



**STATE OF NEW JERSEY**

**DECISION OF THE  
CIVIL SERVICE COMMISSION**

In the Matters of Richard R. Marrero,  
Jr., Jackson Township Fire District 4

CSC Docket Nos. 2024-459 and  
2024-460

List Bypass Appeal  
Certification Appeal  
Hearing Granted

**ISSUED:** April 10, 2024 (HS)

Richard R. Marrero, Jr., appeals the bypass of his name on the Fire Lieutenant (PM2368C), Jackson Township Fire District 4 (District), eligible list and his non-appointment from the Fire Prevention Specialist, UFD (PM4226C), Jackson Township Fire District 4, eligible list. These appeals have been consolidated due to common issues presented.

The appellant appeared as the first ranked non-veteran eligible on the subject Fire Lieutenant (PM2368C) eligible list, which promulgated on February 16, 2023 and expires on February 15, 2026. A certification, consisting of the names of two non-veteran eligibles, was issued on May 8, 2023 (PL230794) with the appellant listed in the first position. In disposing of the certification, the District bypassed the appellant and appointed, effective August 1, 2023, the second listed eligible, Steven Porth.

The appellant also appeared on the Fire Prevention Specialist, UFD (PM4226C) eligible list, which promulgated on October 21, 2021 and expires on October 20, 2024. A certification, consisting of the names of two equally ranked non-veteran eligibles – the appellant and Porth – was issued on March 17, 2023 (PL230332). In disposing of the certification, the District retained both eligibles as interested but indicated that no appointments were made.

On appeal to the Civil Service Commission (Commission), the appellant claims that the District discriminated and retaliated against him and declined to appoint him to the positions of Fire Lieutenant and Fire Prevention Specialist, UFD, based

on: (1) his actual or perceived disability; (2) his work and service as a union president; (3) his request that the District comply with Civil Service regulations with respect to the long-open certification for Fire Prevention Specialist, UFD (PL230332); (3) his asserting his Civil Service rights by requesting the reason for his bypass on the Fire Lieutenant (PM2368C) eligible list; and (4) his questioning whether bypassing him for the position of Fire Lieutenant was discriminatory. The appellant contends that it was discriminatory for the District to have considered opportunities that Porth had while the appellant was out on a medical leave prior to the Fire Lieutenant interviews that took place on July 24, 2023.

In response, the District, represented by Nicole J. Curio, Esq., maintains that the appellant was legitimately bypassed on the Fire Lieutenant (PM2368C) eligible list based on Porth's strong interview, which was "pivotal" and included his presentation of a five-year plan for the District and his preparedness, vision of the District, qualifications, education, temperament, demeanor, and composure. The appellant, according to the District, possessed inferior certifications, lacked initiative and leadership, and had a history of behavior in the firehouse – particularly when dealing with superiors – that led the interviewers to question his ability to be placed in a leadership role. The District insists that the appellant's disability played no role and notes that it delayed the interview process until the appellant returned from his medical leave to ensure that he was provided an equal opportunity to participate in the promotional process. The District counters that the appellant's statement that he was discriminated against because Porth had opportunities the appellant did not while he was out on leave does not evidence discrimination and that Porth's work during the appellant's absence was far from the only matter considered in making the appointment.

Turning to the Fire Prevention Specialist, UFD (PM4226C), eligible list, the District maintains that after taking into consideration the appellant's demeanor and unprofessional behavior, not only as it related to prior behaviors noted by the Fire Commissioners (Commissioners) but particularly with respect to his reactive behavior at a meeting with the Commissioners on July 27, 2023, coupled with his lack of any remorse or accountability, the Commissioners determined that they would not fill the Fire Prevention Specialist, UFD, position as the appellant's behavior had caused significant concern should he be placed into the position. The position is one that deals with individuals in the public on a regular basis and the appellant demonstrated, in front of the Commissioners, that he clearly did not possess the capabilities needed for the position. Further, there is no dispute that the certification was incomplete, and no individual was serving provisionally in the title. Thus, the District insists that there was no obligation to appoint.

In support, the District submits the respective certified statements of Commissioners Wallace Jamison and Raymond Torres, Jr. Torres states, among

other things, that the “[a]ppellant was not promoted to . . . Fire Lieutenant because [Porth] far surpassed him during the interview, and for other reasons stated herein.”

In a lengthy and detailed reply, the appellant registers his disagreement with his bypass. The appellant recounts that at a July 13, 2023 meeting, he had spoken with the Commissioners on behalf of the union to voice concern that Porth’s provisional appointment in the title of Fire Prevention Specialist, UFD, had not been recorded with this agency.<sup>1</sup> Four days later on July 17, 2023 and before the interviews were conducted on July 24, 2023, the Commissioners adopted a resolution appointing Porth to Fire Lieutenant. The appellant maintains that at a meeting with the Commissioners on July 27, 2023, he was asking for the reason he was bypassed for Fire Lieutenant and attempting to self-advocate by noting that the Commissioners had considered projects that Porth had worked on while the appellant was out on medical leave and stating that he had been continually interrupted while speaking during his interview. He was then stopped by Commissioner Alfred Couceiro, who said, “I think what you’re doing right now sums up pretty much the reason.” The appellant insists that bringing concerns and questions to the Commissioners is an activity in which he regularly participates while advocating for the union’s concerns. He argues that asking questions of the Commissioners and clarifying the decisions they make that affect the union are a major part of his duties and protected activities as union president. Additionally, the appellant contends that Torres previously was in favor of the appellant’s appointment to Fire Lieutenant. Specifically, he notes that in text messages to the appellant’s wife, Torres advised that Jamison and Couceiro would not be recommending the appellant for Fire Lieutenant. After the appellant’s wife responded that that was not what she wanted to hear, Torres responded, “I’m sorry I [tried] I was outvoted.” Further, the appellant contends that in the District’s attempt to create a legal justification for the bypass, it discriminated against him with its claims of aggressiveness that are subjectively based on the appellant’s physical appearance that stems from his Latin heritage as he is the only minority employee in the District. In support, the appellant submits a number of exhibits including the meeting minutes for the July 13, 2023 meeting of the Commissioners; the July 17, 2023 resolution; a transcript of the July 24, 2023 interview; a transcript of the July 27, 2023 meeting; and the text exchange between the appellant’s wife and Torres.

According to the transcript of the July 27, 2023 meeting, the conversation proceeded as follows:

UNIDENTIFIED SPEAKER: (Inaudible) right here.

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<sup>1</sup> According to the County and Municipal Personnel System, Porth received a permanent appointment to the title of Fire Fighter, effective July 1, 2017, followed by a permanent appointment to the title of Fire Lieutenant, effective August 1, 2023. A provisional appointment to the title of Fire Prevention Specialist, UFD, is not indicated.

APPELLANT: Here. Here. Okay.

TORRES: Based on the interview, the Board [of Fire Commissioners] would like to offer you the position of [F]ire [P]revention [S]pecialist [, UFD].

Are you willing to take that position?

APPELLANT: Can I have the reasoning why I was overlooked for [Fire] [L]ieutenant, being that I was standing number one on the list?

TORRES: It was just about the interview, they felt that one interview was a little bit better than the other. That's all.

APPELLANT: The reasoning being, what -- like, basically, when you're going to submit to [this agency], what would that reasoning be?

JAMISON: You presented -- you presented very well.

APPELLANT: Uh-huh.

JAMISON: But [Porth] presented better. He went more involved into the operational side of it.

APPELLANT: Okay.

JAMISON: More into the project (inaudible).

You did very well, [appellant].

APPELLANT: Okay.

JAMISON: We're not taking anything away from you for that. But it was a -- it was a tough decision, but [Porth] kind of laid it out a little --

APPELLANT: If I may.

So during my interview, I know you asked about the projects I had accomplished -- you know, what -- what project I had accomplished during this time. And I had informed you that due to medical issues that there were certain things I couldn't accomplish. First, I was out on workers comp for an injury on the job with my knee. Prior to that, I was on workers comp for an injury with my wrist. These are all times I was out of work.

JAMISON: Yeah. But --

APPELLANT: Hang on.

JAMISON: -- that didn't --

APPELLANT: May I -- may I please.

JAMISON: -- (inaudible) that.

APPELLANT: May I please finish my statement, though?

JAMISON: It was (inaudible) into the future.

APPELLANT: Okay. I understand that.

And then you also went onto projects. I was out on this for a year unable to do any projects.

During this time, [Porth] was still at work and he was able to get on a whole bunch of things, but that's held against me. I'm not -- I'm not here because I was out on medical for a lot of these things that he had the opportunity to get more involved in and get ideas on.

Also, when I brought in one of my ideals, was the project for moving forward with fixing the SOPs and SOGs, I kept getting interrupted while I was talking during my interview. I was -- I kept getting cut off. I was trying to explain things and I -- nothing to call you out on, but you kept interrupting me mid-conversation. I wasn't done with my thoughts and you continued to interrupt me.<sup>2</sup>

I don't know if it was because I was the first interviewee, or whatever it may be, but I was never given the full --

COUCEIRO: May I (inaudible)?

APPELLANT: Sure.

COUCEIRO: Number one, you did do very well during your interview. Right?

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<sup>2</sup> It is noted that a review of the transcript for the appellant's interview reveals that Jamison did repeatedly interrupt the appellant's answers to questions.

However, I think what you're doing right now sums up pretty much the reason -- your -- your reasoning right here.

You can't sit here and argue -- or argue yourself -- and I understand. I understand the frustration. And don't take this as negative. I don't want to say negative because we don't have that kind of a relationship. Right?

I'm -- I'm just a very -- I'm a straight-shooter on everything.

We made a decision. We've -- we've said -- we've said why and you're going to the negative -- negatives of it. And that will -- what we -- we made a decision based on -- it had nothing -- like I didn't even think about your medical reasons or anything like that. That was like never taken into consideration.

UNIDENTIFIED SPEAKER: Nobody --

APPELLANT: I -- I understand.

COUCEIRO: -- took that into (inaudible).

APPELLANT: But --

UNIDENTIFIED SPEAKER: Nobody brought that into the --

APPELLANT: I understand that.

COUCEIRO: We (inaudible) -- honestly --

APPELLANT: But that --

COUCEIRO: -- we didn't even discuss like, well, [the appellant] is not here.

APPELLANT: But --

COUCEIRO: We didn't have that discussion. It was about who presented it better. Who did well with saying who -- who spoke and answered the questions a little differently.

As -- as a previous supervisor and -- and dealing with people, you -- you should know, like, yeah, some -- some people do well, some people deserve things more than others. But [Porth] answered the questions

that we were -- even if you felt you were interrupted. I don't feel that you were. But if -- that's your perception. You -- he just answered the questions better.

And the fact that I have to sit here and defend my -- try to defend the -- our reasoning, I -- I disapprove of that (inaudible).

Now did you deserve an answer? Yeah. We gave it. [Porth] did better. I'm sorry. It's, you know, best man moves forward for the job.

But I shouldn't have to sit here and defend my -- my reasoning why someone just I -- we felt someone did better and may do better.

Now it's unfortunate because I do -- I think you deserve a position. Yes. That's why we're offering you the [F]ire [P]revention [S]pecialist[, UFD position]. I think it's a good segue for you to -- to move forward with the organization.

But the fact of the way you're sitting there (inaudible), quite honestly, if I could rescind even that, I -- I would do that right now.<sup>3</sup> Just because I don't feel like that's the appropriate way for you to -- to move forward.

It's not to say, hey, thank you for this, let me think about it, I'll get back to you. No. I think you're letting emotion get in the way or cloud your judgment right now. And what you're saying, perhaps, it would be a better to say, hey, let me come back and have a discussion with you guys later. I don't want -- I am very good at sometime reacting out of emotion when I shouldn't be. If something pisses me off, the mouth's going to flow sometimes.

And I think that you should probably sit back and say, listen, okay, let me think about this before I say something I'm going to regret. And it's not necessarily any negative impact is on you, it's going to make you look bad. And I don't want you to look bad.

So please rethink what you're saying and how you're doing it and, perhaps, come back in -- even if it's 10 minutes, give me a few minutes. Think about it. Get yourself back together and then come back.

I don't think it's -- your -- your approach right now is a bad approach.

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<sup>3</sup> The record reflects that the appellant ultimately was not appointed to Fire Prevention Specialist, UFD. As noted earlier, in disposing of certification PL230332, the District retained the appellant as interested but indicated that no appointments were made.

APPELLANT: When does the Board [of Fire Commissioners] need an answer from me? How long is that offer on the table, essentially, is what I'm requesting, a -- a time frame?

UNIDENTIFIED SPEAKER: He'll let you know.

UNIDENTIFIED SPEAKER: Yeah. I mean --

UNIDENTIFIED SPEAKER: You don't --

UNIDENTIFIED SPEAKER: -- we'll -- we can discuss it (inaudible) --

UNIDENTIFIED SPEAKER: You don't have to take it [appellant].

APPELLANT: I understand that. I just want to know approximately how long of a time frame I have in order to accept this. Is it to the -- the next [Board of Fire Commissioners] meeting or August 1st?

UNIDENTIFIED SPEAKER: I was going -- I was going to say --

UNIDENTIFIED SPEAKER: Yeah.

UNIDENTIFIED SPEAKER: -- the next [Board of Fire Commissioners] meeting.

COUCEIRO: I'm okay with leaving it until the next [Board of Fire Commissioners] meeting.

UNIDENTIFIED SPEAKER: Yeah. That's what -- that was my recommendation.

COUCEIRO: Yeah.

APPELLANT: All right. Thank you very much for your time.

I'll give you an answer by the next [Board of Fire Commissioners] meeting.

The appellant also reiterates that he was improperly denied the Fire Prevention Specialist, UFD, appointment.

In reply, the District maintains that its actions with respect to both eligible lists were proper.



## CONCLUSION

### Fire Lieutenant (PM2368C), List Bypass Appeal

*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.

In this matter, the appellant appeared as the first ranked eligible on the May 8, 2023 (PL230794) certification of the subject Fire Lieutenant (PM2368C) eligible list. Porth was ranked second. The appellant argues that even though he was well-qualified for the position, he was bypassed in favor of Porth for improper reasons. The District maintains that Porth was selected based on the July 24, 2023 interviews, which it states were "pivotal," and its evaluation of his qualifications relative to the appellant's. In a certified statement supplied in support of the District's position, Torres states that the "[a]ppellant was not promoted to . . . Fire Lieutenant because [Porth] far surpassed him during the interview, and for other reasons stated herein."

The appellant strenuously disagrees with the District's assessment and notes, among many other things, that on July 13, 2023, he had spoken with the Commissioners on behalf of the union to voice concern that Porth's provisional appointment in the title of Fire Prevention Specialist, UFD, had not been recorded with this agency. Four days later on July 17, 2023 and before the interviews were

conducted on July 24, 2023, the Commissioners adopted a resolution appointing Porth to Fire Lieutenant. The appellant also provides a transcript of the July 27, 2023 meeting, where the appellant asked, "Can I have the reasoning why I was overlooked for [Fire Lieutenant], being that I was standing number one on the list?" Torres answered, "It was just about the interview, they felt that one interview was a little bit better than the other. That's all." Later in the conversation, Couceiro stated, "However, I think what you're doing right now sums up pretty much the reason -- your -- your reasoning right here," and "the fact that I have to sit here and defend my -- try to defend the -- our reasoning, I -- I disapprove of that (inaudible)." The appellant also provides text messages written by Torres that suggest he previously preferred the appellant for Fire Lieutenant. Further, the appellant claims that he has been inappropriately painted as being aggressive based on his physical appearance that stems from his Latin heritage as he is the only minority employee in the District.

Based on the foregoing, material disputes of fact exist in this matter regarding the reasons for the appellant's bypass on the subject certification. Accordingly, under these circumstances, where it is not possible to determine on the written record whether the reasons for this action were proper, this matter should be referred to the Office of Administrative Law (OAL) for a hearing.

#### Fire Prevention Specialist, UFD (PM4226C), Certification Appeal

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

When fewer than three interested eligibles are certified, an appointing authority generally has the discretion not to make a permanent appointment. *See N.J.S.A. 11A:4-8 and N.J.A.C. 4A:4-4.2(c)*. Nevertheless, based on the record in this particular matter where the appellant was offered the position of Fire Prevention Specialist, UFD, and ultimately not appointed, material disputes of fact exist whether the reasons for the appellant's non-appointment from the certification were discriminatory, retaliatory, and/or unlawful. Accordingly, under these circumstances, where it is not possible to determine on the written record whether the reasons for this action were proper, this matter too should be referred to the OAL for a hearing.

### **ORDER**

Therefore, it is ordered that these matters be transmitted to the Office of Administrative Law for a hearing as contested cases.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 10<sup>TH</sup> DAY OF APRIL, 2024

*Allison Chris Myers*

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Allison Chris Myers  
Chairperson  
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