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

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

Submitted September 13, 2016 – Decided March 9, 2017

Before Judges Leone and Vernoia.

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

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

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

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

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

PER CURIAM

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

I.

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

¹ The County takes no position on this appeal.

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

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

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

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

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

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

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

II.

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

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

"(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors."

[Ibid. (citation omitted).]

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

III.

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

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

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

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

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

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

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

A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

C.

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

Although "promotions in the civil service . . . shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive," N.J. Const. art. VII, § 1, ¶ 2, competition is not the sole "philosophy and public policy behind the Civil Service Act," see Loboda v. Township of Clark, 40 N.J. 424, 434 (1963). "Primarily [the Act] was to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment.'" Ibid. (citation omitted); see Martinez, supra, 403 N.J. Super. at 73. "A fundamental purpose of Civil

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

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

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

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

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

IV.

The Commission "seeks comfort in the doctrine that action by the Civil Service Commission will generally not be upset on judicial review unless there is an affirmative showing that it was arbitrary, capricious or unreasonable." Rogers v. Dep't of Civil Serv., 17 N.J. 533, 541 (1955) (citing Falcey v. Civil Serv. Comm'n, 16 N.J. 117, 123 (1954)).⁸ "This doctrine is to be given

⁸ The Commission also cites Falcey's holding that it may "waive competitive examination on grounds of impracticability." Falcey, supra, 16 N.J. at 123. However, the Commission did not waive examinations but retroactively changed their minimum requirements after examinations were conducted. Moreover, nothing suggests it would have been impracticable to make that change before the examinations.

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

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

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

Reversed and remanded.

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


CLERK OF THE APPELLATE DIVISION