



STATE OF NEW JERSEY

In the Matter of Lenore Levine and
Kesziah Ford, County Correction
Captain and County Correction
Lieutenant, Hudson County

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2018-517 and 2018-
1223

Reconsideration Request

ISSUED: January 18, 2019 (JH)

Lenore Levine and Kesziah Ford request reconsideration of the final administrative determination in *In the Matter of County Correction Captain (PC1189P) and County Correction Lieutenant (PC1202P), Hudson County* (CSC, decided June 7, 2017). A copy of that decision is attached hereto and incorporated herein.

The facts of this matter are thoroughly discussed in the attached decision and will not be reiterated herein.

It is noted that Levine and Ford submitted separate identical requests in which they present that they are "appealing the following":

1. The decision to hold a make[-]up test.
2. Allowing the 9 displaced supervisors to take the 'make[-]up' examination in this matter.¹

¹ The appellants provide a list of nine "demoted supervisors" in which they include Felix and Geoghegan. As noted in *In the Matter of County Correction Captain (PC1189P) and County Correction Lieutenant (PC1202P), Hudson County, supra*, a total of eight individuals were returned to their prior held titles. It is noted Felix did not receive an appointment to the County Correction Lieutenant title and thus, was not "demoted." It is further noted that Geoghegan submitted an application for the PC2530T examination by the original filing deadline and sat for the test on original administration date. Thus, Geoghegan was not provided with a make-up.

3. Allowing 2 sergeant[s] who previously signed up for and were a no show [sic] into the make[-]up test.
4. Allowing sergeants who previously did not sign up for or take the original test to take the make[-]up test.
5. The scoring of the make[-]up tests.
6. Any leaves of absence during the requisite 'time in grade' qualification should be deducted.
7. The proceedings and lack of representation of the current candidates on the eligible list.

Specifically, with respect to points 1 and 2, the appellants argue:

Civil Service complied with the Appellate Division findings and removed those supervisors from the appropriate lists but decided to afford them a second bite of the apple by calling for a 'make[-]up test' [which was administered] in May of 2017 . . . This appellant objects to Civil Service holding a make[-]up test for the displaced officers in its entirety as being manifestly unfair and unjust to those officers who originally followed the rules and took the original test. Those 9 displaced supervisors attempted to, and were almost successful in stealing their titles and increased salary by back dating their appointment date at the direction of the appointing authority.² They should not be rewarded. Likewise, the legitimate applicants should not be punished.

Regarding point 3, the appellants contend that "two officers, Paul Morales and Mi[g]uel Matos, registered at that time to take the test, and did not show up on the test date. Even though those two officers were already promoted, they signed up to take the test because they knew the promotions were under appeal and there was a good possibility that they would lose the appeal. They should not be given another opportunity to take the test, specifically by way of the make-up test, as they were already given that opportunity and did not show up."³ Regarding point 4, the appellants assert that "the 'make-up' test was also opened up to those officers that were eligible to take the test by the November 15, 2015 clos[ing] date but chose not

² As noted previously, the facts of this matter were clearly discussed in *In the Matter of County Correction Captain (PC1189P)* and *County Correction Lieutenant (PC1202P)*, Hudson County, *supra*. In this regard, it is not clear how the appellants derived this conclusion.

³ The appellants argue, in essence, that Morales and Matos should have foreseen the Appellate Division's determination in March 2017 and as such, they should have taken the PC2556T exam administered in May 2016 for County Correction Lieutenant, the title to which they had been appointed in November 2015. The appellants further contend that given their lack of prescience, Morales and Matos should not be provided with any promotional opportunities going forward.

to take the test at that time. The decision to open up the test to new candidates, together with those officers that were no shows at the first test, added yet another officer who gained additional experience to the list and who would bump the other officers to be ranked lower on the eligibility list.”⁴ With regard to point 5, the appellants maintain:

Those displaced supervisors had already served a full 22 months in the title they now had to test for. Allowing them to test for positions they already held for nearly 2 years is no more than a formality and highly prejudicial to those already on the list. The test is to be based on merit and fairness. The others already on the list were not given the opportunity to hold the position prior to taking the test, nor did they receive the vast amount of training, education and hands on experience that those displaced supervisors wrongfully received and benefitted from. The test results are in question and should be weighted to make a level playing field for all those competing for the positions. Whether it be by imputing additional weight to those who previous took the test, or by subtracting an additional amount/percentage from the make-up test scores, or both, Civil Service has stopped short of making an effort to keep the results fair to all⁵ and appears to cater only to those whose false representation⁶ created the dilemma they now find themselves in.

Regarding point 6, the appellants contend, “Some officers may have taken a substantial amount of time off by way of leave of absence during the qualification period. That time should be subtracted from the ‘one year’ requisite of time and disqualify those officers.”⁷ With respect to point 7, the appellants argue:

⁴ A basic tenet of the Civil Service Act and its implementing rules is that appointments and promotions are awarded based on merit and fitness which is measured by competitive examinations. Thus, requiring the appellants to compete with more of their peers is consistent with civil service principles.

⁵ Although the appellants claim that the displaced individuals received an unfair advantage from serving in the County Correction Lieutenant or County Correction Captain titles, respectively, it is noted that these individuals initially scored well on the PC1189P and PC1202P exams, respectively, and subsequently, on the PC2556T and PC2530T exams, respectively. As such, the merit and fitness of the displaced individuals was consistently demonstrated on these tests.

⁶ As clearly indicated in *In the Matter of County Correction Captain (PC1189P) and County Correction Lieutenant (PC1202P)*, Hudson County, *supra*, the Commission did not determine that there were any false representations made by the eight affected individuals.

⁷ While the appellants do not provide any further information, *e.g.*, the names of the individuals or the type of leave, it is noted that the longstanding interpretation of N.J.A.C. 1A:4-2.6(a)1 is that permanent service before and after a leave of absence is combined, or aggregated, to fulfill the one year time-in-grade requirement. See *In the Matter of George L. Venturi, et al.* (MSB, decided June 2, 1998). Thus, absent specifics, the Commission cannot address this matter further.

There were 17 officers that successfully passed the test and who were ranked according to their scores in accordance with Civil Service rules. . . Neither Civil Service, nor the County solicited any of them to ask how they would be impacted by the decisions that were being made. Civil Service solicited input from all the supervisors who were impacted by the Appellate Division decision,⁸ but never solicited input from the 17 officers who would be impacted by the decision that Civil Service was about to make to hold a 'make-up' test. The Appellate Division did not address the issue of a 'make-up' test in its ruling.

In a separate letter, Levine adds that "there could possibly be a recipe for corruption with the County of Hudson and the Supervisors Union NJ PBA 109A. Additionally, I am requesting for the [C]ommission to desist employees from the art of possibly committing violations of employee rights possibly federal violations. Finally, for the [C]ommission to make sure all staff members governed by civil service guidelines are treated equally and fairly at all times." She maintains that "it is my sole request that civil service take action by stopping the suffering that many employees are being forced to endure each and [every day] in the workplace affecting the employees and their families." She presents:

I strongly believe it is at this time that the County of Hudson and Civil Service Commission take the act of righteousness by reviewing all documents, appellate court [sic], letters of recommendation from Law Department of Hudson County, and the previous 2013 promotional list, etc.[.] as well as all other documents that [are] related to this ongoing matter . . . It is my belief that the actions of the above eight law enforcement officers who from the past were union board members are now contaminating the present executive board members to do violations of contracts by circumventing by going to [sic] the County of Hudson political officials to make deals for themselves and not for the membership . . . Overall, there was no action taken against the supervisors of law enforcement mentioned above for the many numerous amounts of possible violations. The violations stemmed from violations from civil service as well as county policy rules and regulations . . . It saddens me that all innocent people who have taken the test legally are suffering from not being promoted as a result of these actions . . . The supervisors who had taken the test rightfully should be compensated for those eight law enforcement officers

⁸ DARA staff is unaware of any such solicitation by the Commission. It is noted that the appellants did not provide any further information regarding this alleged solicitation or any documentation to support their claim.

mentioned above whom falsely took the test causing eight supervisors to suffer.⁹

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error occurred or present new evidence or additional information which would change the outcome of the case and the reasons that such evidence was not presented during the original proceeding.

In the present matter, the appellants have failed to meet the standard for reconsideration. The appellants do not present new evidence or additional information which was not presented at the original proceeding which would change the outcome of the original decision, nor have the appellants proven that a clear material error has occurred in the original decision. Accordingly, based on the record presented, the appellants have failed to support their burdens of proof in this matter.

Moreover, as noted in *In the Matter of County Correction Captain (PC1189P) and County Correction Lieutenant (PC1202P)*, Hudson County, *supra*, announcements for County Correction Captain (PC2530T), Hudson County and County Correction Lieutenant (PC2556T), Hudson County, were issued on November 1, 2015 and closed November 21, 2015. It is noted that neither appellant met the requirements to apply for PC2530T. Furthermore, Ford did not file an application for the PC2556T examination. Thus, it does not appear that Ford possesses standing to bring this matter before the Commission.

With regard to Levine, it is noted that Levine, who sat for the PC2556T test, appeared at rank 8 on the resultant eligible list. Although Levine does not articulate the remedy she is seeking, it is noted that 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), *Schroeder 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). However, it is noted that Levine received a regular appointment to the County Correction Lieutenant title effective May 14, 2018.

⁹ The Commission does not have jurisdiction to address issues regarding union malfeasance, union nonfeasance or Hudson County policies. Rather, the Commission renders the final administrative determination on matters involving the interpretation and application of Civil Service rules. Given that Levine has not provided any specifics or evidence to support any alleged violations of Civil Service rules or laws, the Commission is unable to review these allegations further.

ORDER

Therefore, it is ordered that these requests 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 16TH DAY OF JANUARY, 2019



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Attachment

c: Lenore Levine
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STATE OF NEW JERSEY

In the Matter of County Correction
Captain (PC1189P) and County
Correction Lieutenant (PC1202P),
Hudson County

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2017-2783

Court Remand

ISSUED: JUN 12 2017

The Superior Court of New Jersey, Appellate Division, has reversed and remanded the attached December 3, 2014 final decision of the Civil Service Commission (Commission) for further proceedings consistent with its decision.

The facts of this matter are thoroughly discussed in the attached decision. *See In the Matter of County Correction Captain (PC1189P) and County Lieutenant (PC1202P), Hudson County* (CSC, decided December 3, 2014). Maria Gaines, Helen Ford, Robert Kalb and Luis Oyola asserted that certain candidates for the PC1202P and PC1189P examinations did not meet the requisite year in grade requirement by the November 21, 2012 closing date. Specifically, they claimed that Christopher D'Andrea, Timothea Gabriel, Rene Felix, Miguel Matos, Paul Morales, Sharonda Murrell and Michael Ripp did not meet the time in grade requirement for PC1202P; and that Michael Conrad, John Geoghegan and Christopher Yurecko did not meet the time in grade requirement for PC1189P. The County indicated that due to implementation of a policy, these individuals received appointment dates effective August 6, 2011 for record purposes¹ but did not begin serving in their respective titles until March 23, 2012. The Commission determined that pursuant to *N.J.A.C. 4A:4-2.6(a)1*, Messrs. D'Andrea, Felix, Matos, Morales and Ripp and Ms. Gabriel

¹ The Commission noted that based on the information available in their respective employment records, the former Division of Selection Services determined that they were eligible for the subject examinations.

and Murrell must have actually served in and performed the duties of the County Correction Sergeant title during the requisite one-year period in order to be eligible for the PC1202P exam and that Messrs. Conrad, Geoghegan and Yurecko must have actually served in and performed the duties of the County Correction Lieutenant title in order to be eligible for the PC1189P exam. The Commission further determined that since these individuals did not perform the duties of their respective titles until March 2012, the appointing authority, in effect, inappropriately provided them with retroactive appointment dates.² However, the Commission noted that the appointing authority could have requested that the year in grade requirement be reduced to the completion of the working test period, pursuant to *N.J.A.C. 4A:4-2.6(g)3*, at time of the subject announcements. Further, since the affected individuals applied and sat for the subject examinations based on good faith understanding that they were eligible and the basic tenet of the Civil Service Act is that appointments and promotions be awarded based on merit and fitness which is measured by competitive examinations, increasing the applicant pool by three eligibles for the PC1189P exam and by eight eligibles for the PC1202P exam did not negatively impact those applicants who were originally eligible without waiving the time in-grade requirement. Accordingly, the Commission determined, based on equitable grounds, to reduce the one-year service requirement for the County Correction Captain (PC1189P), Hudson County, and County Correction Lieutenant (PC1202P), Hudson County, examinations to the completion of the working test period for County Correction Lieutenant and County Correction Sergeant, respectively.

Thereafter, Ms. Gaines and Ford and Messrs. Kalb and Oyola, represented by Matthew R. Curran, Esq., pursued an appeal with the Appellate Division. In *The Matter of County Correction Captain (PC1189P) and County Lieutenant (PC1202P), Hudson County*, Docket No. A-2162-14T3 (App. Div. March 9, 2017), the court reversed the decision of the Commission and ordered that Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Yurecko and Ms. Gabriel and Murrell be removed from the PC1202P eligible list and Messrs. Conrad, Geoghegan and Yurecko be removed from the PC1189P eligible list. Specifically, the court found that retroactively amending the subject announcements to the completion of the working test period was contrary to Commission regulations and was not a reasonable application of legislative policies. In this regard, the court found that absent evidence that the affected individuals had successfully completed their working test periods, it could not be presumed that they did so. The court concluded that such a presumption was contrary to the requirements and purpose of working test periods.

² As a result, the Commission determined that Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Ms. Gabriel and Murrell should receive regular appointment dates of March 23, 2012 to the County Correction Sergeant title; and Messrs. Conrad, Geoghegan and Yurecko should receive regular appointments to the County Correction Lieutenant title effective March 23, 2012.

In addition, the court determined that the announced requirements could not be retroactively reduced and the affected individuals' good faith understanding that they were eligible was undermined by the fact that the appointing authority recorded their August 6, 2011 appointment dates but that the individuals were aware that they did not serve in their respective titles until March 23, 2012. Finally, the court found that "competition is not the sole 'philosophy and public policy behind the Civil Service Act'" [citation omitted].

During the pendency of this matter in the Appellate Division, the first and only certification of the County Correction Captain (PC1189P) list was issued on July 22, 2015 (Certification No. PL150840) containing the names of the eligible appearing at ranks 1 through 8. In disposing of the certification, the appointing authority appointed the eligibles appearing at ranks 1 through 3, *i.e.*, Messrs. Geoghegan, Yurecko and Conrad, effective November 28, 2015. In addition, the first and only certification of the County Correction Lieutenant (PC1202P) list was issued on July 15, 2015 (Certification No. PL150829) containing the names of the eligibles appearing at ranks 1 through 10. In disposing of the certification, the appointing authority appointed the eligibles appearing at ranks 1 through 5, *i.e.*, Messrs. Matos, Morales, Ripp, D'Andrea and Ms. Murrell, effective November 28, 2015. Regarding the appellants, it is noted that Ms. Gaines retired effective June 1, 2015, Mr. Oyola effective July 1, 2016 and Mr. Kalb effective December 1, 2016.

By letter dated April 3, 2017, all of the parties to this matter were provided with the opportunity to supplement the record with any additional information and argument that they wanted the Commission to consider.

Ms. Ford requests that she receive a retroactive appointment to the County Correction Lieutenant title effective November 30, 2015 and be granted back pay. Ms. Gaines and Messrs. Kalb and Oyola request that they "receive retroactive promotions as of November 30, 2015 and back pay from November 30, 2015 to the date of their retirement so that their pension benefits can be adjusted accordingly." In support of their appeal, they submit additional documentation including: an email sent March 13, 2017 from Ms. Gaines to Mr. Curran; an email sent March 28, 2014 from Ms. Gaines to DARA staff; an email sent July 9, 2014 from Ms. Gaines to Abe Antun, Hudson County Administrator; and an email sent July 24, 2015 from Ms. Gaines to "jmaldonado@hcnj.us."

In response, the County presents "the potential remedies available to the Commission in addressing the unique circumstances attributable to this case." Specifically, the County indicates, with regard to the retirees, that it "is amenable to retroactively promoting those eligible individuals, who were on the promotional list for lieutenants and captains, and retroactively paying them their lost pay for the period commencing on November 28, 2015 . . ." Regarding Messrs. Geoghegan, Yurecko and Conrad, the County proposes "keep[ing] [Mr.] Geoghegan in the post of

captain" and allow Messrs. Yurecko and Conrad "to continue to serve in the position of captain" or appoint them provisionally to the County Correction Captain title and "issue a notice for a new promotional test." With regard to Messrs. Matos, Morales, Ripp, D'Andrea and Ms. Murrell, the County proposes demoting them and retroactively appointing other eligibles on the PC1202P list, including Ms. Ford. Finally, the County notes that since Mr. Felix and Ms. Gabriel are on the County Correction Lieutenant (PC2556T), Hudson County, eligible list, "no further action is needed as to them."

Mr. Geoghegan requests that an "email string . . . from myself to the [C]ommission dated May 1, 2013" which "was not entered into the record during the original [C]ommission appeal process" or at the Appellate Division be considered "to refute any inference that the applicants in question did not make earnest attempts to seek clarification from the [C]ommission on our eligibility to take the promotional exams prior to taking the promotional exams." In this regard, Mr. Geoghegan provides a copy of an email sent May 6, 2013 from Susan Mannix to Mr. Geoghegan regarding the eligibility of Mses. Gabriel and Murrell and Messrs. Conrad, D'Andrea, Felix, Geoghegan, Matos, Morales, Ripp and Yurecko for the PC1189P and PC1202P exams, respectively.

CONCLUSION

In remanding this matter, the Appellate Division ordered that the "appellants' request for removal of the Applicants from the August 22, 2013 promotional lists" be granted. As such, Messrs. Conrad, Geoghegan and Yurecko should be removed from the PC1189P eligible list and Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Mses. Gabriel and Murrell should be removed from the PC1202P eligible list. Furthermore, as previously noted, some of these affected individuals received appointments to the County Correction Captain and County Correction Lieutenant titles, respectively. Accordingly, Messrs. Conrad, Geoghegan and Yurecko are to be returned to the County Correction Lieutenant title and Messrs. D'Andrea, Matos, Morales and Ripp and Ms. Murrell are to be returned to the County Correction Sergeant title. It is not clear from the record whether the County has vacancies available to accommodate the return of these individuals to the County Correction Lieutenant and County Correction Sergeant titles. In this regard, if the County does not have sufficient vacancies, in accordance with *N.J.A.C. 4A:8*, the County must utilize layoff procedures for any individuals who may be displaced. This includes implementing pre-layoff actions and filing a layoff plan with the Division of Agency Services. See *N.J.A.C. 4A:8-1.3* and *N.J.A.C. 4A:8-1.4*.

With respect to the remedies proposed by the appellants and the County, it is noted that the Appellate Division did not mandate the appointment of the appellants or any other individuals. Rather, the Appellate Division only ordered the removal of the above noted individuals from the PC1189P and PC1202P

promotional lists. Furthermore, regarding Ms. Gaines and Messrs. Kalb and Oyola, in order to achieve permanent appointment, an individual must successfully complete a working test period. See *N.J.S.A.* 11:4-15 and *N.J.A.C.* 4A:4-5.1. Given that these individuals have separated from employment, there is no opportunity for them to serve a working test period. Moreover, the Commission cannot assume, as noted by the court in this matter, that they would have successfully completed their respective working test periods as the County did not observe or evaluate any of them as evidenced by progress reports or performed the duties of the respective titles. Accordingly, it would be improper to provide Ms. Gaines and Messrs. Kalb and Oyola with "retroactive promotions." With respect to Ms. Ford, it is noted that she is the fourth ranked eligible on the County Correction Lieutenant (PC2556T), Hudson County, eligible list, which is set to expire on November 16, 2019. Should she receive an appointment to the County Correction Lieutenant title and successfully complete a working test period, she or the appointing authority may petition the Commission, upon the successful completion of her working test period, for a retroactive appointment date.

It is noted that the most recent announcements for County Correction Captain (PC2530T), Hudson County and County Correction Lieutenant (PC2556T), Hudson County, were issued on November 1, 2015 and closed November 21, 2015.³ As noted previously, Certification No. PL150840 and Certification No. PL150829 were issued on July 22, 2015 and July 15, 2015, respectively. Those individuals whose names appeared on these certifications could have applied for the PC2530T or PC2556T exams, as appropriate. However, since their names were certified, they may not have determined it necessary to apply for these promotional exams. Given that those affected individuals who were appointed are now being returned to their prior titles, they should have the opportunity to be on these eligible lists. Based on the foregoing, in accordance with *N.J.A.C.* 4A:4-2.6(a)2, the PC2530T and PC2556T announcements were amended to permit an extended period for application filing⁴ and eligible candidates filing timely applications were tested in the current cycle.⁵

³ The resultant eligible lists promulgated on November 17, 2016 and are set to expire on November 16, 2019. It is noted that to date, no appointments have been made from the PC2530T or PC2556T lists and there are no current certifications pending. In addition, certification holds have been placed on these lists pending the scoring of any make-up examinations.

⁴ The amended application filing deadline was April 24, 2017. It is noted that the requirements provided in the announcements remained unchanged and all applicants must have met the requirements as of the November 21, 2015 closing date. It is further noted that Thomas Burke, Michael Conrad and Christopher Yurecko submitted applications by the extended application filing deadline for the PC2530T exam and were admitted; and Christopher D'Andrea, James Nieves, Michael Ripp and Sharonda Murrell submitted applications for the PC2556T exam and were admitted.

⁵ It is noted that in *In the Matter of Police Sergeant (PM3776V)*, *City of Paterson*, 176 N.J. 49 (2003), the New Jersey Supreme Court ordered the Civil Service Commission, for future exams, to

With respect to Mr. Geoghegan, whether the affected individuals "ma[d]e earnest attempts to seek clarification from the [C]ommission on [their] eligibility to take the promotional exams prior to taking the promotional exams" is immaterial in the instant matter as the Appellate Division has determined that the affected individuals were ineligible for the PC1189P and PC1202P tests, respectively.

ORDER

Therefore, it is ordered that Messrs. Conrad, Geoghegan and Yurecko be removed from the PC1189P eligible list and Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Ms. Gabriel and Murrell be removed from the PC1202P eligible list. It is further ordered that Messrs. Conrad, Geoghegan and Yurecko be returned to the County Correction Lieutenant title and Messrs. D'Andrea, Matos, Morales and Ripp and Ms. Murrell be returned to the County Correction Sergeant title.

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 7TH DAY OF JUNE, 2017



Robert M. Czech

Chairperson

Civil Service Commission

"administer make-up exams that contain substantially different or entirely different questions from those used in the original examination." *Id.* at 66. As a result, public safety candidates are given a make-up exam when the next regularly scheduled exam for their particular title is administered. In this regard, the make-up test is typically the same as that to be taken by candidates who apply for the next cycle of announcements and make-up candidates are directed to refer to the Orientation Guide associated with the next cycle of tests. It is noted that the 2017 County Correction Captain and County Correction Lieutenant examinations were administered on May 4, 2017.

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STATE OF NEW JERSEY

In the Matter of County Correction
Captain (PC1189P) and County
Correction Lieutenant (PC1202P),
Hudson County

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2013-3078

Examination Appeal

ISSUED: DEC 08 2014 (JH)

Maria Gaines, Helen Ford, Robert Kalb and Luis Oyola challenge the eligibility of Michael Conrad, John Geoghegan and Christopher Yurecko for the promotional examination for County Correction Captain (PC1189P), Hudson County, and the eligibility of Christopher D'Andrea, Rene Felix, Timothea Gabriel, Miguel Matos, Paul Morales, Sharonda Murrell and Michael Ripp for the promotional examination for County Correction Lieutenant (PC1202P), Hudson County.

By way of background, the promotional examination for County Correction Captain (PC1189P), Hudson County was open to employees in the competitive division who had an aggregate of one year of continuous permanent service in the County Correction Lieutenant title as of the closing date of November 21, 2012. The promotional examination for County Correction Lieutenant (PC1202P), Hudson County was open to employees in the competitive division who had an aggregate of one year of continuous permanent service in the County Correction Sergeant title as of the closing date of November 21, 2012. It is noted that eight individuals applied for and were admitted to the PC1189P examination and 24 individuals applied for and were admitted to the PC1202P examination. A review of the record finds that the following eight names appear on the resultant eligible list for PC1189P, which promulgated on August 22, 2013, in rank order: John Geoghegan, Christopher Yurecko, Michael Conrad, Jason Dembowski, Luis Oyola, Thomas Monteleone, Ronald Edwards and Omar Ortiz. The following 17 names appear on the resultant eligible list for PC1202P, which promulgated on August 22, 2013, in rank order: Miguel Matos, Paul Morales, Christopher D'Andrea, Michael Ripp, Sharonda

Murrell, Stephen Lounsbury, Robert Kalb, Timothea Gabriel, Rene Felix, Maria Gaines, Kevin Orlik, Helen Ford, Tracey Bails, Lenore Levine, Samuel Moreno, Mark King and Keszia Ford. It is further noted that certification activity has been stayed pending the outcome of this matter.

On appeal, Ms. Gaines maintains that that the following PC1202P candidates did not meet the time in grade requirement: Christopher D'Andrea, Timothea Gabriel, Rene Felix, Miguel Matos, Paul Morales, Sharonda Murrell and Michael Ripp. She also indicates that the following PC1189P candidates did not meet the requisite year in grade requirement: Michael Conrad, John Geoghegan and Christopher Yurecko. She argues that the appointing authority "felt compelled to compensate all [of the above named individuals] with seniority because they took the promotion [i]n 2012 without the salary for one year." In this regard, she refers to "Arbitrator Joel M. Weisblatt's decision and award which mentions the same date I am referring to in my appeal, March 2012. On said date[,] 7 officers were promoted to the rank of Sergeant and 3 Sergeants were promoted to the rank of Lieutenant." In support of her appeal, Ms. Gaines submits a copy of *In the Matter of the Arbitration between County of Hudson and PBA Local 109A*, PERC No. AR-2012-640 (July 15, 2013), in which it is noted that the County promoted seven Correction Officers to the rank of Sergeant and three Correction Sergeants to the rank of Lieutenant in March 2012.

Ms. Ford argues that "Miguel Matos, Paul Morales, Christopher D'Andrea, Michael Ripp, Sharonda Murrell, Timothea Gabriel, and Ren[e] Felix . . . should not have been afforded the opportunity to take the lieutenant's test PC1202P because they have not met the eligibility requirements for promotional examination [pursuant to N.J.A.C.] 4A:4-2.6." In support of her appeal, Ms. Ford also submits a copy of *In the Matter of the Arbitration between County of Hudson and PBA Local 109A*, *supra*.

Mr. Kalb presents that "Sgt. M. Matos, Sgt. P. Morales, Sgt. C. D'Andrea, Sgt. M. Ripp, Sgt. S. Murrell, Sgt. T. Gabriel, Sgt. R. Felix were given eight months credit in service to make them eligible to apply for this Lieutenants test. The County of Hudson gave these Sergeants credit from their original certification date and then did not promote them until eight months later . . . The list of Sergeants named above had approximately nine months in service at the time of filing for the Lieutenants test, but qualified because the [C]ounty back dated the[ir] time. According to Title 4A this does not make them eligible." He also argues that Michael Conrad, John Geoghegan and Christopher Yurecko were permitted to sit for the PC1189P exam as their "time [was] back dated as well an[d was] unjust to all the other candidates that had fulfilled the[ir] time in service." In support of his appeal, Mr. Kalb also submits a copy of *In the Matter of the Arbitration between County of Hudson and PBA Local 109A*, *supra*.

Mr. Oyola contends that certain individuals who took the subject promotional tests did not have the requisite year in grade by the announced closing date. Specifically, he asserts that at the test center, he "noticed that 11 of my co-workers were also there. They were[:] 1) Lt. Ronald Edwards, 2) Lt. John Geoghegan, 3) Lt. Christopher Yurecko, and 4) Lt. Michael Conrad for the County Correction Captain examination[, and] 5) Sgt. Paul Morales, 6) Sgt. Tracy Bails, 7) Sgt. Keisha Ford, 8) Sgt. Maria Gaines, 9) Sgt. Sharonda Murrell, 10) Sgt. Michael Matos and 11) Sgt. Lenore Levine for the County Correction Lieutenant examination." He claims that two of the candidates who sat for the PC1189P examination and three candidates who sat for the PC1202P examination did not meet the requisite year in grade requirement. In a subsequent submission, he adds that Messrs. Geoghegan, Yurecko and Conrad who took the PC1189P test, and Messrs. Morales and Matos and Ms. Murrell who took the PC1202P test, did not possess the required year in grade. In support of his appeal, Mr. Oyola also submits a copy of *In the Matter of the Arbitration between County of Hudson and PBA Local 109A, supra*.

In response, the County indicates that on August 6, 2011, it determined to promote the following individuals to the County Correction Sergeant title from a list that was scheduled to expire on August 12, 2011: Christopher D'Andrea, Rene Felix, Timothea Gabriel, Miguel Matos, Paul Morales, Sharonda Murrell and Michael Ripp. The County explains:

At the time the decision to promote was made[,] the County attempted to implement a policy it had adopted, which was driven by the economic downturn, that required any individuals promoted within its uniform departments (Sheriff and Corrections) to agree to waive any promotional salary increase for one (1) year as a condition for the promotion. The waiver was to be agreed to by the employees and their collective bargaining representative, in furtherance of that policy the County met with the employees to be promoted and representatives of PBA Local 109A, the collective bargaining representative of the Corrections Officers Superiors, and believed it had come to an agreement in the October-November, 2011 time period as to the waiver. Subsequently, Local 109A disputed that an agreement existed. On July 15, 2013 Arbitrator Joel M. Weisblatt sustained the position of Local 109A and it was determined that the promoted individuals were entitled to a salary increase and the waiver was not upheld. The individuals, . . . while appointed on August 6, 2011, did not actually begin serving until March 24, 2012.

Messrs. Conrad, D'Andrea, Geoghegan, Matos, Morales, Ripp and Yurecko and Messrs. Gabriel and Murrell, represented by Michael L. Prigoff, Esq., argue that while *N.J.A.C. 4A:4-2.6(a)1* requires a year of continuous permanent service as a prerequisite to sit for a promotional examination, "there are numerous exceptions."

In this regard, they refer to *N.J.A.C. 4A:4-1.10(c)*¹ and *N.J.A.C. 4A:4-2.6(g)3*.² They note that while they received appointment dates of August 6, 2011, they did not begin performing the duties of their respective titles until March 23, 2012. They claim that "on several occasions, they inquired of Civil Service about their eligibility to sit for the referenced promotional exams and advised Civil Service of those facts. On all occasions, they were told that they were eligible."³ They maintain that "only now, after the lists have been promulgated and [they] have a chance of being appointed, do appellants seek another bite at the apple to undo what has already been reviewed and rejected." In support of their appeal, they provide a certification dated August 7, 2014 from Mr. Conrad and copies of their employment records indicating the appointment date to their respective titles effective August 6, 2011. In his certification, Mr. Conrad states that "following the examinations, the development of the lists was held up while appeals were reviewed alleging the same facts as these appeals. My understanding is that all of those appeals were denied, and the lists were promulgated with our names on them." He also presents that "had we been advised before taking the exam that we were not eligible, or had the appeals been granted before the lists were promulgated, that would be one thing. However, to have gone through this entire process only to have our eligibility challenged at this late date, after the lists have been promulgated, is not fair."

It is noted that the affected bargaining unit was notified of this matter and did not file a response.

CONCLUSION

A review of the employment records for Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Yurecko and Meses. Gabriel and Murrell indicate that they received regular appointments to the County Correction Sergeant title from the certification issued on May 2, 2011 (Certification No. PL110443) for County Correction Sergeant (PC2783L) effective August 6, 2011; and the employment records for Messrs. Conrad, Geoghegan and Yurecko indicate that they received regular appointments to the County Correction Lieutenant title from the

¹ *N.J.A.C. 4A:4-1.10(c)* provides that when 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.

² *N.J.A.C. 4A:4-2.6(g)3* provides that the time requirements specified in (a) and (b) above may be reduced to completion of the working test period for other valid reasons as determined by the Chairperson of the Civil Service Commission or designee.

³ Although the appellants claim that they contacted Civil Service on several occasions, they provide neither the dates on which they made their inquiries nor names of Civil Service staff with whom they allegedly spoke.

certification issued on May 2, 2011 (Certification No. PL110444) for County Correction Lieutenant (PC2786L) effective August 6, 2011.⁴ Thus, based on the information available in their respective employment records, the Division of Selection Services determined that they were eligible for the subject examinations.

However, as indicated by the appointing authority, Messrs. Conrad, D'Andrea, Felix, Geoghegan, Matos, Morales, Ripp and Yurecko and Ms. Gabriel and Murrell did not actually perform the duties of their respective titles until March 2012. *N.J.A.C. 4A:4-2.6(a)1* provides that applicants for promotional examinations must have one year of continuous permanent service for an aggregate of one year preceding the closing date in a title or titles to which the examination is open. In this regard, Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Yurecko and Ms. Gabriel and Murrell must have actually served in and performed the duties of the County Correction Sergeant title during the requisite one-year period in order to be eligible for the PC1202P exam. Similarly, Messrs. Conrad, Geoghegan and Yurecko must have actually served in and performed the duties of the County Correction Lieutenant title in order to be eligible for the PC1189P exam. *See In the Matter of Albert Giordano* (MSB, decided January 26, 2005) (an employee must actually serve in and perform the duties of the title to which the examination is open during the requisite year-in-grade in order to establish eligibility). Although Messrs. Conrad, D'Andrea, Geoghegan, Matos, Morales, Ripp and Yurecko and Ms. Gabriel and Murrell claim that a retroactive appointment date is an "exception" to the year in grade requirement, it is noted that in *In the Matter of Daniel O. Errickson* (MSB, decided January 11, 2006), the Merit System Board determined that the appellant, who received a retroactive appointment date to the Correction Sergeant title on the basis of administrative delay, was not eligible to sit for a Correction Lieutenant examination as there was no evidence that he performed the duties of a Correction Sergeant during the requisite year-in-grade. *See also In the Matters of David J. Barrett, et al.* (MSB, decided November 19, 2003) (Individuals who received retroactive appointment dates to the Fire Lieutenant and Fire Captain titles solely on equitable considerations but who did not meet the time-in-grade service requirements as of the closing date of the announcement were not entitled to sit for the examinations for Fire Captain and Deputy Fire Chief). Thus, Messrs. D'Andrea, Felix, Matos, Morales and Ripp and Ms. Gabriel and Murrell cannot use their August 6, 2011 appointment date to the Correction Sergeant title, and Messrs. Conrad, Geoghegan and Yurecko to the Correction Lieutenant title for purposes of examination eligibility.

With respect to the regular appointments of Messrs. Conrad, D'Andrea, Felix, Geoghegan, Matos, Morales, Ripp and Yurecko and Ms. Gabriel and Murrell, it is

⁴ It is noted that Certification Nos. PL110443 and PL110444 were recorded as being returned on April 3, 2012. *See also In the Matter of County Correction Sergeant (PC2783L), Hudson County* (CSC, decided April 4, 2012).

not clear from the record why the appointing authority returned Certification Nos. PL110443 and PL110444 indicating the August 6, 2011 appointment dates when it is undisputed that the affected individuals did not perform the duties of their respective titles until March 23, 2012. Thus, the appointing authority, in effect, provided these individuals with retroactive appointment dates. In this regard, pursuant to *N.J.A.C. 4A:4-1.10(c)*, only the Commission may order a retroactive appointment date.⁵ Generally, this unique remedy has been reserved in circumstances in which an employee was actually serving in and performing the duties of a title, but due to some error or other good cause, his attainment of permanent status was delayed or hindered. Thus, the August 6, 2011 appointment dates are not appropriate in the present matter. Accordingly, Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Ms. Gabriel and Murrell should receive regular appointment dates of March 23, 2012 to the County Correction Sergeant title; and Messrs. Conrad, Geoghegan and Yurecko should receive regular appointments to the County Correction Lieutenant title effective March 23, 2012.

In the present matter, the Commission notes that the appointing authority could have requested that the year in grade requirement be reduced to the completion of the working test period, pursuant to *N.J.A.C. 4A:4-2.6(g)3*, at time of the subject announcements.⁶ Furthermore, the affected individuals applied and sat for the subject examinations based on good faith understanding that they were eligible. Moreover, a basic tenet of the Civil Service Act and its implementing rules is that appointments and promotions are awarded based on merit and fitness which is measured by competitive examinations. Increasing the applicant pool by three eligibles for the PC1189P exam and by eight eligibles for the PC1202P exam does not negatively impact on those applicants who were originally eligible without waiving the time in-grade requirement. Thus, requiring the appellants to compete with more of their peers is consistent with civil service principles. Accordingly, based on equitable grounds, it is appropriate to reduce the one-year service requirement for the County Correction Captain (PC1189P), Hudson County, and County Correction Lieutenant (PC1202P), Hudson County, examinations to the completion of the working test period for County Correction Lieutenant and County Correction Sergeant, respectively.

⁵ *N.J.A.C. 4A:4-1.10(c)* provides that when 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.

⁶ In this regard, it is noted that the affected individuals presumably completed their respective working test periods, *see N.J.A.C. 4A:4-5.2(b)1*, and possessed eight months of experience as of the November 21, 2012 closing dates.

ORDER

Therefore, it is ordered that the announcements for County Correction Captain (PC1189P), Hudson County, and County Correction Lieutenant (PC1202P), Hudson County, be amended to completion of the working test period. It is further ordered that the records regarding Christopher D'Andrea, Rene Felix, Timothea Gabriel, Miguel Matos, Paul Morales, Sharonda Murrell and Michael Ripp be corrected to indicate regular appointments to the County Correction Sergeant title effective March 23, 2012; and the records regarding Michael Conrad, John Geoghegan and Christopher Yurecko be corrected to indicate regular appointments to the County Correction Lieutenant title effective March 23, 2012.

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 3RD DAY OF DECEMBER, 2014**



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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2162-14T3

IN THE MATTER OF COUNTY
CORRECTION CAPTAIN (PC1189P)
AND COUNTY CORRECTION LIEUTENANT
(PC1202P), HUDSON COUNTY.

Submitted September 13, 2016 — Decided March 9, 2017

Before Judges Leone and Vernoia.

On appeal from the Civil Service Commission,
Docket No. 2013-3078.

Sciarra & Catrambone, LLC, attorney for
appellants Marcia Gaines, Helen Ford, Robert
Kalb, and Luis Oyola (Matthew Curran, of
counsel and on the briefs; Deborah Masker
Edwards, on the briefs).

Scarinci Hollenbeck, LLC, attorney for
respondent County of Hudson (Sean D. Dias, on
the statement in lieu of brief).

Christopher S. Porrino, Attorney General,
attorney for respondent Civil Service
Commission (Melissa H. Raksa, Assistant
Attorney General, of counsel; Todd A. Wigder,
Deputy Attorney General, on the brief).

John P. Geoghegan, respondent pro se, joins in
the brief of respondent Civil Service
Commission.

PER CURIAM

Appellants challenge the December 8, 2014 final administrative action of the Civil Service Commission (Commission). They complain the Commission retroactively amended announcements for examinations to allow individuals to be promoted to the titles of Lieutenant and Captain in the correction system of the County of Hudson (County) even though they lacked "one year of continuous permanent service" in their prior titles as required by N.J.A.C. 4A:4-2.6(a)(1).¹ We reverse and remand.

I.

The following facts are derived from the Commission's opinion and the documentary evidence. On November 1, 2012, the County issued an announcement that the PC1189P promotional examination for Captain was open to employees with "an aggregate of one year of continuous permanent service as of the closing date in the [Lieutenant] title." The County also issued an announcement that the PC1202P promotional examination for Lieutenant was open to employees with "an aggregate of one year of continuous permanent service as of the closing date in the [Sergeant] title." The announced closing date for both examinations was November 21, 2012.

¹ The County takes no position on this appeal.

On May 5, 2013, appellant Luis Oyola took the Captain examination, and appellants Marcia Gaines, Helen Ford, and Robert Kalb took the Lieutenant examination. After the examination, appellants claimed Michael Conrad, John Geohegan, and Christopher Yurecko (collectively "Captain Applicants") improperly took the Captain examination, and Christopher D'Andrea, Timothea Gabriel, Rene Felix, Miguel Matos, Paul Morales, Sharonda Murrell, and Michael Ripp (collectively "Lieutenant Applicants") improperly took the Lieutenant examination. Appellants argue the Captain Applicants and Lieutenant Applicants (collectively "Applicants") only began serving as Lieutenants and Sergeants respectively in March 2012 and thus lacked the year-in-title required by N.J.A.C. 4A:4-2.6(a)(1).

The County conceded the Applicants did not begin serving the duties of their respective titles until March 23, 2012. However, the County argued it was appropriate for them to take the examinations because the County appointed them to their respective titles effective August 6, 2011.²

² The County explained it appointed the Applicants effective August 6, 2011, because they were on a promotional list scheduled to expire August 11, 2011. The County added it believed their union subsequently agreed the Applicants would be promoted subject to a one-year waiver of the promotional salary. The union challenged the waiver. On July 15, 2013, an arbitrator found that there was no valid agreement and that the Applicants had to be paid their

The Commission found that, although the Lieutenant and Captain Applicants' certifications indicated they received their regular appointments to the Sergeant and Lieutenant titles respectively effective August 6, 2011, they "did not actually perform the duties of their respective titles until March 2012." In effect, the County "provided these individuals with retroactive appointment dates" but, "pursuant to N.J.A.C. 4A:4-1.10(c), only the Commission may order a retroactive appointment date." "Thus, the August 6, 2011 appointment dates are not appropriate." The Commission ordered their records "be corrected to indicate regular appointments to [those] title[s] effective March 23, 2012." As N.J.A.C. 4A:4-2.6(a)(1) required the Applicants "must actually have served in and performed the duties of [their respective] title[s] in order to be eligible for the [promotional] exam[s]," the Commission ruled they "cannot use their August 6, 2011 appointment date to [those] title[s] . . . for purposes of examination eligibility."

Nonetheless, the Commission found, "on equitable grounds, it is appropriate to reduce the one-year service requirement for the . . . examinations to the completion of the working test period." The Commission ordered the announcements for the Captain and

promotional salary effective March 2012. The arbitrator did not utilize the August 6, 2011 date of appointment.

Lieutenant examinations be retroactively "amended" after the examinations to make applicants eligible after the "completion of the working test period."

II.

Appellants appeal the Commission's ruling. We must hew to our standard of review. "Appellate courts have 'a limited role' in the review of [Commission] decisions." In re Stallworth, 208 N.J. 182, 194 (2011) (citation omitted). "An appellate court affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (citation omitted). Courts defer to an agency's interpretation of a statute or regulation within the sphere of its authority, unless the interpretation is plainly unreasonable, but are in no way bound by the agency's interpretation or its determination of a strictly legal issue. US Bank, N.A. v. Hough, 210 N.J. 187, 200 (2012).

"In order to reverse an agency's judgment, an appellate court must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or . . . not supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, 208 N.J. at 194 (citation omitted). We must examine:

"(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."

[Ibid. (citation omitted).]

Here, the Commission did not follow the law and reached a conclusion that was not a reasonable application of the legislative policies to the undisputed facts.

III.

The Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, provides the Commission "shall establish the minimum qualifications for promotion." N.J.S.A. 11A:4-14. The Commission set minimum qualifications in N.J.A.C. 4A:4-2.6. In particular, N.J.A.C. 4A:4-2:6(a)(1) requires: "Applicants for promotional examinations shall meet all of the following criteria by the announced closing date," including "hav[ing] one year of continuous permanent service for an aggregate of one year immediately preceding the closing date in a title or titles to which the examination is open." We have upheld that requirement, finding "[g]ood reason exists for requiring an employee to serve some specified time in

a lower class before becoming eligible for promotion." Watson v. Farrell, 116 N.J. Super. 434, 436 (App. Div. 1971).

As the Commission acknowledged, none of the Lieutenant and Captain Applicants had one year of continuous permanent service in the Sergeant and Lieutenant titles respectively preceding the November 21, 2012 closing date for the examinations. To the contrary, they only began their service in their respective titles on March 23, 2012, less than eight months earlier.

To justify not following N.J.A.C. 4A:4-2.6(a)(1), the Commission invoked N.J.A.C. 4A:4-2.6(g)(3). N.J.A.C. 4A:4-2.6(g) provides:

The time requirements specified in [N.J.A.C. 4A:4-2.6(a)] may be reduced to completion of the working test period if:

1. There is currently an incomplete promotional list and/or the number of employees eligible for examination will result in an incomplete list;
2. It appears that vacancies to be filled within the duration of the promotional list will exceed the maximum number of eligibles that could result from examination; or
3. Other valid reasons as determined by the Chairperson of the Civil Service Commission or designee.

Here, reduction was not justified under subsections (1) or (2). The Commission found a reduction was permitted under subsection (3) and offered three rationales for its determination. We next separately consider the rationales, and find that none support the Commission's decision.

A.

The Commission's first rationale was "that the appointing authority could have requested that the year in grade requirement be reduced to the working test period, pursuant to N.J.A.C. 4A:4-2.6(g)3, at the time of the subject announcement." Appellants concede the Commission has the authority under N.J.A.C. 4A:4-2.6(g)(3) to grant such a request. However, it is undisputed that the County did not make such a request and that the Commission did not grant a reduction prior to the examinations. Absent such a reduction, the Applicants were ineligible under the time-in-title requirement.

Moreover, the Commission's first rationale depended on the Applicants actually completing a working test period in their respective titles.³ The Commission noted the Applicants

³ "An employee who is serving a working test period shall not be eligible for a promotional examination from that title." N.J.A.C. 4A:4-5.1(d).

"presumably completed their respective working test periods, and possessed eight months of experience as of the November 21, 2012 closing dates."⁴ However, there was no evidence the Applicants successfully completed working test periods.

The Commission's unsupported presumption was contrary to the requirements and purpose of working test periods. "'Working test period' means a part of the examination process after regular appointment, during which time the work performance and conduct of the employee is evaluated to determine if permanent status is merited." N.J.A.C. 4A:1-1.3. "The purpose of the working test period is to permit an appointing authority to determine whether an employee satisfactorily performs the duties of a title." N.J.S.A. 11A:4-15; accord N.J.A.C. 4A:4-5.1(a). "The appointing authority shall prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period." N.J.A.C. 4A:4-5.3(a). "The appointments shall be permanent after satisfactory completion of a working test period[.]" N.J.S.A. 11A:4-13(a); see N.J.A.C. 4A:1-1.3 (requiring "successful completion of the working test period").

⁴ The Commission cited N.J.A.C. 4A:4-5.2(b)(1), which sets "[t]he length of the working test period," which for local positions is "three months of active service."

A working test period "furthers the [Civil Service] Act's purpose 'to fill government positions upon a basis of merit and fitness to serve' by creating a probationary period of service during which time the appointing authority can observe and evaluate the appointee." Commc'ns Workers, AFL-CIO v. N.J. Dep't of Pers., 154 N.J. 121, 130 (1998) (citation omitted). "[T]he actual completion of a working test period is ordinarily a basic condition of permanent employment." Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 90 (App. Div. 1977). "Neither the appointing authority nor the Civil Service Commission ha[s] any authority to ratify the improper performance of the working test period." Id. at 91 (finding inadequate a "sham paper transfer to make it appear that Cipriano had actually complied with the working test period").

Here, no evidence indicated the County observed and evaluated the Applicants during a working test period, prepared progress reports, or determined they satisfactorily performed the duties of their respective titles and successfully completed a working test period. Absent evidence that Applicants actually and successfully completed a working test period, the Commission could not presume they had done so.

Even assuming the Applicants successfully completed a working test period, the announcements stated the examinations were open only to employees with "an aggregate of one year of continuous

permanent service" in the applicable title, not merely completion of a short working test period. Retroactively changing the announcement after holding the examinations was contrary to the regulations the Commission adopted under its responsibility to provide for "[t]he announcement and administration of examinations." N.J.S.A. 11A:4-1(a).

"In order to notify all employees of promotional opportunities, promotional examination announcements shall be posted[.]" N.J.A.C. 4A:4-2.1(b). "Examination announcements shall include . . . [m]inimum qualifications for admission to the examination[.]" N.J.A.C. 4A:4-2.1(c)(3). An applicant must "[m]eet all requirements specified in the examination announcement" by the announced closing date. N.J.A.C. 4A:4-2.3(b)(2). Specifically, an applicant must meet the year-in-title requirement and "all other requirements contained in the announcement. If an examination announcement is amended, all requirements must be met by the announced closing date whether or not the application filing date is changed." N.J.A.C. 4A:4-2.6(a)(2).

Thus, "[w]hen an examination is announced, minimum qualifications for the position must be posted." In re Foglio, 207 N.J. 38, 44 (2011). "The minimum qualifications of candidates must be announced beforehand." In re Hruska, 375 N.J. Super. 202,

209 (App. Div. 2005). As even amended requirements must be met by the announced closing date, an amendment also must be announced beforehand, not retroactively.

In Hruska, the announced requirements for a firefighter exam "did not mandate that candidates be active volunteers at the time of appointment," but after the examination the appointing authority added that "unannounced, secret eligibility requirement." Id. at 210-11. We found that "was unjust to Hruska and in violation of the pertinent regulatory framework." Id. at 211. "Had the active volunteer criterion been included in the examination announcement, Hruska could have decided at that time whether he wanted to become active again or whether he wanted to forsake his goal of career service appointment and not take the examination." Ibid.

Hruska's principles are also applicable where the announced requirements are retroactively reduced. Here, appellants may have chosen not to take the examination if they knew it was open to anyone who completed a working test period. More importantly, other applicants who completed a working test period may have chosen to take the examination. They did not have that opportunity because no amendment was made to the minimum requirements in the application prior to the filing date.

Our Supreme Court noted the procedural consequences of deviating from an announced minimum education qualification:

If that course were to be followed, the public announcement of the examination would have to advise the applicant of a right to submit substituted educational training. Moreover, such a change would require that a new examination be given . . . so that everyone who believes he has educational equivalency might apply.

{Gloucester Cty. Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 396 n.10 (1983).}

Here, deviation after the examination from the announced minimum time-in-title requirement necessitated the same procedures, but they were not followed. For all those reasons, the Commission's first rationale, that the Commission could retroactively reduce the year-in-title requirement to the working test period, is not a "valid reason[]." N.J.A.C. 4A:4-2.6(g)(3).

B.

The Commission's second rationale was that the Applicants "applied and sat for the subject examinations based on good faith understanding that they were eligible."⁵ The Commission argues

⁵ The Applicants based that claim on Conrad's certification that he and Matos "called Civil Service on separate occasions" and were "told that [they] were eligible." However, as the Commission noted, the Applicants "provide neither the dates on which they made the inquiries nor names of Civil Service staff with whom they allegedly spoke." The Commission does not rely on those alleged calls.

there was a "reasonable belief" of eligibility because the County told the Commission and the Applicants that they were appointed "effective on August 6, 2011." However, the County used that retroactive date in violation of N.J.A.C. 4A:4-1.10(c), and the Applicants knew they were not serving in their appointed titles until March 23, 2012. The Commission ruled that the County's use of a retroactive appointment date was unauthorized, inappropriate, and had to be corrected, and that the Applicants "cannot use their August 6, 2011 appointment date . . . for purposes of examination eligibility."⁶

To permit use of the discredited August 6, 2011 date "would subject governmental employment to the subterfuge and circumventions that the civil service system was designed to prevent." O'Malley v. Dep't of Energy, 109 N.J. 309, 318 (1987).

⁶ The Commission did not accept and does not now advance the excuses offered by the County for improperly using the retroactive August 6, 2011 date. The impending expiration of a list was not a proper basis, as "[a]n eligible shall not be appointed and begin work after the expiration date of the eligible list" except for specified reasons not present here. N.J.A.C. 4A:4-4.9(a). Moreover, nothing in the arbitrator's ruling justified allowing the Applicants to sit for the examinations, as he found they had served in their respective titles only since March 23, 2012. Cf. In re Martinez, 403 N.J. Super. 58, 63, 73-75 (App. Div. 2008) (finding good cause under N.J.A.C. 4A:1-1.2(c) to relax the year-in-title requirement where the appointing authority agreed to grant a retroactive appointment to settle a lawsuit alleging it wrongfully delayed his progress from a lower title).

"It is the welfare of the public, not that of a particular . . . employee, that underlies civil service legislation." Id. at 316. Because the Commission's second rationale contravenes civil service legislation and regulations, it is not a valid reason under N.J.S.A. 4A:4-2.6(g)(3).

C.

The Commission's third rationale was that "a basic tenet of the Civil Service Act and its implementing rules is that appointments and promotions are awarded based on merit and fitness which is measured by competitive examinations. . . . Thus, requiring the appellants to compete with more of their peers is consistent with civil service principles."

Although "promotions in the civil service . . . 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, competition is not the sole "philosophy and public policy behind the Civil Service Act," see Loboda v. Township of Clark, 40 N.J. 424, 434 (1963). "'Primarily [the Act] was to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment.'" Ibid. (citation omitted); see Martinez, supra, 403 N.J. Super. at 73. "A fundamental purpose of Civil

Service, to assure objective appointments based on merit, is furthered if the minimum eligibility requirements are demanded of all applicants." Gloucester Cty., supra, 93 N.J. at 396.

Moreover, the Commission's third rationale is contrary to the statutory command that the Commission "shall establish the minimum qualifications for promotion." N.J.S.A. 11A:4-14. It also conflicts with the Commission's definition that "'[p]romotional examination' means a test open to permanent employees who meet the prescribed requirements for admission." N.J.A.C. 4A:1-1.3. This rationale would negate not only the valid minimum requirement of a year in title but indeed all of the minimum requirements in the Commission's regulations which "[a]pplicants for promotional examinations shall meet." N.J.A.C. 4A:4-2.6(a). "Because administrative regulations that apply to the regulated public have the force and effect of statutory law, an administrative agency ordinarily must enforce and adhere to, and may not disregard, the regulations it has promulgated." County of Hudson v. Dep't of Corr., 152 N.J. 60, 70 (1997).⁷

⁷ N.J.A.C. 4A:1-1.2(c) provides the "Commission may relax these rules for good cause in a particular situation, on notice to affected parties, in order to effectuate the purposes of Title 11A." However, the Commission declares it has not invoked that relaxation provision. In any event, no notice was given to affected parties, including appellants, either before or after the filing date.

The Commission also asserted that "[i]ncreasing the applicant pool . . . does not negatively impact on those applicants who were originally eligible without waiving the time-in-grade requirement." However, the examinations resulted in August 22, 2013 promotion-eligible lists on which Oyala ranked lower than the Captain Applicants, Kalb ranked lower than the Lieutenant Applicants other than Gabriel and Felix, and Gaines and Ford ranked lower than all of the Lieutenant Applicants. All of the Applicants were promoted, and none of the appellants were promoted.

Thus, the Commission's third rationale is also not a valid reason as required by N.J.S.A. 4A:4-2.6(g)(3).

IV.

The Commission "seeks comfort in the doctrine that action by the Civil Service Commission will generally not be upset on judicial review unless there is an affirmative showing that it was arbitrary, capricious or unreasonable." Rogers v. Dep't of Civil Serv., 17 N.J. 533, 541 (1955) (citing Falcey v. Civil Serv. Comm'n, 16 N.J. 117, 123 (1954)).⁹ "This doctrine is to be given

⁹ The Commission also cites Falcey's holding that it may "waive competitive examination on grounds of impracticability." Falcey, supra, 16 N.J. at 123. However, the Commission did not waive examinations but retroactively changed their minimum requirements after examinations were conducted. Moreover, nothing suggests it would have been impracticable to make that change before the examinations.

sympathetic sweep where the commission has acted within the statutory delegation and has sought to further the legislative policies; it has little application where the commission has disregarded or failed to recognize those policies." Ibid.

Here, without valid reason, the Commission unreasonably disregarded and failed to recognize both legislative policies and regulatory mandates. "Absent a finding by the Commission based upon sufficient credible evidence in the record to support application of 'equitable considerations[,]'. . . the Commission lacks authority to ignore the clear mandate of the statutory [and regulatory] provision[s]" governing here. See Millan v. Morris View, 177 N.J. Super. 620, 624-25 (App. Div. 1981); see also Steinel v. Jersey City, 99 N.J. 1, 3 (1985) (approving Millan).

Accordingly, we reverse the Commission's order and grant appellants' request for removal of the Applicants from the August 22, 2013 promotional lists. Because of the passage of time and promotion of the Applicants, further measures may be necessary which should be addressed in the first instance in the Commission. We remand to the Commission for proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

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


CLERK OF THE APPELLATE DIVISION