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STATE OF NEW JERSEY

In the Matters Robert Vogt, *et al.*, Jersey City

CSC Docket Nos. 2011-4505 to 2011-4512

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Remand

ISSUED: AUG 14 2014 (SLD)

The Superior Court of New Jersey, Appellate Division has remanded the matters of Robert Vogt, Gracia Hernandan, H. James Boor, Joseph A. Castagna, Timothy Hurley, Michael A. Perchun, Vera Smith[1] and Charles Mays, Jr.'s[2] appeal of the decision of the Superior Court of New Jersey, Law Division to allow the appellants to pursue any contractual and/or administrative remedies that may be available to them, pursuant to the collective bargaining agreements or under regulations promulgated under the Civil Service Act. A copy of the Appellate Division's April 4, 2011 decision is attached hereto and incorporated herein.

The facts of this matter are thoroughly discussed in the attached decisions. The appellants argued that they all are or were Health Officers employed by Jersey City and that they had been victimized by the appointing authority's failure to comply with the Civil Service Act. Specifically, they asserted that the appointing authority reclassified positions without notice or approval of this agency and that

[1] Vogt, a former Assistant Health Officer, and Castagna, a former Health Officer, retired February 1, 2010 and September 1, 2009, respectively. Hernandan received a regular appointment to the title of Registered Environmental Health Specialist, Public Health, effective April 4, 2006. Hurley and Perchun received regular appointments to the title of Registered Environmental Health Specialist, Public Health, effective September 30, 1994. Boor received a regular appointment to the title of Chief Registered Environmental Health Specialist, Public Health, effective August 7, 2006. Smith was appointed to the noncompetitive title of Health Officer, effective June 1, 2014.

[2] Charles Mays, Jr., is the *Administrator ad Prosequendum* of the Estate of Charles Mays Sr., a former Registered Environmental Health Specialist, Public Health, who died April 11, 2005.

the appointing authority failed to "place" them in accordance with proper salary and labor grades. They also alleged that the appointing authority: violated *N.J.S.A.* 26:3-25.1[3] by failing to pay the maximum salary within their respective salary ranges five years from the date of their appointments to their respective positions; breached their contract and breached the covenant of good faith and fair dealing in connection with the contract between it and Local 246; was unjustly enriched by its conduct; violated the Civil Service Act by failing to come up with a compensation plan or establish salary ranges for job titles since 1992 and failed to provide the Civil Service Commission (Commission) with a current copy of a compensation plan as required under *N.J.A.C.* 4A:3-4.1(a)[4]; and engaged in fraud and misrepresentation. Before the Law Division, the Judge granted the appointing authority's motion for summary decision, concluding, in part, that the appellants failed to invoke or to complete the grievance procedures pursuant to the applicable collective bargaining agreements and they failed to seek relief under the procedures established by the Civil Service Act. In doing so, the Judge noted that a provision of the collective bargaining agreement states that "an employee who surpasses maximum as a result of the increases shall have labor grade increased to encompass the raise." Thus, the Judge found that the issue of labor grades was covered by the collective bargaining agreement, and should have been subject to grievance procedures. The Judge also found that the appellant's were not entitled to an automatic "bump" to the next labor grade pursuant to either *N.J.S.A.* 26:3-25.1 or *Brown v. City of Jersey City*, 289 *N.J. Super.* 374 (App. Div. 1996).[5] In this regard, the Judge noted that the appellants' "salaries were appropriately raised throughout this time and were congruent with an increase in the maximum of their labor grades." *Vogt v. City of Jersey City*, Docket No. A-1186-09T3 (App. Div., April 4, 2011) quoting the initial Law Division decision. The Judge dismissed, with prejudice, the remainder of the appellants' complaints.

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[3] *N.J.S.A.* 26:3-25.1 provides that:

> Every person holding a license issued under section 41 of P.L.1947, c.177 (C.26:1A-41), who is employed in a position for which this license is required by any board of health, municipality or group of municipalities shall receive the maximum salary in the person's range, within five years from the date of appointment to this position if the majority of the person's job performance evaluations are satisfactory.

[4] *N.J.A.C.* 4A:3-4.1(a)1 provides that in local service, appointing authorities shall establish compensation plans that provide for paying employees in reasonable relationship to their job titles and that each appointing authority shall provide a current copy of its compensation plan to an appropriate representative of this agency, and shall provide any subsequent modifications within 20 days after adoption.

[5] The Law Division noted that four of the appellants (Vogt, Perchun, Castagna and Hurley) were also appellants in *Brown*, and that as a result, had had their salaries set at the maximum of their respective labor grades.

The appellants appealed to the Appellate Division, which upheld the decision of the Law Division, substantially for the reasons in the opinion, but remanded for referral of the dispute to the grievance procedure provided in the parties collective negotiation agreement or for transfer to this agency in order for the appellants to pursue contractual and administrative remedies which may be available to them. However, the Appellate Division found that there was an adequate and proper basis for granting summary judgment in favor of the appointing authority as to the appellants' claim they should have been moved to a new labor grade after five years.

On remand, the appellants, represented by Edward Slaughter, Jr., Esq., argue that the appointing authority has failed to promptly notify this agency of any changes to its classification plan as required by *N.J.A.C.* 4A:3-3.1 since former Jersey City Business Administrator, Brian O'Reilly, admitted that he was not aware of any delegation order which would allow the appointing authority to "classify" positions. Moreover, the appellants maintain that no position can be "reclassified" without notice to the affected employee; however, the appointing authority asserts that it has "reclassified" the appellants to "lower grades."

The appellants also assert that the appointing authority has failed to establish a compensation plan for its employees since 1992 and it has failed to provide either the compensation plan or any changes to it, since 1992, to this agency in violation of *N.J.A.C.* 4A:3-4.1. Moreover, the appellants maintain that the appointing authority pays employees as it sees fit, since there is no current compensation plan and therefore, individuals in lower pay grades or even in the same labor grade as them are paid a higher salary. For example, the appellants assert that in 2008, Vogt, a former Assistant Health Officer, "labor grade 26,"[6] was paid a base salary of $73,340 plus longevity pay of $1,200, for a total of $74,540. However, an individual in labor grade 15 was paid $79,178 in that same year. The appellants also assert that in 2008, another individual in labor grade 26, the same as Vogt, received a salary of $107,279.90. The appellants maintain that since it is apparent that the salaries are well above the maximum established by the 1992 labor grade schedule, it is clear that no current salary schedule exists. Therefore, they argue that, since employees in lower grades are receiving a higher salary than the appellants, it is clear that the maximum for their labor grades must be higher than the amount of salary they are receiving and thus, the statutory requirement of *N.J.S.A.* 26:3-25.1 cannot be met, since no one knows what the maximum salary for any given labor grade is.

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[6] The Law Division decision notes that Vogt's labor grade is 16 pursuant to a 1994 Executive Order. However, the appellants argued that the Executive Order was null and void, and thus, the appellants' labor grades remain the same as prior to the 1994 Executive Order. Therefore, in this matter, the appellants maintain that Vogt's labor grade is 26; Boor's labor grade is 22; Castagna's labor grade is 31; and Hernandan, Hurley, Perchun and Smith's labor grades are 16.

In response, the appointing authority, represented by Stefani C. Schwartz, Esq., maintains that the appellants' appeal should be dismissed in its entirety. Initially, the appointing authority asserts that the appellants cannot demonstrate that they were harmed in any way since they always received the compensation to which they were entitled. In this regard the appointing authority notes that pursuant to the Faulkner Act, *N.J.S.A.* 40:69A-48, the Mayor is authorized to set the salaries, wages or other compensation of all employees of administrative departments, except directors and employees whose salaries are required to be set by ordinance. In a December 20, 1994 Executive Order, then Mayor Bret Schundler indicated that the titles of Sanitary Inspector, Senior Sanitary Inspector, Principal Sanitary Inspector,[7] Assistant Health Officer and Health Officer were in labor grades 6, 8, 10, 16 and 21, respectively. The appointing authority argues that based on the set labor grades and the Appellate Division's decision in *Brown*, *supra*, the appellants all have received the maximum within their respective labor grades within five years of their appointment to the covered titles. As a result of the relevant union contracts, the appellants received pay increases, that "reset" the maximum in their respective labor grades, and as such, the appellants continued to receive the maximum salary levels for their respective labor grades. Furthermore, the appointing authority notes that the Appellate Division agreed with the Law Division that it was not required to promote the appellants to a higher labor grade, but was within its right to instead provide them with appropriate raises which continually raised the maximum salary level of their respective labor grades.

Additionally, the appointing authority asserts that even though the matter was remanded to allow the appellants to exhaust their administrative remedies, their appeal should be dismissed since they are grossly out of time. In this regard, the appointing authority notes that the appellants' initial complaint in Superior Court was on November 8, 2007, yet many of the appellants' claims are based on alleged actions made by the appointing authority going back years and even decades before then. Moreover, it notes that the appellants did not appeal to the Commission until May 2011, even though they allege that the appointing authority has been violating their Civil Service rights because they should have been advanced to higher labor grades in 1996 as a result of the *Brown* decision. The appointing authority maintains that even assuming, *arguendo,* that the appellants' claims have any merit, they should be dismissed since their appeals were not filed within 20 days after they knew or should have known of the complained of action. *See N.J.A.C.* 4A:2-1.1(a). *See also, In the Matter of Michael Vidal* (MSB, decided

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[7] In October 2007, this agency changed the names of the below noted titles as follows:

Sanitary Inspector to Registered Environmental Health Specialist, Public Health;
Senior Sanitary Inspector to Senior Registered Environmental Health Specialist, Public Health;
Principal Sanitary Inspector to Principal Registered Environmental Health Specialist, Public Health; and
Chief Sanitary Inspector to Chief Registered Environmental Health Specialist, Public Health.

July 13, 2005) (Merit System Board[8] found that the filing of an appeal in Superior Court did not toll the time to file an appeal with the Board). The appointing authority also asserts that the "new" claims raised by the appellants are even more untimely. In this regard, it notes that the appointing authority's alleged "bad acts" began in 1992, *i.e.*, its failure to establish a classification plan, that it had reclassified positions without authority since 1992 and that it had failed to notify the appellants that the labor grades for their positions were changed in 1994.

Alternatively, the appointing authority argues that should the Commission not dismiss the appeals for being untimely, the appellants' claims should still be dismissed as they lack merit. The appointing authority maintains that the only claim that should be considered by the Commission is whether the appellants were entitled to be "promoted" to higher labor grades. However, it argues that there is no requirement in *N.J.S.A.* 26:3-25.1 that employees who are placed at the maximum of their salary ranges, must be "promoted" to the next labor range upon any increases to salary. Rather, it is appropriate to simply increase the maximum of the affected salary ranges. Additionally, the appointing authority notes that because titles are placed in particular labor grades, it is possible for certain employees at lower labor grades to earn a higher salary than individuals in a higher labor grade.

Additionally, the appointing authority maintains that despite the appellants' arguments to the contrary, it has not violated their rights under any Civil Service law or regulation. In this regard, *N.J.S.A.* 11A:3-7(d) and *N.J.A.C.* 4A:3-4.1(a) both require local appointing authorities to establish compensation plans in which employees are paid in "reasonable relationship to their job titles" and within the established salary ranges for their titles. The appointing authority maintains that in its decision, the Appellate Division found that it does pay its employees in relation to the job titles and within the salary ranges of the labor grades. Moreover, it argues that it could not have violated *N.J.A.C.* 4A:3-3.2 since that only applies to this agency's duty to establish and maintain classification plans for all job titles in the career, senior executive and unclassified services. The appointing authority also maintains that the appellants' claim that it improperly "reclassified" their positions by way of the 1994 Executive Order is also without merit. In this regard, it argues that the appellants' positions were not "reclassified" since their titles, duties and responsibilities remained the same and only their labor grades were changed. *See N.J.A.C.* 4A:3-3.5. Therefore, since the appellants' positions were not reclassified, there was no requirement that the appointing authority obtain this agency's approval prior to issuing the Executive Order.

Furthermore, the appointing authority maintains that under the doctrine of *res judicata*, the appellants are prohibited from re-litigating their claim that it violated *N.J.S.A.* 26:3-25.1 by failing to pay them the maximum salary within their

[8] The Merit System Board was the predecessor of the Commission.

salary ranges, since the Appellate Division upheld the trial court's granting of summary judgment on that claim. Therefore, since there was a final judgment on the merits of the precise issue that the appellants raise in this appeal, their appeal on that issue must be dismissed.

CONCLUSION

Although the appellants present substantive challenges to their salaries, the controlling issue in this matter is the untimely filing of their appeals. *N.J.A.C.* 4A:2-1.1(b) provides that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. *N.J.A.C.* 4A:1-1.2(c) provides that a rule may be relaxed for good cause. The record does not evidence any basis in this particular case to extend or to relax the time for appeal. In this regard, it is appropriate to consider whether the delay in asserting his right to appeal was reasonable and excusable. *Appeal of Syby*, 66 *N.J. Super.* 460, 464 (App. Div. 1961) (Construing "good cause" in appellate court rules governing the time for appeal); *Atlantic City v. Civil Service Com'n*, 3 *N.J. Super.* 57, 60 (App. Div. 1949) (Describing the circumstances under which delay in asserting rights may be excusable). Among the factors to be considered are the length of delay and the reasons for the delay. *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982). *See Matter of Allen,* 262 *N.J. Super.* 438 (App. Div. 1993) (Appeal rules relaxed where police officer repeatedly, but unsuccessfully, sought clarification of his employment status). *Compare, In the Matter of Rochelle Rosen,* Docket No. A-6468-03T3 (App. Div. June 24, 2005) (Appropriate to not relax 20-day time frame for filing an appeal in light of an unexplained two-year delay in filing an appeal); *In the Matter of Wayne Varga* (MSB, decided March 23, 2005) (Appellant unaware of time period for filing appeal who ultimately filed appeal six months later and argued that he had to address the consequences of his job loss, not a basis to overlook inordinate delay in filing appeal); *In the Matter of Roberta Howard* (MSB, decided January 28, 2004): *In the Matter of Henrietta Mik* (MSB, decided November 19, 2003). The appellants in this matter filed the initial complaint in Superior Court in 2007. Even utilizing that date, their appeal would be considered untimely since the complained of actions occurred as early as 1994. Moreover, the failure to recognize or to explore the legal basis for an appeal, without more, does not constitute good cause to extend or relax the time for appeal under the Commission's rules. *See Savage v. Old Bridge-Sayreville Med. Group*, 134 *N.J.* 241, 248 (1993) (Ignorance of the specific basis for legal liability does not operate to extend time to initiate legal action). Regardless, even if the appellants' appeals were not untimely, as explained below, the Commission finds they lack any merit.

N.J.S.A. 11A:3-7(d) provides that employees of political subdivisions are to be paid in reasonable relationship to titles and shall not be paid a base salary below the minimum or above the maximum established salary for an employee's title. *See*

also N.J.A.C. 4A:3-4.1(a)2. Additionally, in connection with appeals properly before the Commission, the Commission has the right and duty to interpret and apply statutes, including those outside the Civil Service Act, to resolve the dispute before it. *See John Kowaluk v. Township of Middletown,* Docket No. A-4866-02T1 (App. Div., August 6, 2004); *Matter of Allen*, 262 *N.J. Super.* 438, 444 (App. Div. 1993); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000).

As noted by the appointing authority, the doctrine of *res judicata* prohibits the appellants from relitigating their claim that the appointing authority violated *N.J.S.A.* 26:3-25.1 by failing to pay them the maximum salary within their salary ranges since the Appellate Division upheld the trial court's granting of summary judgment on that claim. Accordingly, the Commission will not address that issue.

The appellants initially argue that the appointing authority failed to promptly notify this agency of changes to its classification plan as required by *N.J.A.C.* 4A:3-3.1. In this regard, they argue that the appointing authority admitted that it had "reclassified" the appellants to "lower grades." However, although the appellants correctly note that it is the responsibility of this agency to ensure the proper classification of all career service, senior executive service and unclassified positions, the assignment of a particular title to a labor grade is not considered to be a reclassification. Rather, under Civil Service law and regulations, a particular position may be reclassified when the duties and responsibilities of that position have changed to such an extent that the position is no longer properly classified by its former title. *See N.J.A.C.* 4:3-3.5. There is no indication in the record that the appellants' duties and responsibilities or their titles were changed, and thus, there is no evidence that their positions were reclassified by the appointing authority.

The appellants also claim that the appointing authority has failed to establish a compensation plan for its employees since 1992 and that it has failed to provide either the compensation plan or any changes to it, since 1992, to this agency in violation of *N.J.A.C.* 4A:3-4.1. However, even if the appointing authority has violated this regulation, there is no evidence that the appellants have been harmed by the appointing authority's failure to provide this agency with its compensation plan. As noted above, the Commission may only look to see if a local employee is being paid within the minimum and maximum of the salary range for his or her position. However, there is nothing in the record which establishes that the appellants are not being paid within their salary ranges. On the contrary, both the Law Division and the Appellate Division noted that the appellants' "salaries were appropriately raised throughout this time and were congruent with an increase in the maximum of their labor grades." Moreover, there is no prohibition in Civil Service law or rules that a political subdivision (*i.e.*, local appointing authority), cannot pay individuals in lower labor grades a higher salary. There is also no requirement that political subdivisions conform to any type of graduated labor

grade structure. Rather, those issues are covered by the appropriate negotiations agreement over which the Commission has no jurisdiction.

Further, it is clear from the record that the appellants have been receiving increases to their salaries since first being placed at the maximum for their respective labor grades. The Appellate Division in *Brown* found that when a salary is negotiated and the maximum is also increased, then the employee, with one raise, would be entitled to the benefit of both the collective bargaining agreement and *N.J.S.A.* 26:3-25.1. Moreover, in *John Kowaluk v. Township of Middletown,* Docket No. A-4866-02T1 (App. Div., August 6, 2004); the Appellate Division reiterated its holding in *Brown* and indicated that it:

> . . . drew a distinction between individuals who had served the required five years and as to whom the salary maximum for the grade itself was increased and those who were promoted into a new title. We made plain that those individuals who fall into the former category are entitled to the increased maximum salary while those who more properly fall into the latter category are not.

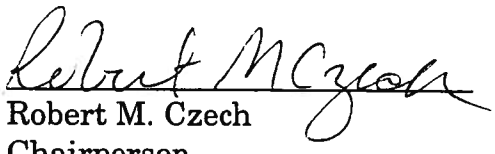
Accordingly, the appellants have failed to sustain their burden of proof in this matter.

ORDER

Therefore, the Commission orders that the appeals 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 13TH DAY OF AUGUST, 2014



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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1186-09T3

ROBERT VOGT, GRACIA HERNANDAN,
H. JAMES BOOR, JOSEPH A. CASTAGNA,
TIMOTHY HURLEY, MICHAEL A. PERCHUN,
VERA SMITH, CHARLES MAYS, JR.,
Administrator ad Prosequendum of
the Estate of CHARLES MAYS, SR.,

Plaintiffs-Appellants,

v.

CITY OF JERSEY CITY,

Defendant-Respondent.

Argued January 5, 2011 – Decided April 4, 2011

Before Judges R. B. Coleman, Lihotz and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5496-07.

Edward Slaughter, Jr., argued the cause for appellants (Pellettieri, Rabstein and Altman, attorneys; Mr. Slaughter, on the brief).

Joshua I. Savitz argued the cause for respondent (Schwartz Simon Edelstein & Celso, LLC, attorneys; Stefani C. Schwartz, of counsel and on the brief; Mr. Savitz and Anthony M. Orlando, on the brief).

PER CURIAM

Plaintiffs are a group of former and present public health officers employed by defendant Jersey City (the City). They assert that they have been victimized by the failure of the City to comply with the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations of the Department of Personnel, N.J.A.C. 4A:1-1.1 to 10-3.2. Plaintiffs appeal from a September 25, 2009 order granting summary judgment in favor of the City, dismissing their complaint with prejudice. Plaintiffs contend the City reclassified positions without notice or approval of the Commissioner of the Department of Personnel (the Commissioner) and that the City has failed to place employees in accordance with proper salary and labor grades. On the City's motion for summary judgment, Judge Bernadette DeCastro concluded among other things that plaintiffs have failed to invoke or to complete the grievance procedures contemplated by applicable collective bargaining agreements, and they had failed to seek relief under the procedures set forth in the Civil Service Act. Accordingly, the court granted defendant's motion to dismiss for plaintiffs' failure to exhaust their grievance and administrative remedies. Additional counts alleging fraud were dismissed for lack of specificity in the pleadings and the absence of proofs establishing the elements of fraud. We affirm the judgment of the Law Division, substantially for the reasons

in the September 25, 2009 written opinion by Judge DeCastro. However, we remand for referral of the dispute to the grievance procedure provided in the parties' collectively negotiable agreement or for transfer to the Civil Service Commission, Department of Personnel for the plaintiffs to pursue contractual and administrative remedies as may be available pursuant to the collective bargaining agreements or under regulations promulgated under the Civil Service Act.

I.

The City is governed by the Faulkner Act, N.J.S.A. 40:69A-1 to -210, and is a civil service municipality whose personnel actions are subject to Civil Service Commission review. N.J.A.C. 4A:4-1.10(a). The Faulkner Act provides, in pertinent part, that "the mayor shall . . . fix the amount of salary, wages or other compensation to be paid to employees of the administrative departments of the municipal government . . .[,]" except for department directors and officers whose salaries are required by law to be fixed by ordinance. N.J.S.A. 40:69A-43a. Pursuant to the Faulkner Act, the Mayor of Jersey City has promulgated labor grades that include a number of job titles. Each civil service employee of the City is placed in a labor grade based on the job functions of the given title, the importance of the job, and the labor grades of other titles

within the same City department. Barring a promotion, demotion or a decision by the City to move the title to a different labor grade, an employee may remain in the same grade throughout the course of his or her employment. The City pays its employees in relation to the job titles and within the salary ranges of labor grades. Plaintiffs allege that the City has not updated the labor grade system since 1992.

In 1994, four of the plaintiffs in this action[1] filed a lawsuit against the City seeking an adjustment of their salaries, relying on N.J.S.A. 26:3-25.1.[2] That statute provides that:

> [E]very person holding a license . . . who is employed in a position for which this license is required by any board of health, municipality or group of municipalities shall receive the maximum salary in the person's range, within five years from the date of appointment to the position if the majority of the person's job performance evaluations are satisfactory.

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[1] Robert Vogt, Joseph A. Castagna, Timothy Hurley and Michael A. Perchun are named plaintiffs in the earlier action that resulted in our reported opinion. The additional named plaintiffs in the earlier action were Rita Brown, Dolores Bruning, Robert Cosgrove, John Raleigh, Louis M. Manzo and Walter R. Lezynski.

[2] In 1996, the year Brown was decided, N.J.S.A. 26:3-25.1 identified the specific class of workers to whom it applied. In 1997, it was amended to the current language. We perceive no difference in the import of the statute.

On April 10, 1996, we issued an opinion in which we ruled in plaintiffs' favor. Brown v. City of Jersey City, 289 N.J. Super. 374 (App. Div. 1996). We directed at that time that the salaries of each of the plaintiffs, which were at the top of their respective labor grades, be raised because as the maximum of the range increases, so does the protected health officer's salary. Id. at 380-81.

In recognizing that health officers receive both the benefit of union-negotiated raises as well as the benefit of the statute, we stated:

> [O]n those occasions when the City responds to union-negotiated increases by congruently adjusting the maximums of the salary ranges, there is no inevitable tension at all between the collective negotiation agreement and the Title 26 provision. That is to say, by reason of that provision, the health officer is already entitled to receive the current maximum for his labor grade's salary range. If, when the increase in salary is negotiated and the maximum is concomitantly increased, the employee simultaneously, with one raise, gets the benefit of both the contract and the statute.
>
> [Id. at 379-80.]

We held:

> We are satisfied . . . that the concept of "maximum" is fluid rather than fixed. That is to say, we disagree with the apparent view of the City that once a health officer has reached the maximum following his five years of service, the statutory purpose and directive has been fulfilled and there is no

> statutory mandate thereafter to increase the employee's salary as the salary range itself is increased . . . . The whole point of the statute is to prevent the freezing of a health officer's salary below whatever the current maximum is. Moreover, it would obviously abrogate the plain intent of the statute if a health officer's salary were frozen at whatever the maximum was five years after his appointment irrespective of how often and by how much the range thereafter increased, irrespective of what new similarly titled employees were to be paid, and irrespective of what those new employees would be entitled to five years hence.
>
> [Brown, supra, 289 N.J. Super. at 379.]

In the present action, the Jersey City Public Employees' Association, Inc., Local 246 (Local 246) is the exclusive representative for white collar workers within the City, which includes plaintiffs Gracia Hernandan, Timothy Hurley, Charles Mays, Michael Perchun and Vera Smith. The collectively negotiated agreement between the City and Local 246 (the CNA) sets forth a grievance procedure as the exclusive method for resolving disputes between the City and Local 246 and its members. Article 24 of the Local 246 CNA provides, in pertinent part:

> B. Definition. The term "grievance" as used herein means any controversy arising over the interpretation or adherence to the specific and express written terms of this Agreement.

> C. Steps of the Grievance Procedure. The following constitutes the sole and exclusive method for resolving contractual grievances between the parties covered by this Agreement and shall be followed in its entirety unless any step is waived by mutual consent[.]

The CNA[3] provides for "an earnest effort" to be made to settle the differences between the aggrieved employee and the Division Director (Step One); a conference between the grievant and his representative and the Department Director or his designee, leading to a decision in writing (Step Two); submission of the grievance to the Business Administrator of the City (Step Three); and referral to the Public Employment Relations Commission (PERC) for final and binding arbitration (Step Four).

The Jersey City Supervisors' Association (JCSA) is the exclusive representative for civilian supervisors in the City, and plaintiffs Robert Vogt and H. James Boor are members of the JCSA. The parties to a collectively negotiated agreement between the City and JCSA (the JCSA Agreement) included a grievance procedure as the exclusive method for resolving disputes between the City and JCSA. The JCSA negotiates salary

[3] At the time the complaint in this action was filed, Local 246 and the City were negotiating a successor agreement to the expired July 1, 2005 through June 30, 2008 CNA. However, Article 37 provides "this agreement shall continue in full force and effect from year to year [after the expiration date] unless one party or the other gives notice in writing . . . of a desire to change, modify or terminate this Agreement."

increases on behalf of all of its members, set forth in the JCSA Agreement. When the complaint in this action was filed, JCSA and the City were negotiating a successor agreement to the expired July 1, 2005 through June 30, 2008 JCSA Agreement. The grievance procedure set forth in Article 21 of the JCSA Agreement was identical to Article 24 of the Local 246 CNA recited above.

On November 8, 2007, plaintiffs filed a complaint in the Law Division, seeking a mandamus and alleging: (1) the City violated N.J.S.A. 26:3-25.1 by failing to pay the maximum salary within their respective salary range five years from the date of plaintiffs' appointments to their respective positions; (2) the City breached their contract and breached the covenant of good faith and fair dealing in connection with the CNA between the City and Local 246; (3) the City was unjustly enriched by its conduct; (4) the City violated the New Jersey Civil Service Act; and (5) the City engaged in fraud and misrepresentation.

Defendant filed a motion for summary judgment, seeking dismissal of the complaint. That motion was granted, and this appeal followed.

II.

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file,

together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009). In making a determination, the motion court and this court must consider the facts in the light most favorable to the non-moving party and decide "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp., Inc. v. Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)).

Challenging the motion judge's conclusion that they failed to exhaust the available administrative remedies, plaintiffs assert that: (1) the grievance procedure provided for in the CNA and the JCSA Agreement do not protect plaintiffs from the City's failure to comply with the Civil Service Act or the regulations of the Department of Personnel; and (2) there are no administrative remedies available which would have granted plaintiffs relief from their alleged harm.

In rejecting this agreement, Judge DeCastro reasoned:

Plaintiffs failed to file grievances or seek relief under the procedures set forth in the Civil Service Act. Admittedly, there may be circumstances where an individual is not required to exhaust administrative remedies before seeking leave of court. An administrative remedy may be dispensed where the interest of justice requires, or if there is a need for a prompt decision in the public interest or where there is no question as to administrative discretion or judgment and only a question of law is involved or where administrative recourse would be futile. Aparin v. Cnty. of Gloucester, 345 N.J. Super. 41 ([App. Div.] 2002).

Plaintiff[s] argue[] that defendant has violated the Civil Service Act and associated regulations because defendant has not come up with a compensation plan or established salary ranges for job titles since 1992 and has not provided the Department of Personnel with a current copy of a compensation plan as required under N.J.A.C. 4A:4-4.1(a)(1). Additionally, plaintiff[s] argue[] that the collective bargaining agreement between Local 246 and the Supervisor Association for the City of Jersey City, only provides for "grievance" of controversies that arise over interpretations or adherence to "specific and express written terms of the Agreement." Plaintiffs are wrong. A provision in the collective bargaining agreement states that "an employee who surpasses maximum as a result of the increases shall have labor grade increased to encompass the raise." Thus, it seems that the issue governing labor grades, is in fact, covered in the collective bargaining agreement and thus should have been submitted to the grievance procedure.

. . . .

> Plaintiffs have failed to utilize the remedies afforded them through the grievance/arbitration process which is mandated through their collective bargaining agreements to resolve disputes over claims relating to their employment.
>
> Furthermore, plaintiffs are required to file administrative appeals with the Civil Service Commission regarding any Civil Service Claim under N.J.A.C. 4A:2-1.1 regarding their labor grade status. Plaintiffs likewise failed to avail themselves to this remedy and instead filed this action. As discussed previously, the defendant, City, is a civil service municipality whose personnel actions are subject to the Civil Service Commission review. Plaintiffs are required to exhaust their administrative appeals.

We note that all plaintiffs, with the exception of Vogt,[4] for whom the JCSA did file a grievance, failed thereafter to file administrative appeals or utilize the grievance/arbitration process.

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -21, provides that "[g]rievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement." N.J.S.A. 34:13A-5.3.

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[4] The arbitration over Vogt's grievance is pending the resolution of this matter.

> The general rule is that an employee seeking to bring a contract grievance must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. Exceptions to this general rule exist where the union has breached its duty of fair representation, where the grievance procedures have been repudiated, where resort to the grievance and arbitration provisions would be futile, and where the parties to the collective bargaining agreement have expressly agreed that arbitration was not the exclusive remedy.
>
> [Thompson v. Joseph Cory Warehouses, 215 N.J. Super. 217, 220 (App. Div. 1987) (internal citations and quotation marks omitted).]

Although the trial judge analyzed the relevant facts of the case, those facts became secondary to the failure of plaintiffs to adhere to the controlling mandate of their collectively negotiated agreements requiring a grievance be filed and the grievance steps be followed. In light of such failure, we affirm the judgment of the Law Division substantially for the reasons expressed in the court's written opinion.

Contrary to plaintiffs' argument, the CNA's and JCSA Agreement's grievance clauses are relevant to this dispute. The language in the JCSA Agreement and the CNA regarding the grievance/arbitration procedure defines grievance as: "any controversy arising over the interpretation or adherence to the specific and express written terms of this Agreement." Further,

the article(s) provide that the grievance procedure is "the sole and exclusive method for resolving contractual grievances between the parties covered by this Agreement." Since plaintiffs specifically contend that the City breached the provision in the agreements stating that "an employee who surpasses maximum as a result of the increases shall have [his or her] labor grade increased to encompass the raise," it is contradictory for plaintiffs to argue that resort to the grievance procedure is futile. Accordingly, Judge DeCastro properly held that the JCSA Agreement and the CNA governed labor grades and the dispute should have been submitted through the grievance/arbitration process.

Likewise, plaintiffs were required to assert their claims regarding the City's violation of the Civil Service Act, as an administrative appeal before the Civil Service Commission pursuant to N.J.A.C. 4A:2-1.1. See also N.J.A.C. 4A:2-1.7(b) (providing for specific appeals but directs that "[a]ny appeal not listed above must be filed in accordance with N.J.A.C. 4A:2-1.1.").

The Department of Personnel is entrusted with the implementation of the Civil Service Act. N.J.A.C. 4A:1-1.2(a). Under the circumstances presented here, "courts are obliged to defer to the primary jurisdiction of the executive

body, referring such issues for administrative resolution." Melani v. Cnty. of Passaic, 345 N.J. Super. 579, 585 (App. Div. 2001) (citations omitted).

In Melani, we held that where a plaintiff was seeking remedial measures pursuant to his or her rights under the Civil Service Act, "as a matter of primary jurisdiction, the 'affording of a remedy [more] appropriately lies with the Department of Personnel.'" Id. at 589 (quoting Kyer v. City of E. Orange, 315 N.J. Super. 524, 527 (App. Div. 1998)). Although there are several exceptions which, if applicable to the case at hand, would obviate the convenience and override the interest of justice in having to exhaust administrative remedies, but none apply here.

> Generally, the exhaustion rule will not be applied: (1) when only a question of law exists; (2) when administrative remedies would be futile; (3) when irreparable harm would result; (4) when jurisdiction of the agency is doubtful; or (5) when an overriding public interest calls for a prompt judicial decision.
>
> [Triano v. Div. of State Lottery, 306 N.J. Super. 114, 121-22 (App. Div. 1997) (citing Magliochetti v. State, 276 N.J. Super. 361, 375 (Law Div. 1994)).]

In light of the availability of an administrative appeal process, Judge DeCastro properly found that plaintiffs were required to exhaust their administrative appeals.

III.

We next address whether the trial judge erred in finding no issue of material fact existed with regard to: (1) whether the City violated the Civil Service Act, Department of Personnel regulations, and (2) whether plaintiffs have suffered economically from the City's alleged violations.

Judge DeCastro, after quoting N.J.S.A. 26:3-25.1, stated:

> Plaintiffs claim that after five years in a particular labor grade under this statute, they should automatically be promoted or "bumped up" to the next labor grade. Since the City has not promoted or bumped plaintiffs to the next labor grade, they argue that the City breached its duties under this law. Plaintiffs are mistaken. The Defendant is not required to promote or bump an employee to the next labor grade.
>
> In Brown the court held that when the City responds to union negotiated increases by "congruently adjusting the maximums of the salary ranges, there is no inevitable tension at all between the collective negotiation agreement and the Title 26 provision." The court found that when the salary increase is negotiated and the maximum is concomitantly increased, the employee simultaneously, with one raise, receives the benefit of the contract and the statute. The Court noted that the purpose behind the statute was to prevent the freezing of a salary below whatever the current maximum is. Brown, supra, 289 N.J. Super. at 188.
>
> Here, plaintiffs salaries were appropriately raised throughout this time and were congruent with an increase in the maximum of their labor grades. The

> defendant was not required to bump them up or promote them to the next labor grade level. Therefore, plaintiff's claim that defendant violated N.J.S.A. 26:3-25.1 fails.

We find that these comments disclose an adequate and proper basis for granting summary judgment in favor of defendant as to this issue.

IV.

In light of our decision that plaintiffs are first required to exhaust their administrative remedies, we decline to address the merits advanced by plaintiffs on this appeal. R. 2:11-3(e)(1)(E).

We therefore conclude that this case can and should be considered in the first instance in accordance with applicable contractual or administrative remedies. The matter is remanded for referral to the grievance procedure outlined in the collectively negotiated agreement or for transfer to the Civil Service Commission, Department of Personnel. Under the circumstances, the complaint should not have been dismissed with prejudice. See Abbott v. Burke, 100 N.J. 269, 297 (1985); Kaczmarek v. N.J. Tpk. Auth., 77 N.J. 329 (1978) (complaint filed in the Superior Court could be transferred to appropriate administrative agency).

Affirmed in part, remanded in part.

Vogt v. City of Jersey City

This matter comes before the court on defendant's motion for summary judgment. On or about November 8, 2007, Plaintiffs Robert Vogt, Gracia Hernandan, H. James Boor, Joseph A. Castagna, Timothy Hurley, Charles Mays, Jr., as the Administrator ad Prosequendum of the Estate of Charles Mays, Michael A. Perchun and Vera Smith (collectively "plaintiffs"), filed a complaint and jury demand in the Superior Court of New Jersey, Hudson County.

The counts of the complaint are as follows:

Count 1: Plaintiffs allege that the City violated N.J.S.A. 26:3-25.1 by failing to pay Plaintiffs the maximum salary within their salary range within five years from the date of Plaintiffs appointments to their respective positions.

Count 2: Plaintiffs allege that the City engaged in a breach of contract and the covenant of good faith and fair dealing in connection with the Collective Bargaining Agreement Between the City and the Jersey City Public Employees, Inc., Local 246 ("Local 246").

Count 3: Plaintiffs allege that the City has been unjustly enriched based upon its failure to increase Plaintiffs' labor grades to encompass Plaintiffs raises and/or its failure to provide Plaintiffs with compensation in accordance with their appropriate labor grades, contrary to N.J.S.A. 26:3-25.1.

Count 4: Plaintiffs allege that the Coty violated the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq. and N.J.A.C. 4A:3-4(c).

Count 5: Plaintiffs allege that the City committed fraud and misrepresentation against plaintiffs.

Count 6: Plaintiffs seek a writ of mandamus from the court.

By way of background, in 1994 four of the these plaintiffs (Brown, Voght, Perchun, Castagna) filed a lawsuit against the City alleging that as of 1986, the City failed to honor the rights accorded by them under N.J.S.A.26:3-51.1. The decision in Brown v. City of Jersey City, 289 N.J. Super. 374 (App. Div. 1996), is relevant to the present lawsuit. As a result each of the four plaintiffs was raised to the maximum salary at that time within their given labor grade.

Vogt is employed by the City and was hired on December 17, 1973. His current title is Assistant Health Officer. Vogt has been the Assistant Health Officer since March 1987. Vogt was a Sanitary Inspector from 1974-1987. Assistant Health Officer and Sanitary Inspector are the only titles Vogt has ever held. As a requirement of his job titles, Vogt possesses two licenses: Registered Environmental Health Inspector and Health Officer. Vogt was promoted into his current title on March 30, 1987. Pursuant to Mayor Shundler's Executive Order dated December 20, 1994, Vogt's labor grade was set at sixteen, which it remains to this day. Vogt's current salary is $74,500, which includes $1200 in longevity pay. Vogt disputes that he is earning the maximum salary in his labor grade. On or about October 9, 2008, the JCSA filed a grievance on behalf of Vogt, and subsequently requested arbitration over the dispute at issue in this matter. It is pending.

Hernandan is employed by the City as a Registered Environmental Health Specialist. Hernandan began her employment with the City in 1997 as a seasonal employee. On September 14, 1998, Hernandan was hired on a permanent basis with the title Receptionist: Bilingual Spanish and English. She was promoted to the title of Clerk on March 12, 2001 in labor grade one. On January 1, 2003, Hernandan was promoted to the position of Sanitary Inspector and her labor grade was changed to labor grade six. Hernandan has obtained the requisite license for her position of Registered Environmental Agent. While Hernandan's salary increased in 2008 from $38,100 to the maximum within her labor grade, $57,381, when she completed five years as a Registered Environmental Health Specialist as required under N.J.S.A. 26:3-5.1, plaintiff contends that the Labor Grade schedule has not been changed and that she is not paid the maximum for her labor grade of sixteen

Boor has been employed by the City since 1987 and is currently employed as the Chief Registered Environmental Health Specialist and has held this position since 1993, w hen he received his State Inspector's License. Boor was a Public Health Investigator from 1987 to 1996, Chief Investigator from 1996 to 2000, Sanitary Inspector from November of 2000 to 2005 and Chief Registered Environmental Health Specialist from 2005 to the present. Boor has held the required Registered

Environmental Health Specialist License since 1993. Boor is currently in labor grade twenty-two. Defendants contend that Boor does not have a legal right to receive the maximum salary under the title of Chief Registered Environmental Safety Specialist because he has only worked in that position since 2005. Boor was a member of Local 246 from 1987 to 1996 and from 2000 to 2005. At all other times during his tenure with the City, Boor has been a member of the JCSA. Boor has always received appropriate raises and those increases are negotiated between the City and JCSA.

Castagna has been employed by the City since May of 1980. Castagna has been employed as the City's Health Officer for seventeen years. Prior to being the Health Officer, Castagana was employed as a Sanitary Inspector First Grade, which is now as Registered Environmental Specialist. Castagna holds both the Health Officer License, which is required for his current title, and a Registered Environmental Health Specialist License. Castagna is the Division Director of the City's Health Division. Castagna was a member of the plaintiff class in Brown. As a result of the decision in the Brown decision, Castagna was raised to the maximum salary within his labor grade after his fifth year as Health Officer. Every year subsequent to the Brown decision, Castagna has received salary increases commensurate with the other managers within the City.

Hurley has been employed by the City for the past thirty years and is currently a Registered Environmental Health Specialist, a title which he has held for his entire career. Plaintiff Hurley possesses the requisite Registered Environmental Health Specialist License. Defendants state that Hurley's current labor grade is six, but plaintiffs argue that the labor grade for plaintiff Hurley's position remains at sixteen because it was not legally changed because the requirements for changing a labor grade were not followed.

Plaintiff Estate of Charles Mays ("Mays") was hired by the City on December 7, 1987 and was employed as a Registered Environmental Health Specialist until the time of his death in 2005. Defendants contend that Mays was in labor grade six at the time of his death, however, plaintiffs maintain that the labor grade held by Mays at the time of his death was not legally changed because the

requirements for changing a labor grade were not followed. Plaintiff contends that at the time of his death, Mays' labor grade was sixteen. However, defendants claim that Mays' salary was $55,781, placing him at the maximum salary for his labor grade. In 1996, Mays' salary was increased by $15,211, the maximum for his labor grade, as a result of the Brown case.

Perchun was hired by the City on July 2, 1979 and his current title is Registered Environmental Health Specialist and he maintains the requisite license for that position. Defendants state that Perchun's current labor grade is six, while plaintiffs disagree, stating that Perchun's labor grade was not legally changed because the requirements for changing a labor grade were not followed. Perchun was a member of the plaintiff class in Brown. As a result of the Brown matter, plaintiff Perchun's salary was increased in 1996 from $40,750 to $47,661, placing him at the maximum salary within his labor grade at that time. Defendant contends that plaintiff Purchun's current salary is $59,481, the maximum for his labor grade, however plaintiffs note that persons in lower labor grades are paid more than plaintiffs.

Vera Smith has been employed by the City since 1987. Smith was a member of the plaintiff class in Brown and as a result her salary was increased in 1996 by $15,211, placing her at the maximum salary within her labor grade at that time.

The City is governed by the Faulkner Act, N.J.S.A. 40:69A-1, et seq. Specifically, the City is classified as a "Mayor-Council Plan" form of government pursuant to N.J.S.A. 40:69A-31, et seq. Plaintiffs are each employees of the City and their job titles require licenses falling within the specifications set forth in N.J.S.A. 26:3-5.1. The City is a civil service municipality whose personnel actions are subject to Civil Service Commission review. N.J.A.C. 4A:4-1.10(a).
Plaintiffs argue that defendants failed to follow the requirements under the Civil Service Act. They allege that the labor grades adopted by the City are from 1992 and it has not been updated as required under the Civil Service Act. They claim that pursuant to N.J.S.A. 26:3-5.1 they should be automatically promoted or "bumped up" to the next labor grade.

Plaintiffs further argue that the contracts with employees' unions require elevation of Labor Grades when maximum salary for a labor grade is reached. Barring the person's promotion, demotion or the City deciding to move the title to another labor grade, the employee will remain in the same labor grade through the course of his/her employment. This results in certain employees at a lower labor grade to be earning a higher salary than certain employees in higher labor grades.

Local 246 is the exclusive representative for white collar workers within the City. Gracia Hernandan, Timothy Hurley, Charles Mays (prior to his death), Michael Perchun and Vera Smith, are members of Local 246. The City and Local 246 are parties to a Collective Bargaining Agreement ("Local 246 Agreement") that sets forth an agreed upon grievance procedure as the exclusive method for resolving disputes between the City and Local 246 and its members.

Article 24 of the Local 246 Agreement provides, in pertinent part, as follows: A grievance, as used herein means any controversy arising over the interpretation or adherence to the specific and express written terms of this Agreement. The agreement is the only method to resolve contractual grievances between the parties covered by this Agreement and shall be followed in its entirety unless any step is waived by mutual consent. Unresolved grievances shall be arbitrated.

The Jersey City Supervisors Association ("JCSA") is the exclusive representative for civilian supervisors in the City and plaintiffs Vogt and Boor are members of the JCSA. The City and the JCSA are parties to a Collective Bargaining Agreement that sets forth a grievance procedure as the exclusive method for resolving disputes between the City and the JCSA and its members. Article 21 of the JSCA Agreement has the same provisions as the Local 246 Agreement stated above.

Pursuant to Rule 4:46-2(c), summary judgment shall be entered:

[I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together

with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.

The Supreme Court in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), elaborated on Rule 4:46-2(c), holding:

> [U]nder this new standard, a determination whether there exists a 'genuine' issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." The Court continued, "[i]f there exists a single unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of [the rule].

142 N.J. 520, 540.

N.J.S.A. 26:3-25.1, provides that "every person holding a license . . . who is employed in a position for which this license is required by any board of health, municipality or group of municipalities shall receive the maximum salary in the person's range, within five years from the date of appointment to the position if the majority of the person's job performance evaluations are satisfactory." Plaintiffs claim that after five years in a particular labor grade under this statute, they should automatically be promoted or "bumped up" to the next labor grade. Since the City has not promoted or bumped plaintiffs to the next labor grade, they argue that the City breached its duties under this law. Plaintiffs are mistaken. The Defendant is not required to promote or bump an employee to the next labor grade.

In Brown the court held that when the City responds to union negotiated increases by "congruently adjusting the maximums of the salary ranges, there is no inevitable tension between the collective negotiation agreement and the Title 26 provision. The court found that when the union increase is negotiated and the maximum is concomitantly increased, the employee simultaneously, with one raise, receives the benefit of the contract and the statute. The Court noted that the purpose

statute was to prevent the freezing of a salary below whatever the current maximum is. Brown, 289 N.J. Super. at 188.

Here, plaintiffs salaries were appropriately raised throughout this time and were congruent with an increase in the maximum of their labor grades. The defendant was not required to bump them up or promote them to the next labor grade level. Therefore, plaintiffs claim that defendant violated N.J.S.A. 26:3-25.1 fails. Summary judgment shall be granted on Counts One and Three of the complaint.

Plaintiffs failed to file grievances or seek relief under the procedures set forth in the Civil Service Act. Admittedly, there may be circumstances where an individual is not required to exhaust administrative remedies before seeking leave of court. An administrative remedy may be dispensed where the interest of justice requires, or if there is a need for a prompt decision in the public interest or where there is no question as to administrative discretion or judgment and only a question of law is involved or where administrative recourse would be futile. Aparin v. County of Gloucester, 345 N.J. Super. 41 (2000).

Plaintiff argues that defendant has violated the Civil Service Act and associated regulations because defendant has not come up with a compensation plan or established salary ranges for job titles since 1992 and has not provided the Department of Personnel with a current copy of a compensation plan as required under N.J.A.C. 4A:4-4.1(a)(1). Additionally, plaintiff argues that the collective bargaining agreement between Local 246 and the Supervisor' Association for the City of Jersey City, only provides for "grievance" of controversies that arise over interpretations or adherence to "specific and express written terms of the Agreement." Plaintiffs are wrong. A provision in the collective bargaining agreement states that "an employee who surpasses maximum as a result of the increases shall have labor grade increased to encompass the raise." Thus, it seems that the issue governing labor grades, is in fact, covered in the collective bargaining agreement and thus should have been submitted to the grievance procedure.

As noted earlier, plaintiff will not have to exhaust administrative remedies when the question is of law, or when the administrative recourse would be futile. Plaintiff must exhaust all administrative remedies. Under Canale v. Yegen, 782 F. Supp. 963, 972 (D.N.J. 1992), the court held that a party seeking waiver of exhaustion requirements cannot merely assert "bare allegations of futility" but must make a "clear and positive showing of futility".

Plaintiffs have failed to utilize the remedies afforded them through the grievance/arbitration process which is mandated through their collective bargaining agreements to resolve disputes over claims relating to their employment.

Furthermore, plaintiffs are required to file administrative appeals with the Civil Service Commission regarding any Civil Service Claim under N.J.A.C. 4A:2-1.1 regarding their labor grade status. Plaintiffs likewise failed to avail themselves to this remedy and instead filed this action. As discussed previously, the defendant, City, is a civil service municipality whose personnel actions are subject to the Civil Service Commission Review. Plaintiffs are required to exhaust their administrative appeals. Thus defendant's motion for summary judgment on Counts Two and Four shall be granted. Additionally, Plaintiffs, Voght, Boor and Castagna are not members of the Jersey City Public Employees, Local 246. Therefore, they cannot claim that the defendant breached that agreement with regard to them.

As for Plaintiffs claim, that the City committed fraud and misrepresentation against plaintiffs. (Count Five) in order to successfully conclude that an act of fraud or misrepresentation has been committed, a plaintiff must prove (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance t hereon by the other person; and (5) that damages resulted from the misrepresentation. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). A party claiming fraud bears the burden of proving such fraud by clear and convincing evidence. R.A. Intile Realty Co. Inc. v. Raho, 259 N.J. Super. 438, 475 (1992). R. 4:5-8(a) also requires that fraud or misrepresentation indicate the "particulars of the wrong, with dates and items if necessary" as far as practicable. The court has

stated that when a fraud pleading which does not include the required specificity, the pleader should ordinarily be afforded the opportunity of amending the pleading in lieu of dismissal of the claim. See Rebish v. Great Gorge, 224 N.J. Super. 619 (1988). However a fraud count may be dismissed if "the allegations do not set forth with specificity, nor do they constitute as pleaded, satisfaction of the elements of legal or equitable fraud." Here, plaintiffs have not included sufficient information in their complaint or in their reply brief in opposition to the motion for summary judgment which would allow this court to find that there are sufficient grounds to maintain a cause of action for fraud or misrepresentation. The plaintiffs' complaint does not specifically state the nature of the misrepresentation and does not allege with specificity when the misrepresentation occurred or who made the misrepresentations to the plaintiffs. Plaintiffs complaint states that "At all times pertinent hereto, defendant misrepresented to plaintiffs, with the intent that the plaintiffs rely upon such misrepresentations, that plaintiffs would be promoted to the appropriate labor grades to encompass plaintiffs raises and the plaintiffs would be paid and receive pension and/or other benefits in accordance with the grades of others employed by defendant." No specific statements were indicated through discovery, and plaintiffs failed to address or expound upon their claim of fraud and misrepresentation in their reply brief. For example, Plaintiff claims that plaintiffs committed a fraud against her because "[the City of Jersey City] hasn't kept them up to salary" because they were supposed to continually be raised every five years up to the maximum. Exhibit H, 30:6-15. This however is not specific enough for this court to find that a fraud or misrepresentation has occurred to these plaintiffs. Accordingly, summary judgment as to Count Five is granted.

In Count 6 Plaintiffs seek a writ of mandamus from the court. Mandamus is a proper remedy: (1) to compel *specific* action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but *not* in a specific manner. Switz v. Middletown Tp., 23 N.J. 580 (1957); Colon v. Tedesco, 125 N.J. Super. 446 (1973); Borough of Eatontown v. Danskin, 121 N.J. Super. 68 (1972); Edelstein v. Ferrel, 120 N.J. Super. 583 (1972). Plaintiffs argue that mandamus is an appropriate remedy in this case because defendant has not complied with several provisions of N.J.A.C. 11A and N.J.S.C. 4A

and are thus entitled to be paid the maximum of their ranges. However, mandamus is not appropriate here because requiring that employees be paid the maximum of their wages would be compelling a specific action in a specific manner. Thus, plaintiffs are improperly urging the court to compel a specific action, namely requiring the City of Jersey City to comply with the Civil Service Act through the payment of maximum wages. Mandamus is not the appropriate remedy for the plaintiffs claim here.

For the foregoing reasons, defendant's motion for summary judgment is granted on all counts and the complaint if hereby dismissed.

BERNADETTE N. DECASTRO, J.S.C.