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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3319-14T3

IN THE MATTER OF FRANCIS MCHALE,
DEPARTMENT OF CORRECTIONS.

Argued November 10, 2016 - Decided February 27, 2017

Before Judges Lihotz and O'Connor.

On appeal from the Civil Service Commission,
Docket No. 2014-1238.

Frank M. Crivelli argued the cause for
appellant Francis McHale (Crivelli & Barbati,
L.L.C., attorneys; Mr. Crivelli and Donald C.
Barbati, on the briefs).

Brian M. Kerr argued the cause for respondent
New Jersey Civil Service Commission
(Christopher S. Porrino, Attorney General,
attorney; Todd A. Wigder, Deputy Attorney
General, on the brief).

PER CURIAM

Appellant Francis McHale appeals from a final decision of the
Civil Service Commission (the Commission) denying him a
retroactive date of appointment to the position of Corrections
Sergeant. After reviewing the record and applicable law, we
affirm.

The facts are undisputed. Appellant joined the New Jersey Department of Corrections (DOC) as a Corrections Officer in 2003. At some point thereafter, he was promoted to Senior Corrections Officer.

On October 2, 2012, disciplinary charges were issued, which stemmed from an incident on July 18, 2012, and appellant was removed from his position. The record before us is silent as to the circumstances or the charges levelled against appellant. Appellant challenged his removal, and following an administrative hearing, the Administrative Law Judge's recommendation to dismiss the charges and reinstate appellant were accepted and adopted as the Commission's final decision. Appellant was reinstated as a Senior Corrections Officer, and awarded back pay, seniority, and counsel fees.

On November 2, 2013, appellant accepted a promotion to Corrections Sergeant. Four days later, he filed an appeal with the Commission, seeking to make the date of appointment retroactive to February 9, 2013, which he maintained was the last possible date he would have been promoted based on his status on the

promotions or eligibility list had he not been wrongfully terminated.¹

The Commission noted, although other similarly ranked Corrections Officers were promoted on February 9, 2013, appellant's position on the eligibility list did not guarantee his appointment on that date. The Commission concluded appellant failed to carry his burden, N.J.A.C. 4A:2-1.4(c) (placing burden of proof on appellant), and did not "conclusively demonstrate that [he] would have been appointed at that time." The Commission's final agency decision dated February 6, 2015, denied appellant's appeal of the effective date of his promotion.

Our review of the Commission's decision is circumscribed. Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009). We may not simply "substitute [our] own judgment for the agency's." Id. at 10 (quoting In re Carter, 191 N.J. 474, 483 (2007)).

Our task is three-fold; we review:

(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

¹ Appellant was ranked 53rd on the promotions or eligibility list. The last officer who was also ranked 53rd on the list was promoted on February 9, 2013. Appellant reasons had he not been terminated, he would have been promoted by that date. See N.J.A.C. 4A:4-1.10 (providing for Commission approval of appointments and promotions).

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.

[Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)).]

"Without a 'clear showing' that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record, an administrative agency's final quasi-judicial decision should be sustained, regardless of whether a reviewing court would have reached a different conclusion in the first instance." Circus Liquors, supra, 199 N.J. at 9.

We turn to the instant matter. Appellant's suggestion his appointment should be retroactive is based on N.J.A.C. 4A:4-1.10(c), which permits the Commission to "order a retroactive appointment date due to administrative error, administrative delay, or other good cause" Appellant asserts the Commission erroneously denied his request, despite a satisfaction of the necessary "good cause." We are not persuaded.

Our Constitution, statutes, and regulations prescribe the scheme by which administrative agencies select and promote candidates. In re Foglio, 207 N.J. 38, 43-44 (2011) (citing N.J. Const. art. VII, § 1, ¶ 2; N.J.S.A. 11A:1-2(a); N.J.A.C. 4A:4-

4.2). In short, the agency administers an examination and ranks applicants according to their score and any applicable adjustments. Id. at 44. The agency retains the discretion to select one of the top three candidates for a vacancy, commonly known as the "Rule of Three." Id. at 45. See N.J.S.A. 11A:4-8 ("The commission shall certify the three eligibles who have received the highest ranking on an open competitive or promotional list against the first provisional or vacancy.").

"The purpose of the Rule of Three is to limit, but not to eliminate, discretion in hiring." Foglio, supra, 207 N.J. at 46 (citing Commc'ns Workers of Am. v. N.J. Dep't of Pers., 154 N.J. 121, 129 (1998)). In fact, the Rule of Three "recognizes employment discretion and seeks to ensure that such discretion is not exercised in a way inconsistent with 'merit' considerations." Ibid. (citing Terry v. Mercer Cnty. Bd. of Chosen Freeholders, 86 N.J. 141, 149-50 (1981)).

Here, although appellant concedes the Rule of Three affords the DOC some discretion in selecting candidates, and also agrees he may have been passed over for promotion on February 9, 2013, he suggests the DOC does not follow the Rule of Three "per se," and promotes applicants "straight down the list." This claim is unaccompanied by factual support, giving us no basis to ignore the Legislative direction regarding use of the long-established

Rule of Three in promotion selection. Moreover, in Foglio, the Supreme Court spoke directly on the entitlement of candidates eligible for promotion, stating:

No right accrues to a candidate whose name is placed on an eligible list. In re Crowley, 193 N.J. Super. 197, 210 (App. Div. 1984). ("[A] person who successfully passes an examination and is placed on an eligible list does not thereby gain a vested right to appointment."). "The only benefit inuring to such a person is that so long as that list remains in force, no appointment can be made except from that list." Ibid. "[T]he best that can be said" of a candidate on an eligible list is that he has "a right to be considered for appointment." Nunan v. N.J. Dep't of Pers., 244 N.J. Super. 494, 497 (App. Div. 1990), certif. denied, 126 N.J. 335 (1991).

[Foglio, supra, 207 N.J. at 44-45.]

Appellant also invites us to conclude the DOC's failure to oppose his administrative appeal concedes the merits of his claim. The regulations squarely place the burden of proof on an appellant, N.J.A.C. 4A:2-1.4(c), and do not permit an inference of correctness because a request is unopposed. R. 2:11-3(e)(1)(E).

Finally, appellant asserts principles of equity and fairness require reversal of the Commission's decision. We reject the appellant's arguments. "[E]quity must follow the law." A.N. ex rel. S.N. v. S.M., 333 N.J. Super. 566, 570 (App. Div. 2000). His place on the eligibility list did not vest him with the right to appointment on February 9, 2013, and he failed to provide a legal

basis supporting entitlement to the remedy of a retroactive date of appointment. Foglio, supra, 207 N.J. at 44-45. We cannot conclude the Commission's final decision was "arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Circus Liquors, supra, 199 N.J. at 9.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION