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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Robert Reitz, Police
Sergeant (PM5156N), South Toms
River

List Bypass Appeal

CSC Docket No. 2015-2826

ISSUED: **NOV 09 2015** (HS)

Robert Reitz, represented by Nancy A. Valentino, Esq., appeals the attached decision of the Division of Agency Services (Agency Services), which upheld the bypass of his name on the Police Sergeant (PM5156N), South Toms River, eligible list.

The appellant, a nonveteran, appeared as the first ranked eligible on the subject eligible list, which promulgated on August 7, 2014 and expires on August 6, 2017. A certification was issued on August 8, 2014 (PL140949). The appellant was listed in the number one position on the certification. In disposing of the certification, the appointing authority bypassed the appellant and appointed the second and third ranked eligibles effective September 15, 2014. The appellant appealed his bypass on the certification to Agency Services. However, Agency Services determined that the appointing authority properly disposed of the certification pursuant to the "Rule of Three." *N.J.S.A. 11A:4-8 and N.J.A.C. 4A:4-4.8(a)3.*

On appeal to the Civil Service Commission, the appellant argues that he was an interested eligible, and the appointing authority only has minimal discretion to bypass interested eligibles. According to the appellant, the appointing authority's decision was arbitrary, capricious and unreasonable, and no legitimate reason based on merit was offered. Therefore, he should receive a retroactive appointment as a Police Sergeant.

In response, the appointing authority, represented by Guy P. Ryan, Esq., states that on September 8, 2014, the Police Chief recommended to the Mayor and Borough Council that the second and third ranked eligibles be appointed based on higher levels of seniority, training and experience. The Police Chief further noted that the appellant had been suspended from April 2, 2014 until September 2014 as a result of an Internal Affairs investigation and had recently been issued a written reprimand for the conduct that resulted in that investigation. The written reprimand, issued by the Police Chief, recited that on April 2, 2014, the Toms River Police Department was called to the appellant's residence due to a domestic violence incident; that the appellant's wife was granted a temporary restraining order (TRO); that the appellant was charged with two counts of terroristic threats in violation of *N.J.S.A. 2C:12-3(b)*; and that he admitted to his supervisor that he had engaged in a verbal argument with his wife that had resulted in her calling the police. The written reprimand further related that the appellant was arrested while at the South Toms River Police Department and that he was unable to work his scheduled shift for the evening. Although the Police Chief acknowledged that the TRO and criminal charges were later dismissed and the appellant's wife stated she did not wish to pursue charges, the Police Chief concluded that the appellant's arrest, occurring at the South Toms River Police Department when he should have been working his scheduled shift, constituted conduct unbecoming a public employee and other sufficient cause for discipline under *N.J.A.C. 4A:2-2.3(a)* warranting the written reprimand. The reprimand also required the appellant to attend follow-up counseling on a weekly basis for three months. Subsequently at its September 15, 2014 meeting, the Borough Council approved the appointments of the second and third ranked eligibles by resolution and indicated the bypass of the first ranked eligible (*i.e.*, the appellant) based on the Police Chief's recommendation. On September 16, 2014, the two appointed individuals took the Oath of Office and began functioning as Police Sergeants. The appointing authority maintains that the appellant's written reprimand provided a legitimate, merit-based reason to bypass him. In support, the appointing authority submits the appellant's written reprimand, dated and received by the appellant September 9, 2014 and the Borough Council's September 15, 2014 resolution.

Additionally, the appointing authority claims that the appellant's appeal is untimely since the appointed individuals' promotions were effected at a public meeting on September 15, 2014, yet the appellant did not file his initial appeal of his bypass until November 4, 2014, 49 days after the appointed individuals began functioning as Police Sergeants on September 16, 2014.

In reply, the appellant argues that the alleged incident giving rise to the written reprimand did not occur and reiterates that the appointing authority had no legitimate reason to bypass him. The appellant emphasizes that the criminal charges and TRO were dismissed because the appellant's wife stated that the allegations *never occurred* (emphasis supplied by appellant) and not because she did

not wish to pursue charges. To contest the written reprimand, the appellant asserts he initiated a grievance through negotiated procedures on September 16, 2014. The appellant maintains that he was unfairly and arbitrarily bypassed due to a mere allegation of domestic violence, and not due to any finding that the event actually occurred or a decision in a criminal or civil forum sustaining the allegation. He contends that he has no ability to contest the allegation that serves as the basis for the written reprimand and is stuck in "administrative limbo." The appellant posits that there is a serious due process concern: if mere allegations of wrongdoing, not sustained in any forum, can provide the basis to deny promotions, a perverse incentive is created to use such allegations to deny promotions of otherwise qualified candidates. In support, the appellant submits a letter to the Police Chief dated September 10, 2014 responding to the written reprimand in which the appellant, through his then-attorney, stated that the criminal charges were dismissed because his wife said the accusations never occurred.

The appellant also maintains that he appealed his bypass in a timely manner. He argues that he actually initiated his appeal on October 10, 2014 by letter addressed to the Division of Appeals and Regulatory Affairs (DARA). In that letter, the appellant stated that he was appealing his bypass on the subject eligible list; argued that his bypass was "unfair, [in]equitable and against the manifest weight of any evidence that could be presented;" and requested 30 days to submit the brief in support of the appeal. DARA staff responded by letter dated October 16, 2014 acknowledging that the appeal had been received and had been referred to the Division of Classification and Personnel Management¹ for a response. The appellant states that the November 4, 2014 submission was the brief in support of the appeal, not the letter initiating the appeal. Thus, the appointing authority's contention that the appeal was initiated 49 days after the contested action does not accurately portray the filing. In support, the appellant submits the October 10, 2014 and October 16, 2014 letters.

In reply, the appointing authority argues that the appellant's September 10, 2014 letter through his then-attorney, responding to the written reprimand, is hardly evidence that the incident of domestic violence never occurred. The appointing authority also points to other language in the September 10, 2014 letter that it deems more important: the appellant indicates that he received the written reprimand for the April 2, 2014 incident and that he "understands your position and *accepts* your decision" (emphasis supplied by appointing authority).² The appointing authority contends that although the appellant may have disagreed with the Police Chief's written reprimand, he accepted it through his then-attorney. As to the grievance filed by the appellant on September 16, 2014, the appointing authority responds that the grievance was actually out of time and denied by the Police Chief. Thereafter, the appellant never advanced the grievance to the next

¹ Now Agency Services.

² The appellant also indicated he would comply with the Police Chief's order regarding counseling.

level and, as a result, he is barred from contesting the written reprimand via this bypass appeal. In support, the appointing authority submits a letter from the appellant's union representative admitting that the grievance was out of time and a letter from the Police Chief denying the grievance as it was out of time and because the appellant had accepted the written reprimand in his September 10, 2014 letter.

The appointing authority also maintains that the appellant's appeal is untimely because the appellant did not copy his October 10, 2014 letter to the appointing authority. It notes that *N.J.A.C. 4A:2-1.1(d)* provides that each party must serve copies of all materials submitted on all other parties.

It is noted that the Borough Council's September 15, 2014 resolution indicates that a copy of the resolution was to be provided to the two appointed individuals, the Police Chief, this agency and the Chief Financial Officer. However, this agency did not dispose of the subject certification until October 15, 2014.

CONCLUSION

N.J.A.C. 4A:2-1.1(b) provides that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. In the present matter, there is no indication that the appellant was provided with actual notice that he had been bypassed. Rather, the Borough Council approved the appellant's bypass and the appointments of the second and third ranked eligibles by a resolution adopted at a public meeting on September 15, 2014, and the appointed individuals took the Oath of Office the following day. Subsequently, this agency disposed of the certification on October 15, 2014, thereby approving the appointments of the second and third ranked eligibles. Thus, the appellant's appeal filed October 10, 2014 was timely. The appointing authority argues that the October 10, 2014 letter should not be considered the appellant's initial appeal since the appellant did not copy it to the appointing authority. However, it is clear from the record that the October 10, 2014 letter, not the November 4, 2014 submission, represented the appellant's initial filing with this agency appealing his bypass, and the fact that the appellant did not initially copy it to the appointing authority does not provide a basis to treat it otherwise. While *N.J.A.C. 4A:2-1.1(d)* does provide that in written record appeals, each party must serve copies of all materials submitted on all other parties, the appellant has provided a copy of the October 10, 2014 letter in this proceeding, and the appointing authority has had an opportunity to respond to the arguments therein. As such, there is not a sufficient basis to dismiss this appeal on the basis of untimeliness, and it is appropriate to proceed to address the merits.

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. At the time of disposition of the certification, *N.J.A.C.* 4A:4-4.8 no longer required that an appointing authority must, when bypassing a higher ranked eligible, give a statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tie score.³ *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, 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 the present matter, the appellant argues that the appointing authority lacked a legitimate, merit-based reason to bypass him. The appointing authority counters that on September 9, 2014, the appellant received a written reprimand stemming from an alleged incident of domestic violence on April 2, 2014. It is well established that disciplinary actions may be considered in bypassing an individual for appointment. *See In the Matter of Paul DeMarco* (MSB, decided April 6, 2005) (Appellant's disciplinary action can be considered in determining whether he could be bypassed from the subject list). 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. Here, the appellant stresses that the domestic violence allegation was never sustained in a criminal, civil or other forum and that the associated TRO was ultimately dismissed. However, it bears noting that the Police Chief did acknowledge in the written reprimand that the TRO and criminal charges were dismissed. The Police Chief nevertheless deemed a written reprimand necessary because the appellant had been arrested at the South Toms River Police Department and, as a result, could not work his scheduled shift. It also cannot be ignored that the appellant, via his September 10, 2014 letter responding to the written reprimand, indicated that he understood the Police Chief's position, accepted the decision and would comply with the order to attend counseling. Furthermore, there is no indication that the written reprimand was overturned through a grievance or other procedure. Therefore, the appellant's written reprimand provided a sufficient basis to bypass him on the subject eligible list.

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). However, in the instant matter, the appellant does not even allege that his non-selection was based on an unlawful motive. *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*

³ The rule amendment became effective on May 7, 2012, upon publication in the *New Jersey Register*.

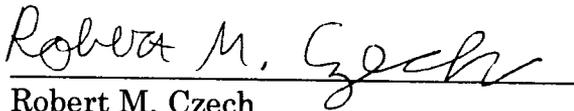
v. Department of Community Affairs, 171 *N.J. Super.* 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing). Moreover, it is noted that the appellant does not possess a vested property interest in the position. The only interest that results from placement 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). Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name on the Police Sergeant (PM5156N) eligible list, 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 5TH DAY OF NOVEMBER, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

- c. Robert Reitz
- Nancy A. Valentino, Esq.
- Joseph Kostecki
- Guy P. Ryan, Esq.
- Joe Hill
- Joseph Gambino



STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
DIVISION OF AGENCY SERVICES
P. O. Box 314
Trenton, New Jersey 08625-0313

Chris Christie
Governor
Kim Guadagno
Lt. Governor

Robert M. Czech
Chair/Chief Executive Officer

April 9, 2015

Stuart J. Alterman, Esq
Alterman & Associates, LLC
8 South Maple Avenue
Marlton, NJ 08053

RE: Robert D. Reitz Jr. - Title: Police Sergeant
Jurisdiction: South Toms River - Symbol: PM5156N
Certification No: PL140949 - Certification Date: 08/08/2014

Dear Mr. Alterman:

This is in response to your correspondence contesting the bypass of your client's name on the referenced certified list of eligibles.

The Appointing Authority disposed of the certification indicating the selection of a lower ranked eligible and bypassed your client's name in accordance with N.J.A.C.4A: 4-4.8, which permits an appointing authority to make an appointment, from among the three highest ranked interested eligibles (Rule of Three). This rule is subject to the statutes governing veteran's preference when applicable.

It should be noted that effective May 7, 2012, a portion of N.J.A.C.4A:4-4.8 was repealed and the Appointing Authority is no longer required to provide a statement of reason when a lower or tied rank eligible is selected.

After a thorough review of our records and all the relevant material submitted, we find that no merit system rules were violated in disposing of the certification. Therefore, the Appointing Authority's decision to bypass your client's name has been sustained and your appeal is denied. Your client's name remains active on PM5156N and may be considered for future opportunities. The eligible list expires on August 6, 2017.

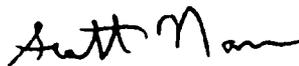
In accordance with Civil Service Rules, you may appeal this decision to the Division of Appeals and Regulatory Affairs within 20 days of the receipt of this letter. You must submit all proofs, arguments, and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to DARA. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

Stuart J. Alterman, Esq
RE: Robert D. Reitz Jr.
April 9, 2015
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Please be advised that pursuant to P.L. 2010 C.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, C. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees. Address all appeals to:

Henry Maurer, Director
Division of Appeals and Regulatory Affairs
Written Appeals Record Unit
PO Box 312
Trenton, NJ 08625-0312

Sincerely,
For the Director,



Scott Nance, Supervisor
Certification Unit

c: Joseph Kostecki