

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3804-11T2

IN THE MATTER OF JOSEPH  
NAPOLEONE, CITY OF CLIFTON

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Submitted April 29, 2014 – Decided August 12, 2014

Before Judges Hayden and Rothstadt.

On appeal from the Civil Service Commission,  
Docket Nos. 2010-3996, 2013-3243.

Sciarra & Catrambone, LLC, attorneys for  
appellant/cross-respondent Joseph Napoleone  
(Matthew R. Curran, of counsel and on the  
brief).

Hartmann, Doherty, Rosa, Berman & Bulbulia,  
LLC, attorneys for respondent/cross-  
appellant City of Clifton (Sharon R. Siegel,  
on the brief).

John J. Hoffman, Acting Attorney General,  
attorney for respondent Civil Service  
Commission (Todd A. Wigder, Deputy Attorney  
General, on the statement in lieu of brief).

PER CURIAM

Petitioner Joseph Napoleone appeals the Civil Service  
Commission's February 23, 2012 Final Action denying his request  
to take a make-up examination for an expired promotional list.  
Respondent City of Clifton (City) cross-appeals the Final

Action's granting of petitioner's request for attorneys' fees in connection with several disciplinary actions.

In an earlier litigation, petitioner sued his employer, the City's police department (Department), for multiple violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, and 42 U.S.C.A. § 1983. He specifically alleged that the department filed baseless disciplinary charges against him, and bypassed him for promotion, as a result of his "whistle-blowing" activities. Petitioner succeeded in that litigation and, as a result, was promoted to the position of sergeant, received a retroactive date of appointment, and was awarded back-pay as a result of his bypass claim.

During the pendency of the litigation, the Department announced an examination for promotion to lieutenant. Petitioner was ineligible to take the examination because he had not yet been promoted to sergeant, and had not in fact served in that position for the requisite one-year period. Following his promotion to sergeant, petitioner filed a motion to take a make-up examination for the lieutenant position; and argued that he satisfied the requirement of one year's service because of his retroactive appointment date to the position of sergeant. The Law Division would not decide the matter, because the Commission was not party to the action. Petitioner then filed a claim with

the Commission, which ultimately denied the application because petitioner did not in fact serve as sergeant for the requisite one year period. Petitioner then filed this appeal from that determination.

After he filed this appeal, petitioner tested for, and ranked first on a later lieutenant promotional exam and he was promoted to lieutenant. He nevertheless continued to pursue his appeal of the Commission's decision so that he could obtain an earlier date of appointment as a lieutenant and receive the corresponding increase in his salary and benefits. On appeal, petitioner argues that the commission's decision was arbitrary and capricious and that he is entitled to take a make-up test for the earlier lieutenant's position, "based on the broad remedial purpose of CEPA and N.J.A.C. 4A:4-3.4." The City argues that we should affirm the Commission's decision because petitioner's request is now moot and, if not moot, the decision was not arbitrary or capricious.

In its cross-appeal, the City challenges the Commission's granting petitioner's request for counsel fees relating to the disciplinary actions that were found to violate CEPA. The City argues that the commission's award of counsel fees was "erroneous" because it was precluded by the Law Division's action in its underlying case. Petitioner disagrees and argues

that the award was within the Commission's authority. The Commission states that it ruled properly and its decision was supported by the facts and applicable law. We now affirm both decisions.

Petitioner has been a member of the Department for over ten years. During that time, he lodged numerous complaints with the Department, alleging misconduct by his peers and superior officers. He alleges that as a result, he was subject to harassment by his fellow officers, and the object of various adverse employment actions by the Department, including multiple disciplinary actions and internal affairs investigations, some leading to suspensions. These investigations led to several departmental hearings, followed by appeals to the Commission, throughout which petitioner was represented by counsel.

One of the Department's retaliatory actions was to bypass petitioner for promotion to sergeant. He applied for and obtained the eighth ranked position on an eligibility list for promotion from patrolman to sergeant. He was not, however, promoted as only three certifications for appointments were issued by the City, to those who ranked first through seventh.

In June 2005, petitioner filed an action in the Law Division alleging the department's collective actions and failure to promote him were in retaliation for his "whistle-

blowing" activities and were therefore in violation of CEPA and 42 U.S.C.A. § 1983. The matter was tried before a jury, presided over by Judge Ralph L. DeLuccia, Jr. The jury returned a verdict finding the Department had retaliated against petitioner in violation of CEPA and § 1983. A final order of judgment was entered on August 18, 2009, awarding petitioner a total \$283,685.75 for back pay resulting from his suspensions, emotional distress damages, back pay from his failure to promote claim, and pre-judgment interest. Petitioner was also awarded a total \$698,416.66 for attorneys' fees and litigation costs.

While the litigation was pending, the City announced a lieutenant examination with a closing date of June 21, 2008, and a promotional list (PM2513K) to be promulgated from March 19, 2008 to March 18, 2012 (March 2008 lieutenant list). The examination was open to individuals with one year of continuous service in the rank of sergeant as of the closing date. Because petitioner had not been promoted to sergeant by the closing date, he was unable to take that examination.

After the entry of the final order of judgment, petitioner filed a motion for equitable relief pursuant to CEPA, seeking inter alia 1) promotion to the rank of sergeant, with a retroactive date of appointment, 2) an order to stay any promotions off the March 2008 lieutenant list pending

petitioner's taking a make-up exam for the list. Judge DeLuccia conducted a hearing on March 27, 2009 and later granted the motion in part. Specifically, it was ordered,

that [Petitioner] . . . will be the next Clifton Police Officer promoted to the position of Sergeant pursuant to the "rightful place" theory, and that [he] will receive full back pay consisting of the difference from his present pay as a Police Officer and the pay he should be receiving as a Sergeant from May 17, 2006 to the date of his promotion . . . and [he] shall receive full seniority and fringe benefits as if he was promoted on January 1, 2006.

In accordance with the order, the Commission revived the December 2002 sergeant list (PM2519D) in order to effectuate petitioner's appointment. He was appointed to the rank of sergeant on March 1, 2009, and received a retroactive date of permanent appointment of January 1, 2006.

The court also ordered,

that Petitioner's requested relief that (1) Defendants should be stayed from promoting candidates from the 2009 Lieutenant's list<sup>1</sup> until Petitioner takes the test, and (2) the Civil Service Commission should be directed to administer a make-up examination to Petitioner for the 2009 Lieutenant's test is denied.

Judge DeLuccia reasoned that he could not grant relief with respect to the Commission because it was not a party to the

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<sup>1</sup> Likely a typo, as petitioner was requesting a makeup examination for the March 2008 lieutenant list.

action, had not been "noticed" with respect to the application, or was not represented at the hearing.

Petitioner subsequently petitioned the Commission, seeking to take a make-up examination for the March 2008 lieutenant list. He argued that, based on his retroactive date of appointment to the position of sergeant effective January 1, 2006, he should have been eligible to take the examination as of the June 2008 closing date. In response, the City argued that the Law Division had denied this request in its May 2009 order, and that that ruling was binding on the Commission.

On February 23, 2012, the Commission issued a Final Administrative Action (Final Action) denying petitioner's request for a make-up examination, noting he "did not begin serving in or performing the duties of a Police Sergeant until March 1, 2010, which was well after the June 2008 closing date for the Police Lieutenant (PM2513K) examination." As the Commission stated, "[I]t is settled that the award of a retroactive date of permanent appointment for equitable reasons cannot be used to establish examination eligibility."

Our scope of review is limited: we defer to administrative agency decisions, which should be reversed only on a "clear showing" that the decision was "arbitrary, capricious, or unreasonable." Circus Liquors, Inc. v. Governing Body of

Middletown Twp., 199 N.J. 1, 9 (2009). Accordingly, our review is generally restricted to three inquiries:

(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.

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

Still, "our appellate obligation requires more than a perfunctory review." Blackwell v. Dep't of Corr., 348 N.J. Super. 117, 123 (App. Div. 2002). Our role is not merely to "rubber-stamp" an agency's actions, but "to engage in a 'careful and principled consideration of the agency record and findings.'" Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000) (quoting Mayflower Sec. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). "[I]f there exists in the reviewing mind a definite conviction that the determination below went so wide of the mark that a mistake must have been made, the record can be appraised as if the matter were being decided at its inception." 613 Corp. v. State, Div. of State Lottery, 210 N.J. Super. 485,



495 (App. Div. 1986) (citing Mayflower, supra, 64 N.J. at 93; State v. Johnson, 42 N.J. 146, 161-62 (1964)).

From our review, we are satisfied that petitioner's claim that he should be permitted to take a make-up examination for the March 2008 lieutenant's list, in light of CEPA's purpose and N.J.A.C. 4A:4-3.4, is without merit and unsupported by the facts or law. CEPA's purpose is to protect and encourage "whistle-blowing" employees from retaliatory action by their employers. Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994). "Because CEPA is remedial legislation, it must be liberally construed to effectuate its important social goal." Donelson v. DuPont Chambers Works, 412 N.J. Super. 17, 29 (App. Div. 2010) (citing Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003); Abbamont, supra, 138 N.J. at 431). Where a petitioner prevails on a CEPA claim, the court should grant the following relief, "where appropriate and to the fullest extent possible:"

- a. An injunction to restrain any violation of this act which is continuing at the time that the court issues its order;
- b. The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;
- c. The reinstatement of full fringe benefits and seniority rights;
- d. The compensation for all lost wages, benefits and other remuneration; and

e. The payment by the employer of reasonable costs, and attorney's fees.

[N.J.S.A. 34:19-5.]

In this case, the court did not specifically decide if the grant of a make-up exam was "appropriate," as the Commission was not party to the action. However, petitioner relied on the court's earlier order, that "[Petitioner] shall receive full seniority and fringe benefits as if he was promoted on January 1, 2006" to establish his eligibility for the earlier lieutenant's examination. Additionally, petitioner argues the Commission should have granted his request for a make-up examination, pursuant to N.J.A.C. 4A:4-3.4, which provides that an expired eligible list may be revived under the following circumstances:

1. To implement a court order, in a suit filed prior to the expiration of the list;
2. To implement an order of the Commissioner or Board in an appeal or proceeding instituted during the life of the list;
3. To correct an administrative error;
4. To effect the appointment of an eligible whose working test period was terminated by a layoff; or
5. For other good cause.

Petitioner specifically argues he is entitled to a make-up exam under point number five, "[f]or other good cause."<sup>2</sup> We are not, however, persuaded by these arguments.

Pursuant to N.J.A.C. 4A:4-2.6(a)(1), "Applicants for promotional examinations shall . . . [h]ave one year of continuous permanent service for an aggregate of one year immediately preceding the closing date in a title or titles to which an examination is open." The Commission has discretion to "relax [the Civil Service] rules for good cause in a particular situation, in order to effectuate the purposes of Title 11A, New Jersey Statutes." N.J.A.C. 4A:1-1.2(c). Additionally, the Commission has discretion to approve or disapprove a retroactive appointment, even if to correct an administrative error or delay, or for other good case. N.J.A.C. 4A:4-1.10.

The Commission has consistently enforced the one year of service requirement, except under limited, unique circumstances. "Although the Commission's interpretation is not necessarily controlling, . . . [w]here the Commission's interpretations [of the administrative code] has continued over a period of years without legislative interference they have been given great weight as evidence of the Legislature's intent" behind the law

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<sup>2</sup> And notably, does not argue under point number one, "To implement a court order."

and regulations. Makowitz v. State, Dep't of Civil Service, 177 N.J. Super. 61, 65 (App. Div. 1980) (citing Malone v. Fender, 80 N.J. 129, 137 (1979); Pringle v. Civil Service Dep't, 45 N.J. 329, 333 (1965)), certif. denied, 87 N.J. 326 (1981). Our review of the Commission's decisions reveals that it has declined to let retroactively-appointed employees take examinations where they did not in fact serve in and perform the duties of the title to which the examination is open during the requisite time period. See In re Daniel O. Errickson, Corr. Sergeant (PS5613I), Dep't of Corr., DOP Docket No. 2006-2031; In re Albert Giordano, Sheriff's Officer Lieutenant (PC2502F), Middlesex Cnty., DOP Docket No. 2004-4046; In re David J. Barrett, Fire Captain (PM3511E) and Robert F. O'Neill and Anthony J. Verly, Deputy Fire Chief (PM3590D), DOP Docket No. 2004-1335.

However, in In re Christopher Szczygiel, Fire Captain (PM3524E), City of Passaic and Deputy Fire Chief (PM3618G), City of Passaic, DOP Docket Nos. 2005-1345, 2005-3165, the commission deviated from its policy. In that case, a retroactively-appointed employee was conditionally admitted to an expired promotional examination, despite not in fact meeting the one-year requirement. Petitioner Szczygiel had tested for and ranked second on an eligibility list for promotion to the

position of Fire Captain. His employer bypassed him in issuing appointments. He then sued and eventually entered a settlement agreement with his employer, over the claim that he had been bypassed. Under the terms of the agreement, Szczygiel was promoted and given a retroactive date of appointment. Additionally, it was agreed that he could take an examination for promotion to Deputy Fire Chief that had expired before Szczygiel was appointed to captain. Both Szczygiel and his employer requested that the Commission allow him to sit for the Fire Chief examination.

The Commission ultimately granted the request, despite the fact that Szczygiel did not in fact serve one year in requisite position. In its decision, however, the Commission cited the judicial policy that strongly favored settlement agreements, and the fact that Szczygiel had in fact served as Captain for one year and ten months at the time of his application. Finally it noted "that this remedy is limited to the unique facts of this case and does not provide precedent in any other matter."<sup>3</sup>

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<sup>3</sup> That decision was later challenged in In re Martinez, 403 N.J. Super. 58 (2008). In that case, a fire captain tested for and placed highest on the list of eligibles for promotion to Fire Chief. Id. at 61. However, an appointment was given to Szczygiel over him, in accordance with Szczygiel's settlement agreement with the City. Id. at 63-66. We ultimately affirmed the Commission's relaxation of the one-year-in-grade requirement regarding Szczygiel ability to take the exam and place on the

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That limited exception to its otherwise consistent application of its regulations does not persuade us that the Commission abused its discretion in not relaxing the one-year-in-grade requirement to allow petitioner to take the previous lieutenant's examination. The Final Action was consistent with its previous decisions, and the exception in Szczygiel, supra, was based upon a joint request made by the parties. We are satisfied there is no reason to disturb the Commission's decision in this case.

Turning next to the City's cross-appeal, it challenges the Commission's award of counsel fees to petitioner in connection with the departmental hearings and appeals arising out of the department's disciplinary actions against him. After the Law Division's final order of judgment, petitioner sought counsel fees and costs as a prevailing petitioner under CEPA. On May 8, 2009, the court ordered,

that the following disciplinary adjudications have been found to be retaliatory actions under the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, et seq., against Petitioner and the adjudications only are dismissed, removed and expunged from Defendants' files

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list; however, we vacated the Commission's decision insofar as it could be read to guarantee Szczygiel's promotion to the job. Id. at 74-79.

regarding Petitioner: the Entin Road discipline (an eight work day suspension), the Kohl's discipline (a ten work day suspension), the Barbara Gioia discipline (a three work day suspension), the two Captain Giardina disciplines (a fifty work day suspension), and the Ruben Pagan discipline (a forty-five work day suspension).

On August 5, 2009, the court heard arguments on the issue of distinguishing between fees incurred in defending against the disciplinary actions, and in pursuing the CEPA claim.

Addressing petitioner's counsel, the court determined that,

What you're entitled to . . . is the time you spend in reviewing the documents, the IA file, the charges, the specifications, and any other discovery that you may have engaged in in terms of developing a full understanding of the case that Clifton was preparing against your client. I'm not going to allow you the time that you spent at the hearing, because I think that is strictly devoted to the defense of these charges. I'm not going to allow you the time with . . . labor counsel because those are strictly matters that relate to the labor – management relations issue between your client and Clifton as a result of those charges.

So there's – there's charges in here with . . . correspondence to the OAL. Again, none of that should be allowed because they are strictly limited to the . . . matter pending before the administrative hearing.

By order dated August 18, 2009, Judge DeLuccia granted in part and denied in part petitioner's application for attorneys' fees. Specifically, the order provided that "litigation

expenses of \$38,846.75 are awarded, but the disciplinary expenses of \$6,592.59 are disallowed."

Petitioner thereafter requested that the Commission grant him the remaining counsel fees and costs, specifically arising from the disciplinary actions found to be in violation of CEPA. The City opposed the application, arguing that 1) the August 18 order denied petitioner's application for attorneys' fees arising from the disciplinary actions (and this somehow precluded an application to the Commission); and 2) petitioner "elected his remedies when he pursued his civil claims in the Superior Court of New Jersey," and therefore the "Commission lacks jurisdiction to even entertain the relief requested."

In the Final Action, the Commission granted petitioner's request for counsel fees arising out of the disciplinary actions which ultimately reached the Commission on appeal. N.J.A.C. 4A:2-2.12(f). The Commission awarded petitioner \$38,613.75 after making several deductions to the amount demanded by petitioner. The City cross-appealed the decision, as above-noted, and we subsequently remanded the matter for the Commission's reconsideration. In its decision on remand, the Commission reiterated that the August 18 order "did not preclude the further award of counsel fees in this forum." The Commission felt that the award was proper even if petitioner



elected to have the Superior Court determine his remedies.

Furthermore,

[T]he Commission [could] not ignore the fact that the disciplinary matters in question were ultimately found by a jury to be CEPA violations and retaliatory in nature. . . . The fact that he chose to pursue a CEPA claim due to the particular incidents he was complaining about should not preclude him from receiving counsel fees for his proper defense during the departmental hearing and filing of administrative appeals once he ultimately won his case in Superior Court. . . . In this matter, to deny Napoleone counsel fees he expended for the sole purpose of defending himself from charges that were ultimately found to be retaliatory in nature would be an improper burden on an employee defending himself against unjust disciplinary charges and could have a chilling effect on potential future claims of unlawful retaliation against public employees.

We agree. And, we are satisfied that the Commission acted within its authority to award the fees associated with disciplinary actions that reached the Commission, notwithstanding the Law Division's order.

"The Civil Service Commission may award . . . reasonable attorney fees to an employee as provided by rule." N.J.S.A. 11A:2-22. It "shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an

employee has prevailed on all or substantially all of the primary issues before the Commission." N.J.A.C. 4A:2-2.12(a).

Therefore, in this case, the Commission was authorized to grant petitioner's request for attorneys' fees, if reasonable. Neither the August 18 order, nor petitioner's election to sue in Superior Court, precluded the Commission from doing so.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION