



B-18

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Lawrence Gioconda,  
City of Elizabeth

CSC Docket No. 2015-3174

Request for Reconsideration  
Request for a Stay

ISSUED: JUL 31 2015 (DASV)

Lawrence Gioconda, represented by David B. Beckett, Esq., requests reconsideration of the attached decision, *In the Matter of Todd Kelly, et al.* (CSC, decided May 6, 2015), which rescinded a third appointment from the January 13, 2014 certification of the Police Lieutenant (PM5107M), City of Elizabeth, eligible list. Additionally, the petitioner requests a stay of the decision.

By way of background, Todd Kelly, James Kearns, and Gerard McDonald (the appellants), Police Sergeants who appear on the current Police Lieutenant (PM1462R), City of Elizabeth, eligible list,<sup>1</sup> challenged the three appointments made from the last certification of the expired Police Lieutenant (PM5107M) eligible list.<sup>2</sup> The appointing authority appointed Jose Rodriguez, Michael Niewinski, and the petitioner, who ranked one through three, respectively, on the January 13, 2014 certification, effective April 1, 2014. The appellants asserted that as of the issuance of the certification, there was only one vacancy; thus, any other vacancies should have been filled from the subsequent Police Lieutenant (PM1462R) eligible list. In response, the appointing authority stated that, at the time it requested a certification, there were two known vacancies. There was also one vacancy for Police Captain, which the appointing authority filled with a Police Lieutenant. However, the ordinance of the City of Elizabeth set the number of Police Lieutenant positions at 21, and by appointing three Police Lieutenants, the appointing authority exceeded its allowance by one position. The appointing authority clarified

<sup>1</sup> PM1462R promulgated on February 6, 2014 and does not expire until February 5, 2017.

<sup>2</sup> PM5107M promulgated on February 3, 2011 and expired on February 2, 2014.

that, at that time and due to potential administrative and criminal issues involving, among others, Police Captains, it determined that it would be inappropriate to fill the Police Captain vacancy. However, later in the proceedings, the appointing authority submitted that Police Captain Daniel Saulnier, who had been appointed as a Police Captain on October 1, 2014, was given a retroactive date of appointment, effective April 1, 2014, which in turn created a third vacancy for Police Lieutenant. Upon its review, the Civil Service Commission (Commission) found that there were only two legitimate vacancies that could be filled from the subject certification. As for the third Police Lieutenant appointment, the Commission stated that while the appointing authority had the discretion not to fill the Police Captain vacancy, it did not provide the appointing authority with the ability to appoint a Police Lieutenant where no established position existed for that title. The Commission emphasized that a subsequent amendment to a City's ordinance creating additional positions could serve to retroactively ratify an appointment. However, no ratifying ordinance had been passed. The Commission also noted that if one of the Police Lieutenant positions was indeed being "re-purposed" and performing Police Captain work, then the position actually was not a Police Lieutenant. The position should have been either filled by the making of a regular appointment from an existing eligible list for Police Captain or left vacant. As for the retroactive date of appointment of Saulnier, the Commission indicated that the appointing authority had no authority to unilaterally effect a retroactive appointment. It must be approved by the Commission, and under the circumstances presented, such a retroactive appointment was not warranted. Therefore, the Commission rescinded the third Police Lieutenant appointment and directed that the certification be returned to the appointing authority for proper disposition in accordance with the "Rule of Three." However, the Commission granted no specific relief to Kelly, Kearns, or McDonald. *See In the Matter of Todd Kelly, supra.*

It is noted that the appointing authority returned the subject certification on June 18, 2015 and appointed Rodriguez and Niewinski effective April 1, 2014. Consequently, the petitioner's appointment was rescinded.

In the instant matter, the petitioner maintains that the Commission's decision is in error, as it is inconsistent with the facts and the law. Moreover, he contends that a stay pending the determination of the instant matter should be granted because it will preserve the status quo, which has existed for more than a year. Additionally, the petitioner argues that a stay would not cause substantial injury to any other party, but it would ensure that the effective operation of the Police Department would not be compromised. The petitioner also contends that there is a clear likelihood of success on the merits of his case. Specifically, he asserts that the Commission "ignored or missed" the evidence in the record, which shows that there were only 21 superior officers who were functioning as Police Lieutenants since Daniel Geddes<sup>3</sup> was actually functioning as a Police Captain at

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<sup>3</sup> Geddes was appointed as a Police Lieutenant on April 1, 2013.

the time of the certification. Geddes had been serving as the supervisor of the Internal Affairs Division, which the appointing authority submitted was “previously and normally assigned” to a Police Captain. The petitioner claims that Geddes was performing the same work which Saulnier now performs as a Police Captain. Geddes did not have a superior officer above him when he was in charge of the Internal Affairs Division. It is noted that the appointing authority did not specifically name Geddes in its submissions in the prior matter. Furthermore, the petitioner argues that under Civil Service regulations, Geddes’ position should have been classified as a Police Captain. He also maintains that the only reason why the third appointment was not permitted by the Commission was due to its erroneous finding that there was no opening in the rank of Police Lieutenant for the third appointment to fill. However, he submits that Geddes’ position was functioning as a Police Captain, and thus, the third appointment to Police Lieutenant could be made. The petitioner indicates that the appointing authority’s concerns regarding the pending investigations of the Police Captains should not be held against him or the two other Police Lieutenant appointees because there was in fact a vacant Police Lieutenant position as of April 1, 2014. Thus, the petitioner reiterates that the facts show that there were 21 superior officers working as Police Lieutenants and nine individuals working as Police Captains, which did not exceed the Table of Organization. He indicates that the Commission should not be confused by Saulnier’s retroactive appointment to deny him the third Police Lieutenant appointment, since Geddes was performing as a Police Captain prior to Saulnier’s appointment.

In support of his request, the petitioner submits a memorandum from the Police Chief, dated September 24, 2014, reassigning Geddes to the “Detective Bureau-Lieutenant Day Shift” and Saulnier to the “Captain Internal Affairs Division” on September 29, 2014. The petitioner contends that this reassignment demonstrates that Saulnier was performing the same duties as Geddes, which are Police Captain duties. The petitioner further indicates that he should continue to serve as a Police Lieutenant, and all other personnel should remain in place, so that there will not be any negative impact to the Second Amended Consent Decree.<sup>4</sup> In that regard, the petitioner asserts that his return to the Police Sergeant rank would result in more Police Sergeants serving than allowed by the governing ordinance,

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<sup>4</sup> The Second Amended Consent Decree, which was filed on November 22, 2011, was a result of a complaint filed by the United States Department of Justice against the State of New Jersey and the Commission, alleging that the Police Sergeant promotional examination, which is administered by the Commission, discriminated against African Americans and Hispanics as evidenced by a statistical analysis of the examination results and appointments from the resultant lists from 2000 to 2009, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended. Subsequently, the parties agreed to settle the lawsuit. The terms of the settlement were in the form of consent decrees. The City of Elizabeth was to appoint three African Americans and three Hispanics to Police Sergeant positions through priority certified lists.

which may undermine the recent promotions to Police Sergeant that were required by the consent decree.

In response, Kelly, Kearns, and McDonald, represented by Bruce Leder, Esq., dispute that a clear material error occurred. They also challenge the petitioner's stay request, as there is no showing of immediate or irreparable harm and the petitioner is not likely to succeed on the merits of his case. In regard to the latter, the appellants submit that there is no support in the record that a Police Lieutenant was actually serving as a Police Captain, as the petitioner fails to identify which duties or responsibilities would establish that a Police Lieutenant was serving as a Police Captain. Further, the appellants contend that there is no evidence that Geddes or Saulnier filed a grievance that he should have been paid a Police Captain's salary at the time. Furthermore, the appellants emphasize that neither Geddes nor Saulnier filed a desk audit to reclassify their position to Police Captain. Rather, the appellants maintain that the appointing authority appointed three Police Lieutenants and exercised its discretion not to fill a vacant Police Captain position. Thus, they contend that the Commission properly determined that Saulnier was not actually working as a Police Captain, nor was any other Police Lieutenant. Additionally, the appellants argue that the only harm that may come to the petitioner is monetary, which is not considered irreparable and can be remedied with an award of back pay. Moreover, the appellants continue to oppose the petitioner's Police Lieutenant appointment. They note that if he were to remain a Police Lieutenant and a Police Lieutenant retires in the interim, then harm is created to all those seeking the vacant Police Lieutenant position. There would no longer be a vacant position since the maximum number of positions would be filled by the petitioner's appointment. In addition, the appellants maintain that the reason for the requirement that a municipality has an ordinance setting the number of positions is to protect the public. Permitting the petitioner to remain a Police Lieutenant would violate the public interest. They note that while the petitioner has done nothing wrong and it was the appointing authority which violated the law, the petitioner's demotion is unavoidable.

Despite the opportunity, the appointing authority and the other parties did not respond.

### CONCLUSION

*N.J.A.C. 4A:2-1.6(b)* sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. A review of the record in the instant matter reveals that reconsideration is not justified.

Initially, there is no dispute that there are only 21 Police Lieutenant positions set by the City of Elizabeth's ordinance. In accordance with *Reuter v. Borough of Fort Lee*, 167 N.J. 38, 43 (2001), the New Jersey Supreme Court declared "[t]hus, from today forward no appointment may be made to any police department position not created in accordance with N.J.S.A. 40A:14-118." Thus, the appointing authority was not able to appoint a third Police Lieutenant from the January 13, 2014 certification of the Police Lieutenant (PM5107M) eligible list, as there would then be 22 Police Lieutenants. In the instant matter, the petitioner asserts that Geddes, a Police Lieutenant, was actually performing the duties of a Police Captain at the time of the subject certification, and his post as the supervisor of the Internal Affairs Division was then filled by Saulnier, who eventually was appointed as a Police Captain effective October 1, 2014. Thus, the petitioner claims that Geddes' situation created a vacant Police Lieutenant position, which the Commission either "ignored or missed."

The Commission did not ignore or miss this situation. Rather, it indicated in the attached decision that:

. . . if it is true that one of the Police Lieutenant positions was being 're-purposed' and performing Police Captain work, then the position actually was not a Police Lieutenant. The position should have been either filled by the making of a regular appointment from an existing eligible list for Police Captain or left vacant. In addition, it is not clear from the record as to whether Rodriguez, Niewinski, Gioconda or another individual serving as a Police Lieutenant was actually performing the alleged Police Captain work. Nonetheless, it was unlawful to make a regular appointment for a third Police Lieutenant position where it had not been established.

The fact remains that the appointing authority did not appoint a Police Captain as of April 1, 2014. While the appointing authority attempted to give Saulnier a retroactive date of appointment, as set forth by the Commission in its prior decision, the circumstances did not warrant making such an appointment. The petitioner's submission also makes it clear that Saulnier was not reassigned to the "Captain Internal Affairs Division" until September 29, 2014. Thus, there is nothing in the record to demonstrate that Saulnier was working as a Police Captain as of April 1, 2014. Moreover, in order to verify whether Geddes was indeed performing Police Captain duties, a review of Geddes' position would have been necessary pursuant to N.J.A.C. 4A:3-3.9. It is noted that the foundation of position classification, as practiced in New Jersey, is the determination of duties and responsibilities being performed at a given point in time as verified by this agency through an audit or other formal study. Classification reviews are based on a current review of assigned duties and any remedy derived therefrom is prospective in nature since duties which may have been performed in the past cannot be

reviewed or verified. There is no indication in the record that Geddes requested a review of his position, nor has the petitioner disputed the appellants' assertion regarding Geddes' salary. It is noted that it is not uncommon for an employee to perform some duties which are above or below the level of work which is ordinarily performed. In this case, the appointing authority assigned Geddes, a Police Lieutenant, to serve as the supervisor of the Internal Affairs Division. It did not make him a Police Captain.<sup>5</sup> Accordingly, the petitioner's arguments are unpersuasive and he has not shown that a clear material error has occurred or presented any additional information which would change the outcome of the case. Thus, his request for reconsideration is denied. Since the Commission has denied the petitioner's request and the appointing authority has properly returned the subject certification, the petitioner's request for a stay is dismissed as moot.

Additional comment is warranted based on current employment records. A review of agency records indicates that, with the appointment of Saulnier, there are currently nine Police Captains, which are permitted by the governing ordinance. There are 19 Police Lieutenants, which does not include the petitioner and takes into account Saulnier's later appointment on October 1, 2014 to Police Captain and another individual's retirement on March 1, 2015. Thus, since there may be 21 Police Lieutenants, any appointment to this title **at this time** must be made from the current Police Lieutenant (PM1462R) eligible list. Furthermore, with the petitioner's return to Police Sergeant, there would be 41 Police Sergeants, but only

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<sup>5</sup> Even if Geddes was performing the duties of a Police Captain, there is no such designation as an "acting" appointment under Civil Service rules. *N.J.S.A. 11A:4-13* and *N.J.A.C. 4A:4-1 et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. Thus, if an audit of Geddes' position were conducted and confirmed that he was performing the duties of a Police Captain, Geddes would be considered serving provisionally pending promotional examination procedures as a Police Captain based on that classification determination. However, these Police Captain duties could be removed by the appointing authority pursuant to *N.J.A.C. 4A:4A:3-3.5(c)1*, which provides in relevant part that the "appointing authority shall either effect the required change in the classification of an employee's position; assign duties and responsibilities commensurate with the employee's current title; or reassign the employee to the duties and responsibilities to which the employee has permanent rights." As indicated in the prior decision, the appointing authority had no intention of appointing a Police Captain at the time of the subject certification. In addition, Geddes would not have been qualified to file for the next Police Captain examination after his appointment as a Police Lieutenant. The Police Captain (PM1534R) examination was announced on June 1, 2013 with a closing date of August 31, 2013. The announcement was open to Police Lieutenants who had one year of continuous permanent service in that title. Geddes was only appointed as a Police Lieutenant on April 1, 2013. It is also noted that Geddes to date has not appeared on a Police Captain eligible list. Thus, there would not be a valid vacant position since Geddes would most likely remain a Police Lieutenant. Alternatively, assuming that the provisional appointment was made and in order for there to be a vacant Police Lieutenant position for the petitioner to fill as of April 1, 2014, the prior Police Captain (PM3528J) eligible list, which promulgated on March 7, 2008 and expired on April 2, 2014 would have to be certified. However, as emphasized, the appointing authority was not interested in appointing a Police Captain at that time. Moreover, Saulnier did not appear on the Police Captain (PM3528J) eligible list. He appeared on and was appointed, effective October 1, 2014, from the subsequent (PM1534R) eligible list, which promulgated on April 3, 2014 and expires on April 2, 2017.

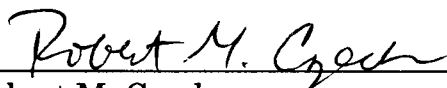
39 Police Sergeants are authorized by the ordinance. There were six recent appointments made to Police Sergeant effective April 30, 2015. The petitioner argues that his return to a Police Sergeant position would negatively affect these appointments made in accordance with the Second Amended Consent Decree. However, appointments, regardless if they are considered priority appointments, cannot be made if there are no positions established by a governing ordinance. Appointments are also considered conditional pending the outcome of an appeal. See *N.J.A.C. 4A:4-1.4*. Therefore, this matter is being referred to the Division of Agency Services, pursuant to *N.J.A.C. 4A:4-1.10(a)*,<sup>6</sup> for review and appropriate action to ensure that the number of positions encumbered by police personnel in the City of Elizabeth Police Department does not exceed the number allowed by the governing ordinance.

### ORDER

Therefore, it is ordered that this request for reconsideration be denied and the request for a stay be dismissed as moot. It is further ordered that the matter of police personnel appointments be referred to the Division of Agency Services for review and appropriate action in accordance with this decision.

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 29<sup>TH</sup> DAY OF JULY, 2015

  
Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

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<sup>6</sup> *N.J.A.C. 4A:4-1.10(a)* states that all initial and subsequent appointments, promotions, and related personnel actions in the career, unclassified, or senior executive service are subject to the review and approval of the Commission.

**Attachment**

c:    **Todd Kelly**  
      **James Kearns**  
      **Gerard McDonald**  
      **Bruce Leder, Esq.**  
      **James Cosgrove**  
      **Raymond Bolanowski, Esq.**  
      **Michael Niewinski**  
      **Craig Gumpel, Esq.**  
      **Lawrence Giaconda**  
      **David Beckett, Esq.**  
      **Jose Rodriguez**  
      **Daniel Saulnier**  
      **Kenneth Connolly**  
      **Dan Hill**  
      **Joseph Gambino**  
      **Beth Wood**





STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Todd Kelly, *et al.*,  
City of Elizabeth

CSC Docket Nos. 2014-2580, 2014-  
2582, and 2014-2583

Administrative Appeals

ISSUED: **MAY 06 2015** (DASV)

Todd Kelly, James Kearns, and Gerard McDonald, Police Sergeants with the City of Elizabeth, represented by Bruce Leder, Esq., challenge appointments made from the January 13, 2014 certification of the Police Lieutenant (PM5107M), City of Elizabeth, eligible list.

By way of background, the Police Lieutenant (PM5107M), City of Elizabeth, eligible list promulgated on February 3, 2011 and expired on February 2, 2014. On January 13, 2014, the appointing authority completed a Request for Certification form, asking that the names of the next three eligibles on the list be certified for three vacancies. The certification was issued on January 13, 2014 with the names of Jose Rodriguez, Michael Niewinski, and Lawrence Gioconda, who ranked one through three, respectively, on the certification. The certification had a disposition due date of April 14, 2014. The appointing authority returned the certification on that date, indicating that the eligibles were appointed effective April 1, 2014. In the meantime, the next Police Lieutenant (PM1462R), City of Elizabeth, eligible list promulgated on February 6, 2014 with an expiration date of February 5, 2017. The appellants Kelly, Kearns, and McDonald are ranked one, two, and four, respectively, on the (PM1462R) eligible list. Gioconda also appears on the (PM1462R) eligible list in rank 12. No certifications have been issued from that list.

In the instant matter, the appellants challenge the January 13, 2014 certification request as "false and inaccurate" in violation of *N.J.A.C. 4A:10-1.1(d)*. They contend that, as of January 13, 2014, there was only one vacancy for Police Lieutenant and not three. Although the appellants submit that a second vacancy

occurred on March 1, 2014 due to a retirement, they argue that, pursuant to *N.J.A.C.* 4A:4-4.8(b), the vacancy did not extend or toll the February 2, 2014 expiration of the Police Lieutenant (PM5107M) eligible list. Moreover, the appellants maintain that this agency did not make a determination that there was a need for a certification in violation *N.J.A.C.* 4A:4-4.2(a). Therefore, they contend that the appointing authority's reliance on an expired list "obstructed" their "lawful opportunity to participate in the selection and appointment process" in violation of *N.J.A.C.* 4A:10-1.1(c). Accordingly, they request that two of the three promotions from the subject certification be voided, the appointing authority be ordered to appoint one of the top three eligibles from the current Police Lieutenant (PM1462R) eligible list, and the appointing authority be assessed costs, charges, and fines.

In response, the appointing authority, represented by Raymond Bolanowski, Esq., First Assistant City Attorney, states that at the time it requested a certification, there were two vacancies for Police Lieutenant known to the Police Department. The vacancies occurred on April 1, 2013 and March 1, 2014 due to retirements. The appointing authority explains that it was aware of the March 1, 2014 retirement date of Michael Delancey since, on August 6, 2013 prior to the issuance of the subject certification, he contacted the appointing authority and asked when was the earliest date he could retire. The appointing authority informed him that the date was March 1, 2014. Delancey subsequently filed for retirement on February 11, 2014. Additionally, the appointing authority notes that there was one vacancy for Police Captain which it instead filled with a Police Lieutenant. The Table of Organization allowed for nine Police Captains and there were only eight positions encumbered at that time. The appointing authority asserts that it "did not intend to fill the [Police Captain] vacancy . . . and has not done so" (as of its July 18, 2014 response). It states that "the vacant [C]aptain's position should be allowed to be filled by the third appointment to Lieutenant." It is noted that the ordinance of the City of Elizabeth sets the number of Police Lieutenant positions at 21. By appointing three Police Lieutenants on April 1, 2014, the appointing authority exceeded its allowance by one position. Furthermore, the appointing authority argues that regardless of whether it had two additional vacant Police Lieutenant positions at the time of the certification request, it was entitled to have a complete certification of three eligibles. It also emphasizes that it was given until April 14, 2014 to dispose of the certification. Therefore, it maintains that the second appointment from the certification was in accordance with Civil Service rules. Additionally, the appointing authority asserts that it properly exercised its discretion in making the third appointment.

In reply, the appellants contend that, although Delancey inquired about his retirement date on August 6, 2013, he did not at that time "express any desire to retire." It was only on February 11, 2014 when Delancey filed for retirement did he advise the appointing authority "for the very first time that he was going to retire on March 1, 2014." The appellants note that Delancey himself did not know he was

going to retire when the appointing authority requested a certification on January 13, 2014. He had been on leave at that time and returned from leave on February 2, 2014, intending to continue to work. Further, the appellants reply that a vacant Police Captain position is not a vacancy for Police Lieutenant, and the appointing authority presents "the unique and unsupported theory that it did not exceed the Table of Organization" for the Police Department. Thus, the appellants maintain that promotions beyond one appointment are in violation of the law and must be voided.

Michael Niewinski, represented by Craig Gumpel, Esq., objects to the appellants' challenge and indicates that he was properly appointed from the subject certification. He sets forth the Table of Organization, noting that as a result of the subject appointments, there were 22 Police Lieutenants and only eight of the nine Police Captains positions filled. Niewinski also reiterates the appointing authority's argument that even if there were just one vacancy at the time of the certification request, the appointing authority was entitled to a complete certification of three interested eligibles. Moreover, he notes that appointments may be made after a list's expiration so long as the appointments are not beyond the certification's disposition due date. *See N.J.A.C. 4A:4-4.9(a)3*. In his case, the appointing authority acted in accordance with the rule. Additionally, Niewinski states that in appointing him and Rodriguez, the appointing authority stayed within the Table of Organization for Police Lieutenant. Further, he argues that "[t]he fact that the City has not engaged in the ministerial act of formally passing an ordinance creating the 22 [P]olice [L]ieutenant positions is of no significant consequence to the promotions made . . . [since the] City may formally modify the table of organization retroactively to correct any deficiency." Finally, Niewinski maintains that he and the two other appointees have a legitimate expectation that their appointments are permanent and final while the appellants only have an opportunity for appointment. Thus, he submits that it would be manifestly unfair to disturb the appointments.

Lawrence Giaconda, represented by David Beckett, Esq., also intervenes, indicating that he passed the working test period for Police Lieutenant and is permanent. Moreover, Giaconda asserts that Delancey inquired about his retirement date in 2013, and thus, the appointing authority had notice of his intention to retire prior to its certification request. He states that the appointing authority has demonstrated its "good faith" in requesting the subject certification and its need to fill three Police Lieutenant positions. Giaconda emphasizes that the appointing authority did not exceed its Table of Organization for "higher-level superiors in the rank of Captain and Lieutenant, and is not creating a new position but filling a vacant one." In other words, Giaconda states that the "Captain's position established by Ordinance is being re-purposed as a Lieutenant position, which will save the taxpayers money and will not result in any expenditure beyond those approved by Ordinance." Further, he notes that an appointment in excess of

the allotted positions could be cured by a later, ratifying ordinance. Therefore, he contends that the appellants provide no basis to disturb his appointment.

The appointing authority further clarifies that due to the uncertainty caused by administrative and criminal investigations involving members of the Police Department, including Police Officers, Police Sergeants, and Police Captains concerning "extra duty pay jobs," and the potential for discipline of these members, as well as a dispute regarding a related issue before the Public Employment Relations Commission (PERC), the appointing authority determined that it would be inappropriate to fill the Police Captain vacancy. Thus, at the time of the January 13, 2014 certification, the appointing authority did not intend to fill the vacant Police Captain position. However, it states that "there were concerns that there was a need for supervisory personnel." Thus, it decided to appoint three Police Lieutenants on April 1, 2014, pursuant to its "managerial prerogative" and its "responsibility to maintain the Police Department's integrity" and to prevent "the erosion of public confidence." It stresses that no Police Lieutenant was involved in the investigations.

Furthermore, since the foregoing matters had concluded, the appointing authority indicates that it requested a certification from the Police Captain (PM1534R), City of Elizabeth, eligible list, which promulgated on April 3, 2014 and expires April 2, 2017. A certification was issued on September 18, 2014, and the appointing authority returned the certification on October 17, 2014,<sup>1</sup> appointing Daniel Saulnier, the first-ranked eligible who had been a Police Lieutenant, effective October 1, 2014. However, the appointing authority states that it actually promoted Saulnier retroactive to April 1, 2014 on September 26, 2014, thereby ratifying the appointment of the third Police Lieutenant effective April 1, 2014. In that regard, the appointing authority submits a September 24, 2014 memorandum from the Police Director to "All Commanders," confirming the promotion of Saulnier on September 26, 2014 at a ceremony at the Mayor's office, and a September 30, 2014 memorandum from the Police Director to an Elizabeth Police Department personnel representative, advising that Saulnier's promotion "shall be retroactive as of April 1, 2014." Accordingly, the appointing authority maintains that with this ratification, the third Police Lieutenant appointment will not exceed the allotted number of positions set forth in the Table of Organization. The appointing authority notes that Saulnier is assigned as the Internal Affairs supervisor, a position which was being overseen temporarily by a Police Lieutenant. Finally, it submits that if appointments which exceed the allotted amount of positions set forth in an ordinance may be retroactively ratified by amendments to that ordinance, the appointing authority has a similar ability to retroactively ratify promotions as it did for Saulnier. It is noted that the appointing authority did not submit this retroactive appointment to the Commission for approval. In support of its position, it submits the certification of James Cosgrove, the Police Director, who attests to

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<sup>1</sup> After review by this agency, the certification disposition was recorded on November 3, 2014.

the foregoing as the designated appointing authority. It also presents documentation regarding the various investigations and the PERC matter.

The appellants respond that the appointing authority initially stated that it did not intend to fill the Police Captain vacancy. The appointing authority's latest submission retracts its statement and provides "a totally new excuse." The appellants assert that the New Jersey Supreme Court in *Reuter v. Borough of Fort Lee*, 167 N.J. 38 (2001), made clear that a municipality with a Police Department must pass an ordinance setting forth the number of individuals to be employed in each rank. They argue that nowhere in the decision does it indicate that a lower-paying position, such as Police Lieutenant, may be used in lieu of a higher-paying position, such as Police Captain. Therefore, the appellants maintain that the appointing authority unlawfully exceeded the number of permitted Police Lieutenants under its ordinance when it made three appointments from the January 13, 2014 certification. Furthermore, they contend that the appointing authority did not pass an ordinance modifying the number of allowed Police Lieutenant positions. The appellants argue that the appointing authority's later excuse regarding unrelated investigations must be rejected, as "[r]eluctance to fill a vacant [Police] Captain spot is not a legally recognizable excuse for a violation of the ordinance." Finally, the appellants allege that the appointing authority inappropriately "created" two of the three vacancies because the Police Lieutenant (PM5107M) eligible list was about to expire.

Gioconda supports the appointing authority's position, stating that it has provided further context regarding the appointments and has effectively demonstrated that only 21 superior officers were performing Police Lieutenant work on April 1, 2014. In addition, he indicates that the retroactive appointment of Saulnier does not require approval of the governing body by ordinance. This retroactive appointment is fully within the authority of the Police Director as the appointing authority and is curative of any alleged technical violation of the number of Police Lieutenants permitted to be employed by ordinance.

## CONCLUSION

*N.J.A.C.* 4A:10-1.1(d) provides that no person shall make any false statement or perform any fraudulent act in connection with any examination, certification, appointment, or other personnel transaction under the provisions of Title 11A, New Jersey Statutes, and Title 4A of the New Jersey Administrative Code. *N.J.A.C.* 4A:4-4.8(b) states in pertinent part that the appointing authority shall notify the Civil Service Commission (Commission) of the disposition of the certification by the disposition due date in the manner prescribed by the Chairperson of the Commission or the Chairperson's designee. The disposition due date may be extended beyond the expiration date of the eligible list to fill current vacancies. Under no circumstances shall a disposition due date be extended beyond the

expiration date of the eligible list when vacancies do not exist. An anticipated vacancy shall not be considered the same as an existing vacancy.

In the instant matter, the appellants claim that the appointing authority violated the above-referenced regulations by advising this agency upon its request for a certification that there were three vacancies for Police Lieutenant and thereafter appointing three individuals when only one vacancy existed at the time of the certification request. Upon a review of the record, the Commission does not find that the appointing authority violated *N.J.A.C. 4A:10-1.1(d)* in requesting the certification for three vacancies. There is no dispute that one Police Lieutenant vacancy occurred on April 1, 2013 prior to the January 13, 2014 certification request. Moreover, the appointing authority apparently understood that there were two additional vacancies that needed to be filled, albeit only an anticipated vacancy that would be created by Delancey's retirement and, as explained below, its mistaken understanding that it could exceed the number of Police Lieutenant positions set forth by ordinance. Thus, the Commission cannot find that the appointing authority made an intentional false statement or committed a fraudulent act by reporting that there were three vacancies.

Regardless, there was ample reason to issue a *complete* certification of three eligibles on the date of the appointing authority's request to fill the actual vacancy that existed. In this regard, *N.J.S.A. 11A:4-8* and *N.J.A.C. 4A:4-4.2(c)* provide that an appointing authority shall be entitled to a complete certification, meaning the names of three interested eligibles for the first permanent appointment to be made. Despite that the second vacant Police Lieutenant position occurred on March 1, 2014 while the certification was pending, the appointing authority was properly issued a certification containing the next three eligibles on the eligible list in order to fill the vacancy created by the April 1, 2013 retirement and it had until April 14, 2014 to properly dispose of the certification. In that regard, *N.J.A.C. 4A:4-4.9(a)3* provides that an eligible shall not be appointed and begin work after the expiration date of the eligible list except when the certification is made just prior to the expiration of the eligible list, in which case the date of appointment and the date the eligible begins work shall be no later than the disposition due date. Thus, the appointing authority's appointment of a second Police Lieutenant complied with this regulation. Further, it is emphasized that *N.J.A.C. 4A:4-4.8(b)* was not violated since the appointing authority disposed of the subject certification by the due date and did not request an extension of the certification to fill an "anticipated vacancy." It is well settled that a request for extension of a certification disposition due date beyond the expiration date of a list should only be granted to fill current vacancies. See *In the Matter of William J. Brennan and Fire Lieutenant (PM1201T) and Fire Captain (PM1191T)*, Township of Teaneck (MSB, decided April 9, 2003); *In the Matter of Police Lieutenant (PM1356W)*, City of Hoboken (Commissioner of Personnel, decided December 17, 2002). Delancey retired on March 1, 2014 and two valid appointments were then made, effective April 1, 2014, to fill the two actual

vacancies. *Compare, In the Matter of Joseph Mongiello* (CSC, decided December 2, 2009) (Commission determined that anticipated retirements do not create genuine vacancies and it was proper to cancel the certification).

Moreover, the appellants maintain that this agency did not make a determination that there was a need for a certification in violation *N.J.A.C. 4A:4-4.2(a)*. This agency appropriately determined that there was a need for certification upon the appointing authority's request for one. In that regard, *N.J.A.C. 4A:4-4.2(a)*, provides that upon determining that there is a need for a certification as provided in *N.J.A.C. 4A:4-4.1*, this agency shall issue or authorize the issuance of a certification to the appointing authority containing the names and addresses of the eligibles with the highest rankings on the appropriate list. *N.J.A.C. 4A:4-4.1(a)* states in pertinent part that when a vacancy is to be filled in the competitive division of the career service from an eligible list, *the appointing authority shall request a certification* of names for regular appointment. It is incumbent upon the appointing authority to make the appropriate number of appointments. Should an issue arise subsequently, the proper avenue is to challenge the appointment(s), as the appellants did in this case.

However, while the Commission finds that two appointments from the subject certification are valid, the third Police Lieutenant appointment is problematic. The ordinance of the City of Elizabeth sets the number of Police Lieutenant positions at 21. By appointing three Police Lieutenants on April 1, 2014, the appointing authority exceeded its allowance by one position. The appointing authority explains that it addressed the need for supervisory personnel by appointing a third Police Lieutenant because it determined that filling the vacant Police Captain position was not appropriate given the pending investigation of members of the Police Department, which included Police Captains. In other words, as Giaconda stated, the "Captain's position established by Ordinance is being re-purposed as a Lieutenant position, which will save the taxpayers money and will not result in any expenditure beyond those approved by Ordinance." It is well established that an appointing authority is not required to fill a vacant position. *See In the Matter of Institutional Fire Chief* (MSB, decided January 12, 2005) (County that did not intend to fill the recently vacated position of Institutional Fire Chief not compelled by law to fill position and this agency recognizes discretion granted to local Civil Service jurisdictions to abolish positions for reasons of economy and efficiency). In this case, only eight of the nine established Police Captain positions were filled at the time of the subject appointments. However, the discretion not to appoint a Police Captain **does not** provide the appointing authority with the ability to appoint a Police Lieutenant where no established position exists for that title. *N.J.S.A. 40A:14-118* provides in pertinent part that:

The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. Any such ordinance shall, in a manner consistent with the form of government adopted by the municipality and with general law, provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members. The ordinance may provide for the appointment of a chief of police and such members, officers and personnel as shall be deemed necessary, the determination of their terms of office, the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force.

In *Reuter v. Borough of Fort Lee*, *supra* at 43, the New Jersey Supreme Court declared “[t]hus, from today forward no appointment may be made to any police department position not created in accordance with N.J.S.A. 40A:14-118.” Accordingly, the appointing authority cannot appoint an additional Police Lieutenant where the position has not been created. Moreover, if it is true that one of the Police Lieutenant positions was being “re-purposed” and performing Police Captain work, then the position actually was not a Police Lieutenant. The position should have been either filled by the making of a regular appointment from an existing eligible list for Police Captain or left vacant. In addition, it is not clear from the record as to whether Rodriguez, Niewinski, Gioconda or another individual serving as a Police Lieutenant was actually performing the alleged Police Captain work. Nonetheless, it was unlawful to make a regular appointment for a third Police Lieutenant position where it had not been established.

However, while N.J.S.A. 40A:14-118 permits a governing body to create and staff police departments and mandates that positions can only be created in accordance with this statutory provision, the courts have had a permissive attitude regarding ratification of imperfect governmental actions. In that regard, it has been determined that a subsequent amendment to a city’s ordinance creating additional positions can serve to retroactively ratify appointments. *See In the Matter of Mark Competello* (MSB, decided January 25, 2006), *aff’d on reconsideration* (MSB, March 22, 2006). *See also, Larry S. Loigman v. Township of Middletown*, Docket No. A-906-02T3 (App. Div. November. 7, 2003) (Appellate Division concluded that subsequent adoption of Township ordinance retroactively ratified Police Officer appointments effected in violation of *Reuter v. Borough of Fort Lee*, *supra*, which precludes appointments of appointment of police personnel not created by ordinance). *See also, In the Matter of Police Captain (PM3536B), City of Hoboken* (MSB, decided January 28, 2004). Niewinski states that “[t]he fact that the City



has not engaged in the ministerial act of formally passing an ordinance creating the 22 [P]olice [L]ieutenant positions is of no significant consequence to the promotions made . . . [since the] City may formally modify the table of organization retroactively to correct any deficiency.” Gioconda expresses a similar sentiment that an appointment in excess of the allotted positions could be cured by a later, ratifying ordinance. However, in the present case, no ratifying ordinance has been passed to create an additional Police Lieutenant position. Contrary to Niewinski’s statement, the governing body must formally act to ratify the third appointment. Further, as set forth below, the appointing authority’s action with regard to Saulnier does not cure the deficiency.

The appointing authority submits that if appointments which exceed the allotted amount of positions set forth in an ordinance may be retroactively ratified by amendments to that ordinance, the appointing authority has a similar ability to retroactively ratify promotions as it did for Saulnier. However, *N.J.A.C. 4A:4-1.10(a)* states that all initial and subsequent appointments, promotions, and related personnel actions in the career, unclassified, or senior executive service are subject to the review and approval of the Commission. Additionally, *N.J.A.C. 4A:4-1.10(c)* provides that when a regular appointment has been made, the Commission may order a retroactive appointment date due to administrative error, administrative delay, or other good cause, on notice to affected parties. In this case, after the certification was returned and approved, Saulnier’s appointment was effective October 1, 2014. Initially, it is noted that although the appointing authority may have “promoted” Saulnier and had a ceremony on September 26, 2014, the certification was recorded as having him appointed effective October 1, 2014. A swearing-in ceremony bears no weight in the approved appointment date. It is further noted that an appointment is not valid or final until it is approved by this agency. See *Thomas v. McGrath*, 145 *N.J. Super.* 288 (App. Div. 1976) (Morgan, J.A.D. dissenting), *rev’d based on dissent*, 75 *N.J.* 372 (1978); *Adams v. Goldner*, 79 *N.J.* 78 (1979); *In the Matter of Donald Gates* (MSB, decided June 6, 2007); *In the Matter of Reena Naik* (MSB, decided February 28, 2007). See also, *In the Matter of Asa Paris* (MSB, decided February 13, 2008), *aff’d on reconsideration* (CSC, decided September 10, 2008). Moreover, as per the above-cited rules, an appointing authority has no authority to unilaterally effect a retroactive appointment. Thus, Saulnier’s retroactive appointment to April 1, 2014 must be approved by the Commission. As indicated above, no request was received in that regard.

Even assuming, *arguendo*, that if a request for retroactive appointment had been submitted, it does not meet the standard set forth in *N.J.A.C. 4A:4-1.10(c)*. No administrative error or delay has been shown. Rather, the appointing authority’s rationale is that it did not find it appropriate to appoint a Police Captain at the time of the subject certification because of pending investigations of members of the Police Department. It only determined later to appoint a Police Captain. However, this reasoning does not provide good cause for Saulnier’s retroactive appointment to

April 1, 2014, given that the (PM1534R) eligible list from which Saulnier was appointed did not promulgate until April 3, 2014. Moreover, nothing in the record states that Saulnier was actually working as a Police Captain at that time. Further, the appointing authority initially stressed in this matter that it had no intention to appoint a Police Captain on April 1, 2014. To now allow a retroactive appointment in order to create a vacant Police Lieutenant position creates an improper fiction. Accordingly, Saulnier's appointment to Police Captain remains effective October 1, 2014. The appointing authority is directed to amend any internal personnel record which reflects an earlier date of appointment.

Lastly, the appellants contend that the appointing authority's reliance on an expired list "obstructed" their "lawful opportunity to participate in the selection and appointment process" in violation of *N.J.A.C. 4A:10-1.1(c)*. As set forth above, two appointments, effective April 1, 2014, from the January 13, 2014 certification of the Police Lieutenant (PM5107M) eligible list are valid. The third Police Lieutenant appointment is not valid and is hereby rescinded. Regardless of the latter, the appellants did not miss an opportunity to be appointed. They appear on a later eligible list and the maximum number of 21 Police Lieutenant positions have already been filled by the prior eligible list. Accordingly, but for the rescission of the third Police Lieutenant appointment, no remedy can be afforded to the appellants. However, given that only two appointments are permitted, the Division of Agency Services is directed to return the subject certification to the appointing authority to properly dispose of the certification. The Commission notes that the appointing authority may dispose of the certification pursuant to the "Rule of Three," meaning in this context, the appointing authority may choose to appoint Rodriguez, Niewinski, or Gioconda to fill the two positions.<sup>2</sup> See *N.J.S.A. 11A:4-8*, *N.J.S.A. 11A:5-7*, and *N.J.A.C. 4A:4-4.8(a)3ii*. Upon receipt of the certification, the Division of Agency Services is to correct the personnel record of the displaced individual, as his appointment to Police Lieutenant has been rescinded.

### ORDER

Therefore, it is ordered that these appeals be granted in part, and the third appointment from the January 13, 2014 certification of the Police Lieutenant (PM5107M), City of Elizabeth, eligible list is rescinded. It is further ordered that the Division of Agency Services immediately return the subject certification to the appointing authority for proper disposition in accordance with this decision. Additionally, Daniel Saulnier's appointment date to Police Captain remains as October 1, 2014.

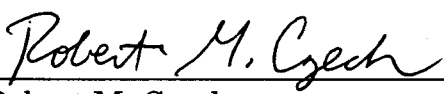
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<sup>2</sup> It is not necessary to certify an additional name for the two appointments, as it is clear that Rodriguez, Niewinski, and Gioconda are interested in a position. See *N.J.A.C. 4A:4-4.2(c)2*.

In the event that the appointing authority fails to make a good faith effort to fully comply with this decision within 45 days of receipt of this decision, the Commission orders that a fine be assessed against the appointing authority in the amount of \$100 per day beginning on the 46<sup>th</sup> day from receipt of this decision, continuing for each day of continued violation up to a maximum of \$10,000.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 6<sup>TH</sup> DAY OF MAY, 2015

  
Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries and Correspondence	Henry Maurer Director Division of Appeals and Regulatory Affairs Civil Service Commission Written Record Appeals Unit P.O. Box 312 Trenton, New Jersey 08625-0312
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c: Todd Kelly  
James Kearns  
Gerard McDonald  
Bruce Leder, Esq.  
James Cosgrove  
Raymond Bolanowski, Esq.  
Michael Niewinski  
Craig Gumpel, Esq.  
Lawrence Giaconda  
David Beckett, Esq.  
Jose Rodriguez  
Daniel Saulnier  
Kenneth Connolly  
Dan Hill  
Joseph Gambino  
Beth Wood

