



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Frank Rossi,
City of Newark

Administrative Appeal

CSC Docket No. 2018-1598

ISSUED: April 10, 2018 (RE)

The City of Newark (Newark) and Frank Rossi, represented by Bette Grayson, Esq., petition the Civil Service Commission (Commission) for a retroactive regular appointment for Frank Rossi to the title of Police Lieutenant, effective December 26, 2011, due to administrative error.

By way of background, Frank Rossi was permanently appointed to Police Sergeant on January 22, 2002. His employment records indicate continuous employment from that date to the present, except for a leave of absence (military leave with pay) from January 1, 2016 to June 15, 2016. Rossi ranked 5th on the eligible list for Police Lieutenant (PM2539K), Newark, which promulgated on March 19, 2009 and expired on February 6, 2013. One certification (PL111070) was made from this eligible list, resulting in the appointment of the first ranking candidate on December 26, 2011. No further certifications were made from this list. Another eligible list for Police Lieutenant (PM5035P) was promulgated on February 7, 2013 and expired February 6, 2016. Rossi was admitted to that examination, but did not appear to take to the examination when it was given on September 27, 2012. That list was certified four times and resulted in 86 appointments.

On appeal, Newark states that it previously requested retroactive appointments "of certain eligibles based on a legal settlement." It states that, "at that time, Mr. Rossi was serving in the military and was unavailable for an appointment." Newark indicates that Rossi has since returned from active duty and is available for an appointment, and that it could not appoint him while he was on military duty. Thus, Newark requests a rule relaxation of the regulations to permit

Mr. Rossi to receive a regular appointment date for seniority and salary step purposes from the certification (PL111070).

Rossi appeals that at the time of the litigation, he was called up on active military duty in Iraq but was told by Newark's legal counsel he would be promoted along with the people behind him on the eligible list (PM2539K). He states that he was on active duty at the time of the original promotion, and then in the spring of 2016. He submits a Wartime Service Record Overview from the Department of the Army dated May 19, 2016 which indicates that in July 2016 he returned from deployment to Iraq, where he was awarded the Bronze Star Medal for Valor. It also states that he was deployed in 2002, 2006, and 2009 in Afghanistan. He states that he had previously agreed to the terms of a settlement which indicated he would be promoted to Police Lieutenant with retroactive seniority. He states that his name was not included in *In the Matter of Sean Gaven, et al., City of Newark* (CSC, decided May 17, 2017), as the Commission claimed that Newark did not disclose there was a fifth-ranking candidate on the promotional list. A copy of that decision is attached hereto and incorporated herein.

CONCLUSION

N.J.A.C. 4A:4-4.8(c), states, in pertinent part, that upon receipt of the certification, an appointing authority shall appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, and shall notify the Civil Service Commission of the disposition of the certification by the disposition due date. *N.J.A.C.* 4A:4-1.10(c), states that when a regular appointment has been made, the Commissioner may order a retroactive appointment date due to an administrative error, administrative delay or other good cause, on notice to affected parties. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) entitles service members to return to their civilian employment upon completion of their military service with the seniority, status, and rate of pay that they would have obtained had they remained continuously employed by the civilian employer.

At the outset, it is noted that the appointing authority requests a retroactive appointment for Rossi to Police Lieutenant on the basis that he was serving in the military and unavailable for an appointment. Rossi was asked to provide his status of service, and he indicated 14 circumstances where he was training or mobilized on active duty. In 2011, he indicated he was absent from January 13 to 16, 2011, from February 4 to 12, 2011, and May 15 to June 11, 2011. Thus, he was not absent or unavailable for appointment on December 26, 2011.

Rossi argues that his name was not included in *In the Matter of Sean Gaven, et al., City of Newark* (CSC, decided May 17, 2017), as the Commission claimed that Newark did not disclose there was a fifth-ranking candidate on the promotional list.

In actuality, his name was not included as he was not a petitioner in that matter, and he was not included in the settlement agreement. As noted in that decision, the settlement agreement was executed prior to authorization by the Department of Community Affairs (DCA). Thus, the waiver for the approval of the promotions was not signed. However, the promotions were not barred unless there is a negative impact on the City's financial budget. Newark identified that it does not have a DCA waiver for Rossi as he was not part of the original settlement. Additionally, Rossi was not similarly situated as those petitioners, as the settlement indicated that the subject individuals have each been working as Police Lieutenants for a significant period of time. Thus, the settlement indicated that they were entitled to emoluments and compensation appropriate to the rank of Police Lieutenant, and including pension credits. Rossi has been working in-title, and has not been performing the work of a Police Lieutenant.

Rossi argues that he was not part of the settlement as he was deployed at the time it was litigated. The initial Civil Action, a complaint, jury demand, designation of trial counsel, and certification with plaintiffs Matthew Ruane, Douglas Lee III and Marlin Easter, is dated January 31, 2013. Sean Gaven, Rory Murphy, Cesar Soares, Christopher Brown, and Celso Velez filed a similar Civil Action on February 13, 2013. Rossi was on active duty from September 3 to 29, 2012, and June 15 to July 6, 2013. Thus, he was not on active duty when these plaintiffs filed the Civil Action, and he did not file a similar Civil Action. The purpose of the settlement agreements were to resolve the issues asserted in the Actions and to dismiss the Actions with prejudice and without costs. While the settlement agreements were signed in April 2016, when Rossi was deployed, the initial Actions were underway years before. Individuals whose names merely appear on a list do not have a vested right to appointment. *See In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984), *Schroder v. Kiss*, 74 *N.J. Super.* 229 (App. Div. 1962). The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990). Rossi did not pursue a Civil Action at the same time as the petitioners' in *Gaven*, did not perform out-of-title work as a Police Lieutenant for a significant period of time, and Newark has not indicated that DCA has approved this promotion. Accordingly, there is no basis to provide Rossi with retroactive seniority.

ORDER

Therefore, it is ordered that this request be denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c: Frank Rossi
Bette Grayson, Esq.
Kecia Daniels
Kelly Glenn
Records Center



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Sean Gaven, *et al.*,
City of Newark

CSC Docket Nos. 2017-2400, *et al.*

Administrative Appeals

ISSUED: **MAY 19 2017** (RE)

Sean Gaven, Rory Murphy, Cesar Soares, Christopher Brown, Celso Velez, Matthew Ruane, Lee Douglas III, and Marlin Easter, represented by Patrick Toscano, Jr., Esq., petition the Civil Service Commission (Commission) for retroactive regular appointments effective December 26, 2011 to the title of Police Lieutenant, and for admittance to the promotional examination for Police Captain (PM1345U), Newark.

By way of background, the petitioners ranked 4, 3, 2, 9, 8, 10, 13 and 14 respectively on the eligible list for Police Lieutenant (PM2539K), Newark, which promulgated on March 19, 2009 and expired on February 6, 2013. One certification was made from this eligible list, resulting in one appointment. Subsequently, a second eligible list (PM5035P) was promulgated on February 7, 2013 and expired February 6, 2016. Mr. Soares was appointed from this list with a July 15, 2014 appointment date, and the remaining petitioners are Police Sergeants. Subsequently, the petitioners filed actions in the Superior Court of New Jersey, Law Division, against the City of Newark, and the petitioners and the appointing authority entered into a settlement. This settlement provides for the petitioners' appointments as Police Lieutenant retroactive to December 26, 2011, for seniority and examination purposes within 30 days. Further, the settlement indicates that their working test periods would be considered "waived" and they would be eligible to take a Police Captain examination.

Messrs. Ruane, Douglas, Easter, and Brown applied for the examination for Police Captain (PM1345U), Newark, which had a closing date of September 30,

2016, and were denied eligibility on the basis that they lacked the required amount of permanent status in the title to which the examination was open, in this case, Police Lieutenant. This examination was open to employees in the competitive division currently serving and having an aggregate of one year of continuous permanent service as of the closing date as a Police Lieutenant. Permanent service is gained from a regular appointment and the completion of a working test period. In this case, seven of the petitioners were Police Sergeants as of the closing date. They request admittance to the examination based on the settlement. For this exam, 21 candidates were admitted and took the two-part examination in October 2016 and January 2017. The results are not yet available.

Lastly, this settlement agreement was executed prior to authorization by the Department of Community Affairs (DCA). As a result, the waiver for the approval of the promotions will not be signed. However, these promotions will not be barred unless there is a negative impact on the City's financial budget. Going forward, Newark is notified that it must present settlement agreements to DCA representatives before execution and submission to the Commission.

N.J.A.C. 4A:4-2.6(a) (Eligibility for promotional examination) states in pertinent part that applicants for promotional examinations shall, by the closing date, meet the criteria of having 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.

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.

N.J.A.C. 4A:4-3.4(a) provides that the [Civil Service Commission] may revive an expired eligible list 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 [Civil Service Commission] 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.

CONCLUSION

A review of the settlement indicates that it substantially complies with Civil Service law and rules. The policy of the judicial system strongly favors settlement. See *Nolan v. Lee Ho*, 120 N.J. 465 (1990); *Honeywell v. Bubb*, 130 N.J. Super. 130

(App. Div. 1974); *Jannarone v. W. T. Co.*, 65 N.J. Super. 472 (App. Div. 1961), cert. denied, 35 N.J. 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. See *Nolan, supra*. In this matter, no such compelling circumstances exist. Therefore, the Commission orders that the eligible list for Police Lieutenant (PM2539K), Newark eligible list be revived in order to effectuate the appointments of the petitioners to that title on December 26, 2011 for seniority purposes only. Although Mr. Soares was appointed from a subsequent eligible list (PM5035P) on July 15, 2014, he should be recorded as having been appointed on December 26, 2011 from the eligible list for Police Lieutenant (PM2539K).

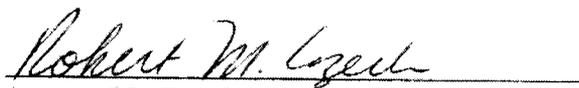
As to the petitioners' eligibility for the examination for Police Captain (PM1345U), the petitioners must have actually served in and performed the duties of the title of Police Lieutenant during the requisite time-in-grade in order to be eligible. The power to award, based on administrative error, delay, or other good cause, retroactive seniority to individuals who have in some way been harmed with the concomitant right to sit for promotional examinations, implicitly recognizes the principle of merit and fitness for promotion. In this regard, the settlement submits that the subject individuals have each been working as Police Lieutenants for a significant period of time. As such, aside from Mr. Soares, who has already completed a working test period, they should be deemed to have served their three-month working test periods as Police Lieutenant. Further, Messrs. Ruane, Douglas, Easter, and Brown should be admitted to the examination for Police Captain (PM1345U), Newark and be given make-up examinations. Additionally, Messrs. Gaven, Murphy, and Velez should be admitted to the examination upon receipt of their appropriately completed promotional applications and fees. A copy of the promotional application is attached for their use and should be submitted, along with a \$75.00 application fee **and a copy of this decision**, within 20 days of receipt of this decision to the address listed on the top left of the first page of the application. It is noted that Mr. Soares has been admitted to the examination for (PM1345U).

ORDER

Therefore, it is ordered that these requests be granted, and the Police Lieutenant (PM2539K), Newark eligible list be revived in order for Messrs. Gaven, Murphy, Brown, Soares, Velez, Ruane, Douglas, and Easter to be appointed retroactive to December 26, 2011 as Police Lieutenants, for seniority purposes only, and the personnel records of these employees be amended in accordance with this decision. It is further ordered that the petitioners' requests for admittance to the Police Captain (PM1345U), Newark promotional examination, except for Mr. Soares, be granted upon receipt of their properly completed promotional applications, and they be considered for prospective appointment only.

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 17th DAY OF MAY, 2017**



Robert M. Czech
Chairperson
Civil Service Commission

**Inquiries
and
Correspondence**

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

Attachments

c: Sean Gaven	CSC Docket No. (2017-2400)
Rory Murphy	CSC Docket No. (2017-2401)
Cesar Soares	CSC Docket No. (2017-2402)
Christopher Brown	CSC Docket No. (2017-2403)
Celso Velez	CSC Docket No. (2017-2404)
Matthew Ruane	CSC Docket No. (2017-2405)
Lee Douglas III	CSC Docket No. (2017-2406)
Marlin Easter	CSC Docket No. (2017-2407)
Patrick Toscano, Jr., Esq.	
Jack Kelly	
Kecia Daniels	
Michael Johnson	
Kelly Glenn	
Records Center	