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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1265-21**

**IN THE MATTER OF  
ANTONIO SALTERS,  
FIRE FIGHTER (M1838W),  
TOWNSHIP OF HILLSIDE.**

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Argued January 24, 2023 – Decided April 13, 2023

Before Judges Sumners and Susswein.

On appeal from the New Jersey Civil Service Commission, Docket No. 2021-1827.

Brian P. Matousek argued the cause for appellant Antonio Salters (Grayson & Associates, LLC, attorneys; Brian P. Matousek and Bette R. Grayson, on the briefs).

Kenneth B. Goodman argued the cause for respondent Township of Hillside (O'Toole Scrivo, LLC, attorneys; Kenneth B. Goodman, on the brief).

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

PER CURIAM

Petitioner Antonio Salters appeals from a Civil Service Commission (CSC) final determination denying his administrative appeal of the Township of Hillside's decision not to hire him as a firefighter. Based on a competitive examination, Salters was ranked fourth out of forty eligible candidates. Thirteen candidates were ultimately appointed. Salters claims he was bypassed because of political retaliation, asserting that he and his father were political rivals of the mayor—the person who interviewed the candidates and was responsible for making appointments.

Following Salters's interview, the mayor sent a letter to the chief of the Hillside Fire Department stating that Salters lacked honesty and candor based on what the mayor characterized as a deceptive answer during the interview and her own "research" about Salters's background. Hillside maintains Salters was not appointed because he lied about being a lifelong resident—an accusation based on him attending high school in the neighboring city of Newark—and was not as enthusiastic about being a firefighter as other candidates during the interview.

The CSC determined a hearing was not necessary to resolve disputed facts and concluded that Salters failed to demonstrate Hillside's stated reasons for not

appointing him were pretextual. After carefully reviewing the record, we remand to the CSC to conduct a hearing and make findings of fact.

I.

On December 4, 2020, Salters was certified as an eligible candidate for a firefighter position. On January 4, 2021, he submitted an employment application to the Hillside Fire Department. In accordance with Hillside's application process, Salters was interviewed by the mayor.

On February 4, 2021, the mayor sent a letter to the chief of the fire department explaining she found Salters "to lack honesty and candor." She primarily based that conclusion on Salters's assertion that he was a "lifelong" resident of Hillside despite attending high school in Newark.<sup>1</sup> That perceived "deceptive answer" "gave [the mayor] occasion to look further into [Salters's background]." Her "research" purportedly revealed that Salters was "entangled in a pending criminal matter dealing with his father" and that he "may have lied on his college application in order to receive financial aid and in order for his

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<sup>1</sup> Salters acknowledged in his employment application that he went to University High School in Newark. He also stated in the application that he had lived at the same house in Hillside his entire life. He contends he went to school in Newark while living in Hillside and claims that is not unusual. The mayor personally knew Salters went to University High School because she had worked there.

father to avoid paying taxes." She also mentioned Salters "seemed to lack the general enthusiasm which was exhibited by the other candidates." Because of those concerns, the mayor concluded Salters "would not fit well within the optimal culture in which [Hillside] as a Township should strive for."

Of the forty candidates on the list of firefighter candidates, thirteen were appointed. Those individuals were ranked between positions two and thirty-six on the list of eligible candidates. One of the appointments was Salters's brother, who had been ranked twenty-second. Salters had been ranked fourth on the list. The individual ranked third was removed from the list for "[f]alse statement(s) of material fact(s)."<sup>2</sup>

Salters appealed Hillside's decision to bypass him to the CSC and requested a hearing. He alleged the decision was both political retaliation and racial discrimination.<sup>3</sup> Hillside, through counsel, submitted a letter to the CSC on August 13, 2021 opposing the appeal and stating its reasons for bypassing Salters. Salters responded to that submission on August 20, 2021.

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<sup>2</sup> Although Hillside maintains Salters lied about his lifelong residency, the record shows he was not removed from the list. Rather, he was marked "I2" meaning, "Retain [on the list of eligible candidates] - Interested - Others appointed (reachable for appointment)."

<sup>3</sup> On appeal, Salters only makes arguments regarding political retaliation.

On November 22, 2021, the CSC denied Salters's administrative appeal in a final determination. The decision concluded that "other than mere allegations and speculation, the appellant has not presented any substantive evidence that would lead the Commission to conclude that his bypass was improper or an abuse of the appointing authority's discretion under the 'Rule of Three.'"<sup>4</sup> It continued, "[t]he appointing authority presents legitimate, non-discriminatory reasons for the appellant's bypass, which have not been refuted."

Specifically, the CSC found Salters did not rebut Hillside's claim that he was not a lifelong resident of Hillside. The CSC further reasoned Hillside's claim that Salters lacked enthusiasm was an independent legitimate reason to bypass him. The final determination also explained the appointment of Salters's brother undermined the claims that the mayor and township retaliated against him based on his father's political activities.

Defendant raises the following contention for our consideration:

THE CIVIL SERVICE COMMISSION'S FINAL  
ADMINISTRATIVE ACTION DENYING THE  
SALTERS LIST REMOVAL APPEAL AND  
SUSTAINING THE APPOINTING AUTHORITY'S  
DETERMINATION SHOULD BE REVERSED AS IT

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<sup>4</sup> The "Rule of Three" provides that an appointing authority must appoint one of the three highest-ranking candidates to an open position unless there is a legitimate, merit-based reason to bypass a higher-ranking candidate. In re Foglio, 207 N.J. 38, 45–47 (2011).

WAS ARBITRARY, CAPRICIOUS, AND  
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WHOLE

## II.

The scope of our review of quasi-judicial agency determinations is limited. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). That is particularly true "[i]n light of the executive function of administrative agencies." Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). Accordingly, "[a]n agency's determination on the merits 'will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo, 206 N.J. at 27). The party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

On appeal, the judicial role in reviewing an administrative action is generally limited to three inquires:

- (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;

(2) whether the record contains substantial evidence to support the findings on which the agency based its action; and

(3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Allstars, 234 N.J. at 157 (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007).

As we have noted, the Rule of Three permits an element of hiring discretion, allowing "an appointing authority to select one of the three highest scoring candidates from an open competitive examination." Foglio, 207 N.J. at 45 (quoting Local 518, N.J. State Motor Vehicle Emps. Union v. Div. of Motor Vehicles, 262 N.J. Super. 598, 603 (App. Div. 1993)). That rule, which is codified at N.J.S.A. 11A:4-8 and N.J.A.C. 4A-4.8(a)(3), has "governed the certification of candidates to the appointing body as well as the appointing body's hiring discretion for over a century." Foglio, 207 N.J. at 45. "In essence,

the appointing authority must select from one of the top three candidates ranked on the list." In re Martinez, 403 N.J. Super. 58, 72 (App. Div. 2008).<sup>5</sup>

However, "the Rule of Three does not stand as 'an immutable or total bar to the application of other important criteria' by a government employer." Foglio, 207 N.J. at 46 (quoting Terry v. Mercer Cnty. Bd. of Chosen Freeholders, 86 N.J. 141, 150 (1981)). "[T]he appointing authority retains discretion to bypass a higher-ranked candidate 'for any legitimate reason based upon the candidate's merit.'" Id. at 47 (quoting In re Hruska, 375 N.J. Super. 202, 210 (App. Div. 2005)). Attempted deception and inferior interview performance are legitimate reasons to bypass. Foglio, 207 N.J. at 49; N.J.A.C. 4A:4-6.1(a)(6) and (9). Retaliation, of course, does not qualify as a "legitimate reason." In re Brown, 458 N.J. Super. 284, 286 (App. Div. 2019).

The four-step test the CSC used to evaluate the retaliation claim is articulated in Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super 436 (App. Div. 1990). Under that test, first, the claimant must make a prima facie showing of retaliation by demonstrating a protected activity led to an adverse employment decision. Id. at 445. If that is done, "the burden of going forward,

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<sup>5</sup> We note that eligible veterans are given priority, despite the Rule of Three. N.J.A.C. 4A:4-4.8(a)(3). No issues pertaining to the veterans' preference are raised in this appeal.



but not the burden of persuasion, shifts to the employer to articulate some legitimate non-retaliatory reason for the adverse action." Ibid. Then, the claimant must show the retaliatory reason motivated the employer's action by demonstrating "that the articulated reason is a pretext for the retaliation." Ibid. If the claimant makes such a showing, a presumption of retaliation is created that the employer must rebut by proving by a preponderance of the evidence that the action would have taken place regardless of any retaliatory intent. Id. at 446.

Salters made a prima facie showing of retaliation for purposes of the first step in the Jamison analytical paradigm. The claim of past political conflict between Salters and the mayor, coupled with Salters's high rank on the list of eligible candidates, suggests that political retaliation may have factored into Hillside's decision to bypass him.

We next consider that Hillside articulated two distinct non-retaliatory reasons to bypass Salters—the alleged lie about his "lifelong" residency and his lack of enthusiasm in the interview. As we noted, both of those are legitimate grounds to bypass a candidate. See Foglio, 207 N.J. at 49; N.J.A.C. 4A:4-6.1(a)(6) and (9). Once those justifications were articulated, Salters needed to demonstrate those reasons were pretextual. Jamison, 242 N.J. Super. at 445.

Regarding residency, we reiterate the mayor's claim that Salters lied is based on the fact that he went to school in Newark. But the record shows that Salters expressly acknowledged in his employment application that he attended University High School in Newark while living in Hillside. We are at a loss to understand where the deception lies. Salters maintains that attending school in Newark did not preclude residing in Hillside.

Regarding the lack of enthusiasm, Hillside relies on the letter the mayor sent to the chief of the fire department stating, "Salters seemed to lack the general enthusiasm which was exhibited by the other candidates." Although this was not the primary factor in the bypass decision, as the CSC noted in its final determination, interview performance is a legitimate consideration in deciding whether to bypass a candidate. Foglio, 207 N.J. at 49 (noting "the performance of the applicants in the give-and-take of an interview" as a legitimate reason to bypass a candidate). In this instance, however, the wholly subjective evaluation of Salters's interview performance was made by the same person claimed to have a motive to retaliate. That circumstance calls into question the value of the mayor's assessment as a legitimate justification for bypassing Salters.

To put the two asserted reasons for bypassing Salters in context, we also consider the portions of the mayor's letter that neither the township nor the CSC

mentioned—the mayor's claim that there is a "pending criminal matter dealing with [Salters's] father" and that Salters may have lied "on his college application in order to receive financial aid and in order for his father to avoid paying taxes." Hillside does not argue those allegations constitute legitimate reasons to bypass Salters. To the contrary, it proceeds as if those allegations had never been made. We believe those allegations are nonetheless relevant in this proceeding, not because they are true, but rather because they were made by the mayor in the same letter that provides the factual support for the reasons the township does rely upon.

We believe the unsupported allegations of criminality present a prima facie claim the mayor acted with retaliatory intent when she sent the letter to the fire department's chief and bypassed Salters. They likewise tend to support Salters's claim that the reasons given to the CSC by Hillside were a pretext to conceal political retaliation at the mayor's behest. We note in this regard, a "failure to consider all the evidence in a record" can demonstrate a "lack of fair support." US Masters Residential Prop. (USA) Fund v. N.J. Dep't of Env't Prot., 239 N.J. 145, 160 (2019).

We next consider whether an evidentiary hearing is needed in these circumstances to resolve disputed facts or whether this matter should be resolved

based on the current written record. The relevant regulation, N.J.A.C. 4A:2-1.1(d), provides in pertinent part, "[e]xcept where a hearing is required by law, this chapter or N.J.A.C. 4A:8, or where the Civil Service Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record." We recognize this regulation leaves to the CSC the determination of whether there is a material and controlling dispute of fact. In this instance, the final determination expressly states that "[n]o material issue of disputed fact has been presented which would require a hearing." That determination—like all agency decisions—is subject to appellate review.

In re Wiggins held, "[t]he determination whether such a situation [necessitating a hearing] exists is one committed to the discretion of the [agency], and its decision will be affirmed unless it goes beyond the range of sound judgment." 242 N.J. Super. 342, 345 (App. Div. 1990). In that case, we remanded for a hearing because "an intensely factual determination . . . controlled the outcome." Ibid.

More recently, in Brown, we reviewed the CSC's determination that a promotional bypass was proper and deemed it necessary to remand for a hearing, noting the facts created "an air of pretextuality not easily disregarded." 458 N.J.

Super. at 290. We explained that the deference given to agencies "largely emanates from our appreciation of the agency's expertise combined with its opportunity to see and hear the witnesses when making credibility findings on disputed questions." Ibid. (citing In re Taylor, 158 N.J. 644, 656 (1999)). We concluded the CSC's "conclusory" determination was "arbitrary, capricious, and unreasonable" "[b]ecause the parties' factual disputes ha[d] yet to be examined through the give and take of an evidentiary hearing, at which the agency might for the first time form a view of the disputants' credibility." Ibid.

The matter before us raises similar concerns to those that necessitated a hearing in Brown. The CSC's determination was conclusory—its reasoning spanned only one paragraph—finding that Salters did not refute Hillside's asserted non-retaliatory reasons. But as we have explained, Salters has tenable arguments refuting those reasons.

We emphasize, moreover, the township cherry picked those reasons from the mayor's letter, ignoring the mayor's unsupported allegations of an "entanglement" in criminal conduct and lying for financial gain. The allegations communicated to the fire department chief, but not relied upon by Hillside in justifying its bypass decision, suggest the possibility of personal or familial animus and, thus, a retaliatory motive. Considering the totality of circumstances

presented in the limited record before us, we believe there is "an air of pretextuality not easily disregarded" that warrants a hearing, id. at 290.

The Civil Service system is designed to safeguard the integrity of the appointment process, and serves, in part, to protect against the kind of political retaliation of which Salters claims. See DiBuonaventura v. Washington Twp., 462 N.J. Super. 260, 269 (App. Div. 2020) (noting the CSC as part of the "umbrella of protections for public employees"). Mindful of the deference we owe to the CSC in implementing those safeguards, nothing in this opinion should be construed as expressing a definitive view on whether either or both of the non-retaliatory reasons relied upon by Hillside are pretextual. Nor do we venture an opinion on this limited record as to whether a retaliatory reason more likely motivated the employer. See Jamison, 242 N.J. Super. at 445. We leave those fact-sensitive determinations to be made in the first instance by the CSC based upon a more fulsome record to be developed at a hearing.

We vacate and remand for further proceedings in conformity with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION