



STATE OF NEW JERSEY

In the Matters of R.B. and M.S.,
Battalion Fire Chief (PM3390C),
Paterson

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

List Bypass Appeal

CSC Docket Nos. 2025-846 and 2025-
847

ISSUED: March 19, 2025 (ABR)

R.B. and M.S.,¹ jointly represented by Michael L. Prigoff, Esq., appeal the bypass of their names on the promotional list for Battalion Fire Chief (PM3390C), Paterson. These appeals have been consolidated due to common issues presented by the appellants.

By way of background, the subject examination was announced with a closing date of July 21, 2021. The subject eligible list, containing 46 names, promulgated on February 16, 2023, and expires on February 15, 2026. R.B. and M.S., non-veterans, were initially ranked 12th and 13th, respectively, on the subject eligible list. Both R.B. and M.S. appealed the scoring of the oral portion of their PM3390C examinations and their appeals were granted by the Civil Service Commission (Commission) in *In the Matter of R.B.* (CSC, decided December 20, 2023) and *In the Matter of M[.]S[.]* (CSC, decided December 20, 2023), respectively.

During the pendency of the appellants' appeals, a certification was issued on March 27, 2023 (PL230380), with R.B.'s and M.S.'s names listed in the 12th and 13th positions. Based upon the scoring changes resulting from their appeals, M.S.'s and

¹ Since, a previous matter, *In the Matter of R.B.* (CSC, decided December 20, 2023) contained sensitive information regarding appellant R.B., the Commission's December 20, 2023, decision referred to R.B. using initials, rather than his full name. Since that prior decision is referenced in this appeal it is necessary to continue to refer to R.B. by initials only. As a result, M.S. will be accorded similar treatment and referred to only by initials in the instant appeal .

R.B.'s ranks were revised to 3A² and 4A,³ respectively. Their respective positions on the PL230380 certification were accordingly revised to fourth and sixth. In disposing of the certification on April 19, 2024, the appointing authority bypassed the appellants and appointed the eligibles listed in the first, second, third, fifth, seventh, and eighth positions on the revised certification, effective March 28, 2023.

On appeal to the Civil Service Commission (Commission), the appellants argue that the appointing authority's decision to bypass them was improper, as they claim that throughout their tenures with the appointing authority, it has always promoted in rank order and has never utilized the Rule of Three to bypass an eligible. They contend that the appointing authority does not have a legitimate reason to bypass them. R.B. emphasizes that he has more seniority than Giocchino Panico and Ryan Fender, the eligibles in the seventh and eighth positions on the subject certification, for whom he was bypassed and he presents that he served provisionally in the subject title for nearly a year without issue, while the eligibles in the fifth (Santino Falcone) and eighth (Fender) positions did not possess such experience. The appellants further argue that that nothing in their respective personnel records supported deviating from the practice of rank order promotions. M.S. avers that he possesses an exemplary record, having served in numerous roles, including acting as the Administrative Captain; merging the police, fire and EMS dispatch systems; supervising the Fire Prevention and Fire Investigation Bureaus; and serving as the Rescue Captain. Each appellant maintains that the relative merits of the candidates were not considered in making promotions, with M.S. claiming that that a chief confirmed that the appointing authority never requested M.S.'s records. M.S. also expresses concern that he may have been discriminated against due to his status as a Latino and Native American and he states that the six candidates who were promoted were all Caucasian. In this regard, M.S. presents that "[a]ll of his coworkers and supervisors in the Department knew this as common knowledge . . . and there are friendly jokes of [him] being the tallest Mexican (since [he is] 6' 6")," and that he "indicated [his] Hispanic and Native American heritage" on his promotional examination application. Each appellant furnishes a certification in support of their claims.

In reply, the appointing authority, represented by Oscar A. Escobar, Jr., Esq., maintains that these appeals are moot because the appellants "are poised to be promoted upon approval by [Paterson's] Fiscal Monitor." Further, the appointing authority contends that its decision to bypass them on the certification at issue was consistent with Civil Service law and rules. In this regard, it presents that it made appointments from the subject certification based on the order of the subject eligible list and certification as of March 2023. It denies that race or any other invidious

² R.S.'s revised rank of 3A signifies that he ranks below the eligible who was ranked third on the PM3390C list and ahead of the eligible ranked fourth.

³ R.B.'s revised rank of 4A signifies that he ranks below the eligible who was ranked fourth on the PM3390C list and ahead of the eligible ranked fifth.

motivation was the basis for its bypass of the appellants. Rather, the appointing authority advises that upon learning of the amendments to the subject eligible list and certification in 2024, it sought guidance from Commission staff and, based upon that guidance, utilized the Rule of Three to avoid demoting Falcone, Panico and Fender, who have been doing outstanding work as Battalion Fire Chiefs since their regular appointments to the title, effective March 28, 2023. In support of these claims, it submits a certification from Deputy Fire Chief Jason Macones with supporting exhibits, including the certifications from the PM3390C list it received from this agency and a February 7, 2024, email containing guidance from a Commission staff member regarding the application of the Rule of Three in this circumstance.

In response, the appellants aver that the Commission should reject both the suggestion by the appointing authority that the matter is moot because the appellants have been promoted⁴ and the claim that the decision to retroactively bypass the appellants was made on the recommendation of the Commission. Since the appellants' revised scores, pursuant to *In the Matter of R.B.*, *supra* and *In the Matter of M.[S].*, *supra*, were given retroactive effect they contend they are both entitled to have seniority and pay in the title of Battalion Fire Chief as of the March 28, 2023, effective date they were entitled to be appointed based upon their ranks and Paterson's policy of promoting in rank order. They argue that such retroactive adjustments to their seniority and pay are necessary to make them "whole." The appellants maintain that the correspondences furnished by the appointing authority to support its arguments confirm that the appointing authority had a longstanding policy of promoting in rank order and that its use of the Rule of Three was not based upon Commission guidance, but rather a unilateral decision made without regard to the appellants' superior qualifications relative to Panico and Fender. The appellants further allege that the performance of Panico and Fender after promotion is not a rational justification for the appointing authority not promoting the appellants, as all of the parties in interest knew or should have known that any promotions made in March 2023 were conditional and subject to revision based upon retroactive appeal decisions like the appellants' scoring appeals. Further, the appellants maintain that if they were properly promoted in March 2023, they would have had sufficient time in grade to take the Deputy Fire Chief (PM5436F), Paterson examination along with the six Battalion Fire Chiefs promoted in 2023. As such, the appellants contend that they should be given retroactive appointment dates to the title of Battalion Fire Chief and permitted to file late applications for that examination, which had a closing date of December 24, 2024.

⁴ A certification from the PM3390C list was issued on January 30, 2025, (PL250117), however this certification has not yet been disposed of.

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. 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.

Initially, the appointing authority's contention that this matter is moot because the appellants "are poised to be promoted" is without merit. Critically, since the appellants have not yet been appointed to the title of Battalion Fire Chief from the January 30, 2025, certification (PL250117) and the appointing authority has not indicated that it intends to provide any other remedies the appellants are seeking, particularly to request a retroactive appointment date and pay, it is necessary for the Commission to review the merits of the claims the appellants raise on appeal.

As to the merits of these appeals, since a non-veteran headed the certification and the highest-ranking veteran appeared in the seventh position on the subject certification,⁵ it was within the appointing authority's discretion to select any of the top three interested eligibles on the certification for each appointment made.⁶ 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).

⁵ The highest-ranking veteran on the certification was Panico in the seventh position.

⁶ *See N.J.A.C.* 4A:5-2.2.

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). Here, M.S. presents the possibility that he was bypassed for an improper discriminatory reason. However, M.S. has not provided any substantive evidence beyond mere allegations that his bypass was motivated by or connected to such an improper reason. M.S.’s claim about the possibility that he was discriminated against due to his status as a Latino and a Native American is speculative. Even assuming, *arguendo*, that it could be said that M.S. made a *prima facie* showing of discrimination, the appointing authority has clearly sustained its burden by providing a legitimate non-discriminatory reason for the decision, *i.e.*, a desire not to displace the incumbents it appointed after the initial rank order. M.S. has not offered any clear evidence to demonstrate that the proffered reasons are pretextual or that racial discrimination more likely motivated the appointing authority here.

The crux of the appellants’ remaining arguments is that it was improper for the appointing authority to bypass the appellants because it was a deviation from the appointing authority’s historic practice of making appointments in rank order and abstaining from using the Rule of Three. If the Commission were to accept this claim, it would effectively serve as a pronouncement that the Rule of Three is a “use it or lose it” power and that if appointing authorities do not bypass candidates from lists with any sort of regularity, they may be foreclosed from doing so in the future. Such a ruling would be an anathema to the merit and fitness principles enshrined in the New Jersey Constitution, as it could encourage appointing authorities to employ the Rule of Three less judiciously in an effort to avoid having that power lapse due to non-use. Beyond this principled reason for rejecting the appellants’ arguments about the appointing authority’s ostensible historic practice, the record amply supports the appointing authority’s decision to bypass them here. By all accounts, the appointing authority made its appointments from the PL230380 certification in order of the rank of the candidates when the list initially promulgated, appointing the eligibles ranked first through sixth, effective March 28, 2023. By the time the Commission rendered its decision on December 20, 2023, these individuals had been serving as Battalion Fire Chiefs for nearly nine months. When the PL230380 certification was reissued to the appointing authority for redistribution based upon the changes in rank that followed *In the Matter of R.B.*, *supra*, and *In the Matter of M[.]S[.]*, *supra*, the appointing authority chose to retain the six eligibles it initially appointed when it received the initial certification, rather than displace any of them in favor of R.B. and/or M.S. To accomplish this, it utilized the Rule of Three to bypass R.B. and M.S. after consulting with Commission staff. The Commission finds no basis to conclude that the appointing authority’s decision to do so here was improper.⁷

⁷ In making this determination, the Commission emphasizes that because regular appointments from certifications such as the one at issue are conditional, pending the outcome of any scoring appeals, in

Finally, any arguments that the appellants should be provided with retroactive effective dates because the Commission made an administrative error when initially scoring their examinations are without merit. No vested or other rights are accorded by an administrative error. *See Cipriano v. Department of Civil Service*, 151 N.J. Super. 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 N.J. 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 N.J. Super. 538 (App. Div. 1998). The retroactive effect of the relief ordered by the Commission in *In the Matter of R.B.*, *supra*, and *In the Matter of M.[S].*, *supra*, as in other promotional fire examination scoring appeals of this nature, extended only to the placement of their names on the PM3390C list itself. The appellants' increased rank following the outcome of their prior appeals did not accord them any vested right to a retroactive date or even to an appointment to the title of Battalion Fire Chief. Indeed, individuals whose names merely appear on a list do not have a vested right to appointment. *See In re Crowley*, 193 N.J. Super. 197 (App. Div. 1984), *Schroder v. Kiss*, 74 N.J. Super. 229 (App. Div. 1962). 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 award of an retroactive appointment date pursuant to N.J.A.C. 4A:4-1.10(c) is purely discretionary, as the rule states that "[w]hen a regular appointment has been made, the Civil Service Commission *may* order a retroactive appointment date due to administrative error, administrative delay, or other good cause, on notice to affected parties" and does not mandate retroactive appointments in any case, even those involving administrative errors. Here, the record fails to establish that good cause exists for the Commission to order retroactive appointment dates if the appointing authority appoints the appellants from the PL250117 certification. Here, even assuming, *arguendo*, that the PL230380 certification reflected the appellants' final scores and ranks when it was initially issued, the mere fact that their names appeared on the subject eligible list and certification did not guarantee their appointments to the title of Battalion Fire Chief from the subject certification. Regardless of any Rule of Three non-use history, in the absence of an improper motive, the appointing authority could have chosen to bypass both appellants and made the same appointments it ultimately made. Since the appointing authority has acted reasonably within its discretion, it would be improper for the Commission to mandate that the appointing authority provide the appellants with retroactive appointments or pay. Similarly, based upon the foregoing, the Commission does not find that good cause exists to permit the appellants to file late applications for the Deputy Fire Chief (PM5436F), Paterson examination.

an instance such as this where a certification is reissued after pending scoring appeals are resolved, absent an improper motive, appointing authorities retain the option to change which reachable eligibles receive appointments from the reissued certification. Here, for instance, after the PL230380 certification was reissued, if the appointing authority appointed R.B. and M.S. and returned the eligibles ranked seventh and eighth to the list, it could have permissibly done so.


Accordingly, the appellants have not met their burdens of proving that their bypasses were improper or that they are entitled to any of the relief they have requested.

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 19TH DAY OF MARCH, 2025



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