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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3672-20**

**IN THE MATTERS OF
MARCELLO ERRIGO AND
JAMES WESTON, PASSAIC
COUNTY SHERIFF'S
OFFICE.**

Argued October 31, 2022 – Decided November 28, 2022

Before Judges Currier and Enright.

On appeal from the New Jersey Civil Service Commission, Docket Nos. 2018-2495 and 2018-2512.

Lauren Sandy (The Law Offices of Lauren Sandy, LLC) argued the cause for appellants Marcello Errigo and James Weston.

Albert C. Buglione argued the cause for respondent Passaic County Sheriff's Office (Buglione, Hutton & Deyoe, LLC, attorneys; Albert C. Buglione, of counsel; Heather W. Goldstein, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent Civil Service Commission (Pamela N. Ullman, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Marcello Errigo and James Weston appeal from a July 21, 2021 final agency decision of the Civil Service Commission (Commission) adopting the initial decision of an Administrative Law Judge (ALJ) to uphold appellants' bypass for the position of Sheriff's Officer Sergeant in Passaic County (County).¹ Appellants also challenge the Commission's decision to uphold Errigo's removal from the eligible list and its reversal of the ALJ's finding the County violated the "Rule of Three."² We affirm.

The parties' dispute centers around Errigo's and Weston's employment and disciplinary history. Because the details of that history were set forth at length in the Commission's decision and the ALJ's underlying opinion, we confine our comments to the facts pertinent to our opinion.

Before Weston commenced working for the County Sheriff's Department in 2002, he was an investigator at the County Prosecutor's Office. In 1990, while employed as an investigator, he admitted to stealing a candy bar from a recruit

¹ Appellants' matters were previously consolidated due to the common issues presented.

² Under the Rule of Three, after the Commission certifies a list of at least three candidates, the appointing authority has the discretion to select any of the top three candidates; there is no presumption in favor of the highest-ranked candidate. N.J.S.A. 11A:4-8; see also N.J.A.C. 4A:4-4.8(a)(3).

at the Somerset County Police Academy. The County imposed a five-day suspension for the theft. Between 1991 and March 1995, he was investigated for suspected theft at the workplace and was seen on surveillance video removing a jar of change and other items from co-workers. By 1995, Weston faced termination based on administrative charges related to theft and resigned from his position before a disciplinary hearing occurred. Although Weston was hired by the Sheriff's Department in 2002, the County claims he falsified his application by failing to accurately disclose the circumstances leading to his resignation from the Prosecutor's Office.

In 2014, Weston received a five-day suspension after becoming involved in a physical altercation with a probationer. The probationer sued Weston and the lawsuit was settled in the probationer's favor. According to the County, Weston "failed to file a Use of Force Report for this incident — in violation of the laws of New Jersey; New Jersey Attorney General Guidelines and [the County's] Rules/Policies Procedures."

Errigo was hired by the Sheriff's Department in 1996 as a corrections officer and became a Sheriff's Officer in 2002. The County documented that he was suspended without pay in 2003 based on a gambling incident. Additionally, he was indicted in November 2004 for official misconduct, but pled guilty to a

lesser offense of hindering apprehension and was sentenced to a year of probation and a \$5,000 fine. Based on an agreement Errigo reached with the County, he was permitted to return to work.

In 2008, Errigo received a four-day suspension for conduct unbecoming. The suspension was based on an internal investigation which revealed Errigo "double-dipped" by submitting two slips for the same hours worked; one slip was for a road job between the hours of 7:00 a.m. and 5:30 p.m., and the second slip was for being in court between 9:00 a.m. and 11:00 a.m. The investigation revealed Errigo committed similar violations on five prior occasions. Although Errigo was terminated from his position due to the conduct unbecoming offense, he appealed this decision through the Office of Administrative Law (OAL). The matter settled and Errigo was reinstated to his position in October 2010.

Although Weston and Errigo first took and passed the promotional examination for Sheriff's Officer Sergeant in 2009 and 2012, respectively, and Weston passed the exam again in 2012, neither officer was promoted. In 2015, both appellants achieved passing scores on the sergeant examination, with Errigo initially ranking fourth and Weston initially ranking eighth on the September 17, 2015 list, the list which is the subject of this appeal. Certification of the eligible list issued in February 2016 and contained the names of five

eligible candidates. The first ranked eligible was appointed off of the list, and candidates number 2 and 3 were removed from the list. Errigo, the number 4 candidate at the time, was bypassed, and candidate number 5 was appointed.

On November 17, 2016, certification of the revised list — which accounted for the above appointments — reflected Weston was ranked number 4 and Errigo was now ranked number 1. Four days later, appellants were told they would be called to headquarters and receive formal notice they would be promoted to the position of Sergeant. But on November 22, appellants were told they would again be bypassed. Neither appealed from their 2016 bypasses and the County did not remove them from the promotion list at that time.

Certification PL171320 issued on November 1, 2017 and contained the list of ten eligibles. Errigo was the number 1 candidate and Weston was ranked number 2 candidate on the eligible list. On December 27, 2017, the County "skipped" Errigo and Weston for promotions to Sergeant, but selected the number 3 candidate. Neither officer was called to headquarters to receive notice of the bypass. The County subsequently made another round of promotions off the same list, skipping the top four eligible candidates, including appellants, and promoting the candidates ranked 5, 6, and 7 to the position of Sergeant.

In January 2018, Errigo and Weston filed appeals with the Commission, claiming they were bypassed for personal and political reasons. Errigo asserted he was bypassed for supporting a political opponent of the current Sheriff, and Weston alleged he was bypassed because as president of his local union between 2009 and 2012, he often opposed actions of the Sheriff under the purview of protected union activity. Weston also contended he was skipped because he did not endorse the Sheriff for re-election.³

In February 2018, the County requested removal of appellants' names from the eligible list, claiming their employment history was unsatisfactory. Subsequently, the Commission concluded the officers' appeal raised issues of material fact that it could not resolve, and referred the matter to the OAL for a hearing.

The ALJ conducted hearings between November 2019 and February 2020. On June 16, 2021, the ALJ found each of the eleven witnesses who testified at the hearings were credible, and that while there was substantial evidence of

³ We have been informed that Weston retired during the pendency of this action, but continues to seek the promotion to Sergeant with back pay and other corollary benefits to the promotion as of the date he was last bypassed.

political and personal animus by the County against appellants, "said evidence [was] . . . largely anecdotal, based on innuendo and conjecture."

The ALJ also concluded:

Errigo's disciplinary history includes an actual guilty plea and criminal conviction, and is, therefore, substantial enough to constitute a rational basis for Errigo's being bypassed and removed from the promotional list[.] Weston's disciplinary history is considerably less severe, as i[t] does not include any criminality whatsoever, does not include any recent infractions, and, thus, does not constitute a rational basis for bypass or list removal.

The ALJ further found the County violated the Rule of Three when it "failed to effectuate the promotion of any of its top three candidates" and instead passed appellants over for candidates ranked 5, 6 and 7. Moreover, the ALJ concluded that because Weston had served in the United States Coast Guard in the 1980s, his bypass was illegal under N.J.A.C. 4A:4-4.8(a)(3)(ii), based on his veteran status. Thus, the ALJ found "Weston should be promoted to Sergeant retroactive to the date of his bypass (December 27, 2017) with full back pay, back benefits, seniority, and incremental steps."

After receiving the ALJ's initial decision, the Commission independently evaluated the record. On July 21, 2021, it issued its final decision, agreeing with the ALJ that appellants failed to show their bypasses or removals were

based on an invidious, improper, or illegal motivation. Additionally, the Commission concurred with the ALJ's finding that Errigo's disciplinary history provided a sufficient basis for his bypass and removal from the eligible list, and that Weston's past disciplinary history did not justify his removal from the eligible list.

But the Commission disagreed there was an insufficient basis for Weston's bypass. In fact, it found Weston's bypass was warranted given his disciplinary history. Moreover, the Commission rejected the ALJ's finding the County violated the Rule of Three when it bypassed Errigo and Weston on certification PL171320. The Commission reasoned that because appellants were removed from the eligible list, bypassing them was consistent with the regulatory requirements that one of the first three interested eligibles be appointed to a vacant position.

However, because the Commission found Weston's removal from the eligible list was improper, it concluded it should evaluate whether there was a Rule of Three violation on certification PL171320 if Weston's name was restored to the eligible list. After re-assessing the appointments made from the subsequent certification, the Commission determined there was no Rule of Three violation because even if Weston had been on the eligible list, his bypass would

have been proper in favor of lower-ranked candidates, based on the County's reasoning for his bypass on the earlier certification. The Commission explained its reasoning as follows:

Certification PL171320 was headed by Errigo, followed by Weston and eight lower-ranked eligibles. Originally, Errigo and Weston were removed, as well as the 4th and 9th ranked eligible[s]. The 3rd, 7th, 8th and 10th candidates were appointed and the 5th and 6th ranked candidates were bypassed. This disposition was proper as for each appointment, one of the top three interested eligibles was appointed. However, as the Commission has found that Weston could not be removed from the certification, further analysis is necessary. As Weston was not a veteran, he was not entitled to an appointment, thus, while the appointment of the 3rd candidate would be permissible, the appointment of the 7th, 8th and 10th candidates would be problematic. In this regard, to appoint those three candidates, Weston, as well as the 5th and 6th ranked candidates would all have to be bypassed. As such, those lower-ranked candidates could not be appointed absent a violation of the Rule of Three. In most cases, where a Rule of Three violation is present, the Commission will order the reissuance of the certification and order the appointing authority to properly redispense of the certification. However, the subsequent history of certifications from the list provides reconciliation in this matter and renders such a reissuance unnecessary.

The next certification of the list, PL181192 contained the 5th and 6th eligibles from above as the 1st and 2nd eligibles. It also contained three lower-ranked eligibles. In disposing of that certification, the [County] appointed the 1st, 2nd, 4th and 5th candidates

and bypassed the 3rd ranked candidate. This disposition was proper as for each appointment, one of the top three interested eligibles was appointed. Thus, as the [County] had appointed the 5th and 6th ranked candidates on PL171320 on the subsequent certification, it is reasonable to ascribe that it preferred those candidates to Weston. In other words, . . . it is clear . . . the [County], given the option of Weston or the 5th and 6th ranked eligibles on PL171320, would have appointed either of those eligibles and bypassed Weston for the legitimate reasons already provided[.] Weston would also be entitled to be added to the PL181192 certification for consideration. However, as only one eligible was bypassed on that certification, he would not be entitled to appointment from that certification and would properly be listed as bypassed for the reasons presented previously.

The Commission also noted that "even if it ordered Weston's appointment, he would not be entitled to differential pay. That remedy is only appropriate where it has been proven . . . the reason for an appointing authority's non-appointment is based on improper motivation."

Finally, the Commission concluded the ALJ incorrectly found Weston should have been promoted based on his veteran status. It reasoned Weston never requested nor received veteran's preference under N.J.A.C. 4A:4-4.8(a)(3)(ii), so he was deemed a non-veteran for purposes of an appointment to the position of Sergeant.

On appeal, Errigo and Weston contend the Commission's decision was arbitrary, capricious, and unreasonable, and "not supported by the substantial evidence." They also urge us to reverse the bypass decision, arguing the Rule of Three was "clearly violated." We disagree.

Our scope of review of a final agency decision is circumscribed. Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). "[A] 'strong presumption of reasonableness attaches'" to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)). The party challenging the final administrative action has the burden to demonstrate grounds for reversal. Lavezzi v. State, 219 N.J. 163, 171 (2014) (citing In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013)).

When reviewing an agency decision, we examine (1) whether the agency action violated "express or implied legislative policies," (2) whether there is substantial evidence in the record to support the agency's decision, and (3) whether in applying the law to the facts, the agency reached a conclusion "that could not reasonably have been made on a showing of the relevant factors." Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citations omitted). Where an agency's decision satisfies these criteria, we

accord substantial deference to its fact-finding and legal conclusions, recognizing "the agency's 'expertise and superior knowledge of a particular field.'" Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). We do not "substitute [our] own judgment for the agency's." Ibid. (quoting In re Carter, 191 N.J. 474, 483 (2007)).

The New Jersey Constitution requires that "[a]ppointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive." N.J. Const. art. VII, § 1, ¶ 2. These principles eventually led to the adoption of the "Rule of Three." In re Foglio, 207 N.J. 38, 45 (2011); N.J.S.A. 11A:4-8.

Under the Rule of Three, after the Commission certifies a list of at least three candidates, the appointing authority has the discretion to select any of the top three candidates; there is no presumption in favor of the highest-ranked candidate. N.J.S.A. 11A:4-8; see also N.J.A.C. 4A:4-4.8(a)(3). The purpose of the rule is "to limit, but not to eliminate, discretion in hiring." Foglio, 207 N.J. at 46 (citing Commc'ns Workers of Am. v. N.J. Dep't of Pers., 154 N.J. 121, 129

(1998)). "While ensuring that competitive examinations winnow the field of candidates, the Rule of Three does not stand as 'an immutable or total bar to the application of other important criteria' by a government employer." Ibid. (quoting Terry v. Mercer Cnty. Bd. of Chosen Freeholders, 86 N.J. 141, 150 (1981)); see also In re Crowley, 193 N.J. Super. 197, 214 (App. Div. 1984) (an appointing authority can bypass a higher-ranked candidate for any "legitimate reason"). But the agency is prohibited from using discriminatory reasons to make its decision—for example "anti-union animus or discrimination based on . . . race, ancestry or gender." Foglio, 207 N.J. at 57 n.5 (citations omitted).

A higher-ranked candidate challenging a bypass bears the burden of establishing by a preponderance of the evidence that the appointing authority's bypass decision was motivated by discrimination, retaliation, or other improper motive. See N.J.A.C. 4A:2-1.4(c). Once the candidate makes a prima facie showing, the burden of production—but not the burden of persuasion—shifts to the authority to present a legitimate, non-discriminatory reason for the decision. Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445 (App. Div. 1990).

Should the authority meet its burden, the candidate can still prevail if the candidate shows the articulated reasons are pretextual or that an improper

motive was more likely responsible. Ibid. If the candidate meets that burden, the candidate has established a presumption of discriminatory or retaliatory intent and the burden shifts to the authority. Id. at 446. The authority must then prove the action would have taken place regardless of the discriminatory or retaliatory motive, usually by showing that the other candidates had better qualifications. Ibid. Therefore, under the Rule of Three, "assuming . . . the appointing authority had a legitimate reason for bypassing appellant's name, it did not violate the New Jersey Constitution." Crowley, 193 N.J. Super. at 214; see also In re Hruska, 375 N.J. Super. 202, 210 (App. Div. 2005).

Governed by these principles, we affirm substantially for the reasons set forth in the Commission's July 21 decision, as it is supported by sufficient credible evidence on the record as a whole. R. 2:11-3(e)(1)(D). In fact, we see no reason to second-guess the Commission's findings regarding appellants' failure to establish by a preponderance of evidence that their bypasses were motivated by discrimination, retaliation, or other improper motive. Likewise, we agree with the Commission's determination that the County justifiably bypassed Errigo and Weston, considering each officer's disciplinary history. Moreover, the competent credible evidence in the record amply supports the Commission's finding that Errigo's removal from the eligible list was warranted

based on his disciplinary history, and that although Weston's removal was not proper, the County did not violate the Rule of Three in bypassing the officers. Finally, because the Commission found Weston never requested nor received veteran's preference under N.J.A.C. 4A:4-4.8(a)(3)(ii), we agree with its determination that Weston was considered a non-veteran for appointment purposes.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION