Section, the record *only* reflects that they applied for the subject examination. Although the appellants claim that more than one "supervisory announcement" was issued by the appointing authority, and they applied for those announcements, they have not provided any substantive evidence of that claim in this matter. Regardless, such information does not establish their contentions with respect to the underlying bypasses. Even if the appellants applied for similar "positions," those announcements were "vacancy announcements." Appointing authorities utilize internal vacancy postings as a means of compiling a pool of individuals that are interested in applying for a position that an appointing authority is planning to fill. However, the Commission does not have jurisdiction over any internal vacancy postings that an appointing authority may issue and, as such, any applications submitted as a result of such internal postings cannot be appealed to this agency. Rather, the Commission only retains jurisdiction over official Civil Service announcements and certifications issued by this agency. In this matter, it is the examination for Supervisor, Construction Plans Approval Section (PS6902D), and the resultant PS230245 certification.

Although the appellants claim that their bypasses were for an improper reasons, they have failed to provide any substantive evidence in support. An appointing authority has the discretion to dispose of a certification within the guidelines of Title 11A of the New Jersey Statutes Annotated and Title 4A of the New Jersey Administrative Code. This discretion includes utilizing each candidate's history and qualifications to determine the best candidate from a list of three eligibles, any of whom may be selected under *N.J.A.C. 4A:4-4.8(a)3*. Based on the information provided by the appointing authority, the appellants have presented no substantive information in this matter to show that there was any invidious motivation involved in the selection process. In this matter, the appointing authority indicated that the lower ranked candidate was the most qualified for the position, based on his particular experience compared to the requirements of the current position, which the appellants have not substantively refuted in this matter. In this regard, the appellants have not shown that the appointing authority's assessment of all of the candidates' qualifications for the position in question was inaccurate or erroneous. The Commission has reviewed this matter and does not find any evidence that the appellants were bypassed for an invidious or unlawful reason. Moreover, the mere fact that that appellants' names appeared on the certification does not entitle them to an appointment. The appellants do not possess a vested property interest in

the position. 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).


With respect to the appellants' arguments that Strang was appointed provisionally to the subject title, the Commission does not have jurisdiction over the appointment of provisional employees. Provisional employees may be appointed based on the operational makeup and hiring needs of an appointing authority, where no complete list of eligibles exist for that title, provided that the individual provisionally appointed meets the minimum requirements for the title. In the instant matter, Strang was provisionally appointed prior to the subject eligible list's promulgation, when there was no complete list of eligibles. As such, the Commission does not have the jurisdiction to review Strang's provisional appointment, as it is clear he also met the minimum requirements for the title. Finally, regarding their argument that there were additional vacancies that were not filled, it is the appointing authority's discretion to organize its workforce as it deems appropriate, and the Commission will not review or overturn such discretionary determinations absent evidence of abuse or violation of the applicable regulations. Accordingly, the appellants have not met their burden of proof in this matter.

ORDER

Therefore, it is ordered that these appeals 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 14TH DAY OF AUGUST, 2024



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: Michael Moticha
Kurt Kuhlman
Jodi Evangelista
Division of Human Resource Information Services
Records Center