



STATE OF NEW JERSEY

In the Matter of Police Lieutenant,
(PM3381E), Jersey City

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket Nos. 2024-319, *et al.*

Request for Stay and Requests for
Reconsideration

ISSUED: September 20, 2023 **(ABR)**

Jersey City, represented by Arthur R. Thibault, Esq., and Kyle J. Trent, Esq., petitions the Civil Service Commission (Commission) for a stay of the Commission’s decision in *In the Matter of Police Lieutenant (PM3381E), Jersey City* (CSC, decided August 2, 2023), pending the outcome of its appeal in the Superior Court, Appellate Division. Additionally, Joseph Chidichimo and David Leon, Police Sergeants with Jersey City, request reconsideration of the final decision in *In the Matter of Police Lieutenant (PM3381E), Jersey City, supra*. Since these requests address similar issues, they have been consolidated herein.

By way of background, in response to a June 22, 2023, inquiry from the Division of Agency Services (Agency Services), the appointing authority requested that the Police Lieutenant (PM3381E) examination not be announced and Agency Services held the announcement in abeyance, pending its review of the appointing authority’s request. On July 12, 2023, Agency Services denied the appointing authority’s opt-out request. In this regard, Agency Services indicated that a review of its records appeared to indicate that the appointing authority was in need of a new eligible list for the title of Police Lieutenant. Accordingly, Agency Services reinstated the PM3381E examination announcement.¹ The appointing authority subsequently appealed the decision to the Commission, which denied the appeal. Thereafter, the

¹ Following the Commission’s August 2, 2023, decision, the PM3381E examination deadline was amended to August 15, 2023, while the closing date remained September 30, 2023.

appointing authority appealed the Commission's decision to the Appellate Division and filed the instant petition with the Commission.

Jersey City's Request for Stay

In support of its request, the appointing authority argues that it meets all of the factors required for a stay. The appointing authority avers that it has demonstrated a probability of success on the merits because the decision of whether to proceed with the subject examination falls under its managerial prerogative and it has clearly established that it does not intend to promote or fill a vacancy in the subject title in the foreseeable future, and thus does not need a Police Lieutenant eligible list. Against this backdrop, it contends that the subject examination cannot be justified, particularly given the expenses required for the administration of the examination and the time, energy and resources candidates would be compelled to expend. The appointing authority further avers that the Commission's calculation of the number vacancies for the title of Police Lieutenant and its reliance on *In the Matter of Promotional Lists for Public Safety Titles* (MSB, decided April 7, 2004) were erroneous and further demonstrate a likelihood that it will succeed on the merits. The appointing authority similarly argues that irreparable harm and a balance of hardships weigh in favor of its request. Specifically, the appointing authority contends that monetary damages could not adequately compensate it for the harm caused by acting contrary to its managerial prerogative and from creating a false impression that Police Sergeants will be promoted because of the administration of the subject examination. The appointing authority also suggests that the public interest favors having its Police Sergeants focus on performing their regular duties instead of preparing for an examination that will have no meaning. Conversely, the appointing authority argues that no harm would result from staying the administration of the subject examination because the appointing authority would not have to make promotions and fill vacancies even if it is administered. Finally, the appointing authority proffers that the administration of the subject examination under the foregoing circumstances would harm the public interest by wasting taxpayer resources.

In response, the Jersey City Police Superior Officers Association (JCPSOA), represented by Christopher A. Gray, Esq., argues that the appointing authority's request should be denied as it fails to meet any of the criteria for a stay. JCPSOA contends that the appointing authority's arguments amount to a rehashing of the arguments raised before and rejected by the Commission and that the Appellate Division is unlikely to reverse the Commission's decision regarding a matter clearly within its discretion. JCPSOA avers that the appointing authority's characterization of irreparable harm is "glaringly absurd," as the record is devoid of any evidence of harm the appointing authority would suffer if a test were administered. It observes that the appointing authority is not required to take any action to effectuate Civil Service testing and that testing here does not interfere with the appointing

authority's agenda for running or operating its police force. JCPSOA asserts that the existing Police Lieutenant eligible list has been exhausted and that 14 vacancies currently exist.² JCPSOA asserts that there is no financial harm to the appointing authority, as it does not provide those taking promotional courses with paid time off to attend class or the ability to study while working. JCPSOA also contends that promotional testing is beneficial to the appointing authority and Jersey City residents because the majority of Police Sergeants have enrolled in promotional police study courses to increase their knowledge of police best practices at zero expense to the appointing authority. It presents that JCPSOA members understand that the creation of a promotional list does not guarantee promotion and the appointing authority's desire not to have a promotional test, so there is no basis to conclude that an examination will give a "false impression" that Police Sergeants will be promoted. JCPSOA avers that a promotional examination would not be inefficient or a waste of taxpayer resources, as it would merely represent a few extra applications for a statewide examination for the title of Police Lieutenant. Moreover, JCPSOA proffers that since a promotional list would be valid for at least three years, it is reasonably likely that the appointing authority will have to fill vacancies in the rank of Police Lieutenant during that span, particularly as the life of an eligible list would extend beyond the current Jersey City mayoral administration and into a new one. It maintains that the only inefficiency and waste of taxpayer resources is the appointing authority's failure to comply with the Civil Service law and rules by failing to accurately report promotions. JCPSOA argues that the Commission's August 2, 2023, determination was consistent with 20 years of precedent and historical data, as well as the authority vested in the Commission through the Civil Service Act. JCPSOA argues that a stay would cause substantial injury to its members, as it would require them to wait nearly a year for the testing cycle and lead to provisional appointments being made to the title of Police Lieutenant without regard to merit, fitness or objective testing. JCPSOA further avers that the public interest weighs against a stay, as the public interest is not served by preventing promotional testing in an agency that has vacancies, historical steady promotional needs, and has exhausted promotional lists.

Chidichimo's and Leon's Requests for Reconsideration

Chidichimo and Leon submit identical requests for reconsideration. They argue that the PM3381E examination should be canceled because "2023 is not the normal testing year and is a full year prior to the normal testing cycle based on when the last Lieutenants [sic] exam was given." They also assert that it was highly unusual for the appointing authority to promote 47 eligibles to the title of Police

² JCPSOA maintains that the appointing authority has been delinquent in updating the County and Municipal Personnel System (CAMPS) and it urges the Commission to take "additional aggressive action against Jersey City." JCPSOA also advises that it has a pending grievance before the Public Employment Relations Commission (PERC) regarding contractual obligations that it maintains obligate the appointing authority to always maintain active Civil Service promotional lists.

Lieutenant at once, as they did in January 2023, and that with only 14 Police Lieutenant positions available for a group of 74 eligible sergeants to fill, testing would be “extremely wasteful” for nearly 75% of eligible applicants. Chidichimo and Leon state that they are among 15 officers who were promoted to the title of Police Sergeant on November 22, 2022, and that it would be “absolutely unprecedented and egregious if the top 15 people on the [Police Sergeant] list were not eligible to take the next available [Police Lieutenant] examination after being promoted so quickly.” Chidichimo and Leon request that either no examination be conducted in 2023 or that if one occurs outside of the “normal testing cycle,” that they and the other 13 Police Sergeants appointed effective November 22, 2022, be permitted to take a promotional examination for the title of Police Lieutenant in 2024 and have their names added to the PM3381E list in accordance with their scores, as a “fair compromise” to “correct a politically motivated injustice.” Chidichimo and Leon also maintain that the subject examination should not be administered because the appointing authority missed May 1, 2023, and July 1, 2023, deadlines to apply for the subject examination announcement and because the appointing authority has made clear that it does not need or want a test for Police Lieutenant this year, and PERC issued a ruling on August 7, 2023, which found that JCPSOA had not produced a showing of extraordinary circumstances to justify their request for an early Police Lieutenant examination.

CONCLUSION

Jersey City’s Request for Stay

N.J.A.C. 4A:2-1.2(b) indicates that a request for a stay or interim relief shall be in writing, signed by the petitioner or his or her representative and must include supporting information for the request. *N.J.A.C.* 4A:2-1.2(c) provides that the following factors will be considered in reviewing such requests:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted; and
4. The public interest.

N.J.A.C. 4A:2-1.2(f), citing *N.J. Court Rules* 2:9-7, states that following a final administrative decision by the Commission, and upon the filing of an appeal from that decision to the Appellate Division, a party to the appeal may petition the Commission for a stay or other relief pending a decision by the Court in accordance with the procedures and standards in (b) and (c) above. *N.J. Court Rules* 2:9-7 indicates that “[o]n or after the filing with the Appellate Division of a notice of appeal or of a notice of motion for leave to appeal from a state administrative agency or officer, a motion for ad interim relief or for a stay of the decision, action or rule under

review shall be made in the first instance to the agency whose order is appealed from and, if denied, to the Appellate Division.”

In the instant matter, the appointing authority has not met the standard for a stay, as set forth in *N.J.A.C.* 4A:2-1.2(c). Initially, there does not appear to be a likelihood of success on the merits of the appeal before the Appellate Division. It is well settled that an appellate court will reverse the final decision of an administrative agency only if it is arbitrary, capricious or unreasonable or if it is not supported by substantial credible evidence in the record as a whole, or if it violates legislative policy expressed or fairly to be implied in the statutory scheme administered by the agency. See *Karins v. City of Atlantic City*, 152 *N.J.* 532, 540 (1998); *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980); *Mayflower Securities Co. v. Bureau of Securities*, 64 *N.J.* 85, 93 (1973); *Campbell v. Civil Service Department*, 39 *N.J.* 556, 562 (1963). The appointing authority has not demonstrated a clear likelihood of success on the merits, as the Commission’s decision to proceed with the PM3381E examination is consistent with longstanding practices and the demonstrated need for the promulgation of a new list based on both the exhaustion of the prior Police Lieutenant (PM4118C) eligible list and Agency Services’ analysis of the appointing authority’s historical needs for the subject title.

Additionally, it cannot be said that the appointing authority has demonstrated immediate or irreparable harm. Much of the appointing authority’s arguments regarding harm are financially based and the courts generally do not consider financial harm to constitute immediate or irreparable harm. See *Crowe v. De Gioia*, 90 *N.J.* 126, 132 (1982). Even if financial harm could be said to support the granting of a stay, it also bears significance that the appointing authority has not given any indication that it will bear any cost if the PM3381E examination moves forward and it does not proceed to fill any vacancies from that list. Although the appointing authority alleges an impingement on its managerial prerogative, since there is no claim that it would be compelled to make any appointments from an eligible list if there are truly no vacancies that arise during the life of said list, it cannot be said that the administration of the examination at issue would cause immediate or irreparable harm to the appointing authority’s managerial prerogative. Beyond that, the balance of the appointing authority’s “harm” arguments focus on the impacts on this agency and the candidates. In terms of this agency, the appointing authority’s contentions about wasted resources amount to suggestions that this agency would be wasting its own funds and energy by proceeding with the administration of an examination that might generate a list that the appointing authority may not utilize. As JCPSOA notes, the PM3381E examination would not be a standalone test. Rather, it would be administered using the same Police Lieutenant examination being developed for other appointing authorities for use in the current testing cycle. Thus, the “waste” to this agency would be comparatively small.³

³ The Commission observes that to accept the appointing authority’s concerns about this agency “wasting” its own resources would be to say that it needs to be saved from itself. Arguably, if the courts

The balance of the appointing authority's "harm" arguments comes down to false hope: namely that the administration of the subject examination will create a false expectation that candidates will expect to be promoted because an eligible list will promulgate, even though the appointing authority has said repeatedly that it does not intend to make appointments from the subject eligible list. As JCPSOA has acknowledged that its members understand that even if an eligible list promulgates, the appointing authority may not make any appointments from it, it cannot be said that proceeding with an examination will generate false hope. Even if JCPSOA had not indicated that its members understood that the subject promotional list may not be utilized, it bears noting that the promulgation of an eligible list does not create a vested right to appointment. 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), *Schroder 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). Finally, as JCPSOA points out, even if no promotional appointments result from the subject examination announcement, the appointing authority is likely to derive a benefit from having its candidates review applicable laws, rules and best practices as they prepare for the examination. Accordingly, it cannot be said that the appointing authority has demonstrated the "immediate or irreparable harm" contemplated by *N.J.A.C.* 4A:2-1.2(c).

As to the absence of injury to other parties, the Commission observes that a stay could cause substantial injury to the Commission and to the 66 candidates who submitted applications for the PM3381E examination. If the Commission grants a stay and the Appellate Division denies the appointing authority's appeal, it would create significant logistical challenges, as this agency would either have to quickly administer the PM3381E examination within a current cycle or delay the administration of the examination until the next promotional law enforcement examination cycle. This would also create significant uncertainty for the 66 candidates who applied for the PM3381E examination and compel them to choose between preparing for an examination with an uncertain timeline or waiting until they have notice about the administration of the examination with a risk that they will have only a minimal amount of time to prepare. Conversely, proceeding with the PM3381E examination best preserves the status quo, as it provides candidates and this agency with certainty regarding the timing of a potential PM3381E examination. Additionally, if the Appellate Division grants the appointing authority's appeal, the Commission can simply cancel any PM3381E eligible list and leave the appointing authority in substantially the same position it would have been in had the examination not occurred. Moreover, the public interest weighs in favor in proceeding

were to accept such an argument, it could force this agency to account for the use of its own resources whenever an appointing authority wishes to contest the announcement of an examination.

with the subject examination. The Commission observes that this agency has a duty to carry out the constitutional mandate that appointments and promotions “in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive. . .” *See N.J. Const. art. VII, § I, ¶ 2*. Clearly, in the instant matter, this mandate is best accomplished by proceeding with the subject examination, particularly in light of the Commission’s August 2, 2023, decision.

Chidichimo’s and Leon’s Requests for Reconsideration

N.J.A.C. 4A:2-1.6(a) states that within 45 days of receipt of a decision, a party to the appeal may petition the Commission for reconsideration. *N.J.A.C. 4A:2-1.6(b)* indicates that a petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

1. The new evidence or additional information not presented at the original proceeding, which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or
2. That a clear material error has occurred.

Concerning Chidichimo’s and Leon’s requests, even assuming that they have standing to make such a challenge, which is questionable, a review of the record demonstrates that reconsideration is not justified. Chidichimo and Leon do not appear to contest that the Police Lieutenant (PM4118C) eligible list has been exhausted. Chidichimo’s and Leon’s complaints that “2023 is not the normal testing year and is a full year prior to the normal testing cycle based on when the last Lieutenants [sic] exam was given” are insufficient to support reconsideration. Importantly, Civil Service law and rules do not establish any requirement of a “normal testing year” or a “normal testing cycle,” as claimed by Chidichimo and Leon. While *N.J.A.C. 4A:4-3.3(b)* states that open competitive and promotional lists shall be promulgated for three years from the date of their establishment, it also provides that the duration may be for a shorter time period under certain circumstances. Additionally, in the case of promotional examinations, the relevant timeframe is not any “normal testing year” or “normal testing cycle.” Further, pursuant to *In the Matter of Promotional Lists for Public Safety Titles, supra*, this agency’s longstanding practice has been to ensure the continuous availability of promotional law enforcement lists for jurisdictions with a demonstrated historical need for appointments, including Jersey City. Moreover, as noted above, this agency has a duty to carry out the constitutional mandate that appointments and promotions be made according to merit and fitness to be ascertained, as far as practicable, by examination. To delay an examination announcement until 2024 based upon the purported “normal testing year/normal testing cycle” standard articulated by

Chidichimo and Leon, would mean that if the appointing authority were to decide to fill any Police Lieutenant vacancies in the interim, it would have to do so through provisional appointments made without regard to merit and fitness ascertained by testing. Further, as noted above, individuals whose names merely appear on a list do not have a vested right to appointment. *See In re Crowley, supra; Schroder v. Kiss, supra.* Thus, there is no basis to suggest that an appointment from a Police *Sergeant* promotional list creates a vested right to be appointed from or even considered for appointment from the next Police *Lieutenant* eligible list. Accordingly, it would be inappropriate to delay the announcement of an examination to allow Chidichimo, Leon and other similarly new Police Sergeants to achieve the one-year time-in-grade requirement set forth in *N.J.A.C. 4A:4-2.6(a)1*. Further, based upon the foregoing and the clear requirement in *N.J.A.C. 4A:4-2.6(a)1* that an applicant have 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, it would be inappropriate to create a special examination announcement to allow Chidichimo, Leon and other similarly situated Police Sergeant incumbents to, in essence, file late applications for the PM3381E examination after they achieve one year of continuous permanent service in the title of Police Sergeant.

Even assuming, *arguendo*, that Chidichimo's and Leon's claim that testing this year would only result in appointments for approximately 25 percent of eligible applicants, it cannot be said that this information constitutes new evidence or additional information which would have changed the outcome of the Commissions' August 2, 2023, decision or demonstrate a clear material error. In its August 2, 2023, decision, the Commission considered the possibility of the appointing authority making no appointments from a list that would promulgate following the PM3381E examination, but found that the totality of the circumstances still favored proceeding with the subject examination. Since candidates whose names merely appear on a list do not have a vested right to appointment, the potential that only a minority of candidates may ultimately be appointed from that list does not, in and of itself, make that examination "wasteful" or necessitate postponing the administration of that examination to a later time. Accordingly, moving forward with the subject examination under the circumstances, to ensure that fully qualified candidates may be appointed from lists rather than untested provisional employees, should vacancies arise, is still preferable and more consistent with the Civil Service law and rules.

As to arguments that the appointing authority failed to meet a May 1, 2023, deadline to request the subject promotional examination, the Commission observes that the deadline specified in the Division of Test Development, Analytics, and Administration's January 2023 Examination Information Alert (EIA) applied to announcements requested by employers. Here, as the announcement was generated in accordance with *In the Matter of Promotional Lists for Public Safety Titles, supra*, rather than at the request of the appointing authority, the Commission does not find that the timing of PM3381E examination announcement constitutes a basis to cancel

the PM3381E examination. Further the July 1, 2023, date referenced in the EIA refers to the issuance of the examination announcement and was not a secondary deadline for the appointing authority to request an examination announcement. As such, it does not preclude the PM3381E examination from proceeding.⁴ Finally, the August 7, 2023, PERC ruling on JCPSOA's unfair practice charge does not demonstrate that the Commission's decision to proceed with the subject examination fails to comport with the Civil Service law and rules.

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 20TH DAY OF SEPTEMBER, 2023

Dolores Gorczyca

Dolores Gorczyca
Presiding Member
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: John Metro (2024-319)
Arthur R. Thibault, Esq. (2024-319)
Peter Wojtowicz

⁴ The Commission observes that any impact to the candidate population that resulted from the PM3381E announcement being held in abeyance appears to have been reasonably mitigated by allowing candidates an additional opportunity to apply between August 2, 2023, and the amended August 15, 2023, filing deadline.

Kyle J. Trent, Esq. (2024-319)
Christopher A Gray, Esq. (2024-319)
Joseph Chidichimo (2024-333)
David Leon (2024-351)
Division of Agency Services
Division of Human Resource Information Services
Records Center