

Superior Court of New Jersey – Appellate Division
Letter Brief
Appellate Division Docket Number: A-000352-23

C. ELSTON & ASSOCIATES, LLC
309 Morris Avenue
Suite E
Spring Lake, New Jersey 07762
Telephone: (732) 280-6911

Of Counsel
and On the Brief: Catherine M. Elston, Esq. (ID #015051990)
cmelston@elstonlaw.com

Date of Submission: March 25, 2024

Letter Brief and Appendix on behalf of Petitioner-Appellant Fabio Cologna

IN THE MATTER OF FABIO COLOGNA

Case Type: Civil
Agency: Civil Service Commission
Agency Docket No.: 2023-1728

Dear Judges:

Pursuant to *R. 2:6-2(b)*, please accept this letter brief and appendix on behalf of Petitioner-Appellant Fabio Cologna (“Appellant”).

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS..... ii
INDEX TO APPENDIX..... iii
PROCEDURAL HISTORY AND STATEMENT OF FACTS1
LEGAL ARGUMENT6
 I. *STANDARD OF REVIEW*6
 II. *THE CSC’S VALIDATION OF THE CITY’S UNLAWFUL PROMOTIONS IN JULY 2022 IS ARBITRARY, CAPRICIOUS AND UNREASONABLE. THE CSC’S USE OF THESE UNLAWFUL PROMOTIONS AS A BASIS TO DENY APPELLANT’S PROMOTION IS ARBITRARY, CAPRICIOUS AND UNREASONABLE (Raised Below: PA6, PA8).*.....7
 III. *THE FAILURE TO PROMOTE APPELLANT TO CAPTAIN VIOLATED CIVIL SERVICE VETERAN STATUTES AND REGULATIONS (Not Addressed In Decision Below)*.....12
 IV. *THE CSC’S ENFORCEMENT OF N.J.A.C. 4A:4-4.8(b) IS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AS THE CSC APPROVED PROMOTIONS IN JULY 2022 DESPITE THE ABSENCE OF GENUINE VACANCIES FOR SUCH PROMOTIONS AND THEN ALLOWED “GENUINE VACANCIES” THAT OCCURRED AFTER SUCH PROMOTIONS TO SATISFY CSC REQUIREMENTS (Not Addressed In Decision Below).*13
 V. *THE CITY’S VIOLATION OF CIVIL SERVICE PRECEDENT TO DENY APPELLANT A PROMOTION VIOLATES THE DOCTRINES OF EQUITABLE ESTOPPEL AND TURNING SQUARE CORNERS (Not Addressed In Decision Below).*14
CONCLUSION.....17

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Pa5 Civil Service Commission (CSC) Final Administrative Action, issued
August 23, 2023

INDEX TO APPENDIX

<u>Page</u>	<u>Document</u>
Pa1	Appellant's Notice of Appeal, filed October 4, 2023
Pa5	Civil Service Commission (CSC) Final Administrative Action, issued August 23, 2023
Pa11	Appellant's Civil Case Information Statement, filed October 4, 2023
Pa15	Certification of Counsel in support of Appellant's CSC Appeal
Pa17	<u>Exhibit A</u> – Notification of Certification, 12/28/22, PL221817
Pa19	<u>Exhibit B</u> – PFRS Order of Business, August 8, 2022
Pa31	<u>Exhibit C</u> – PFRS Order of Business, September 12, 2022
Pa42	<u>Exhibit D</u> – PFRS Order of Business, December 12, 2022
Pa54	<u>Exhibit E</u> – Emails between Appellant and Bernard Grilletti, 5/2023
Pa57	<u>Exhibit F</u> – Email from Michael Kraus to Appellant 5/18/2023
Pa59	<u>Exhibit G</u> – Email exchange, Appellant and CSC, May 1, 2023
Pa61	<u>Exhibit H</u> – City's submission to CSC, April 24, 2023 with exhibits
Pa74	<u>Exhibit I</u> – Letter from Appellant to Hari Sundar, March 29, 2023
Pa78	<u>Exhibit J</u> – Letter from CSC to Jason Freeman, February 2, 2023
Pa80	<u>Exhibit K</u> – Memo from Chief Anton Peskens to Appellant, April 17, 2022 (error: date is April 17, 2023)
Pa83	<u>Exhibit L</u> – Letter from the CSC to Appellant, March 7, 2023
Pa86	<u>Exhibit M</u> – Notice of Eligibility, 2/16/23, PM2330C
Pa88	<u>Exhibit N</u> – Email from Appellant to Krauss, February 15, 2023
Pa91	Statement of Items Comprising the Record, December 11, 2023
Pa94	Email to Appellant from Annemarie Ragos of CSC, dated February 27, 2023
Pa95	Email from Appellant to Hari Sundar, dated March 6, 2023
Pa96	Email from Hari Sundar to Appellant, dated March 23, 2023
Pa99	Email from Appellant to Hari Sundar, dated April 14, 2023
Pa100	Email from Hari Sundar to Catherine Elston, Esq., dated May 23, 2023

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The City of Hoboken is a Civil Service jurisdiction. At all times relevant, Appellant was, and remains, a member of the Hoboken Fire Department.

In July 2022, the City promoted five HFD members to the rank of captain from the Civil Service Commission, (“CSC”), eligibles list, Symbol PM1039V. **Pa66.** By letter to the City of Hoboken, the CSC advised that this list of eligibles expired January 16, 2023². Id.

As per the City, as well as Hoboken Fire Officers President Bernard Grilletti, when the July 2022 promotions were made, there were no “genuine vacancies” as later defined by the CSC as there were no retirements to create such vacancies. **Pa55;** **Pa63.** (The City advised the CSC: “The City requested PL221817 following our normal practice to fill the expected retirements in a timely manner unaware of the genuine vacancy issue..”) **Pa63**

The City further admitted to the CSC that the July 2022 promotions were made even though genuine vacancies did not exist for the positions until September and October, 2022, upon the retirements of Captain Frank Daliani, effective October 1, 2022, **Pa39**, and Captain Robert F. Chaneski, effective September 1, 2022. **Pa28.**

¹The Procedural History and Statement of Facts are so intertwined that they have been combined for the Court’s convenience.

² Other documentation from the CSC stated that the list’s expiration date was February 7, 2023. **Pa60.**

(hereinafter, “Vacancies 1 and 2”) **Pa7; Pa55**. The CSC found, “The vacancies left by the retirements of Chaneski and Daliani, per the appointing authority’s indication, had already been filled by the time certification PL221817 was issued.” **Pa7**. Certification PL221817 was issued in December 2022. **Pa72**. No promotions were made from July 2022 through at least February 16, 2023, and the Certification from which the July promotions were made, PL220549 had already been returned the CSC on August 1, 2022. **Pa6, FN3**.

As per the City’s letter to the CSC dated April 24, 2023, sometime in 2022, the City was notified that several members of the Hoboken Fire Department would be retiring on February 1st and March 1st, 2023. Those retiring effective February 1st included: 1) Captain Ronald Miltner, **Pa68**; 2) Captain Vincent DePinto, **Pa67**; and, 3) Captain Baron Ballester, **Pa67**. Those retiring effective March 1st included Battalion Chief Joseph Turner, Captain Angel Amaro, Captain Nick Goldsack, and Captain Leonardo DelViscio. **Pa67**.

In anticipation of the retirements in 2023, on December 28, 2022, the City forwarded a request to the Civil Service Commission for a certification list of ten eligible candidates for promotion to captain. **Pa65**. On the same day, December 28, 2022, the Civil Service Commission issued a “Certification of Eligibles for Appointment” Certification Number PL221817, (“Cert.PL221817”). **Pa72**.

Appellant was ranked number 1 on the list and was also designated by the Civil Service Commission as a disabled veteran. Id.

On or about January 9, 2023, Appellant was notified by the New Jersey State Civil Service Commission, (“CSC”), that as of December 28, 2022, his name had been certified to the City of Hoboken from PL221817 for consideration for appointment to the position of Fire Captain for the City of Hoboken. **PA18.** As per the CSC, the disposition due date of PL221817 was March 28, 2023. **Pa5.**

Effective February 1, 2023, three additional captains retired: Captains Ronald Miltner, **Pa52**, Vincent DePinto, **Pa51**; and Baron Ballester, **Pa50**. (hereinafter, “Vacancies 3, 4 and 5”) As such, there were at least five genuine vacancies for the promotion to captain before the expiration of Appellant’s certification on March 28, 2023.

After receipt of Cert. PL221817, the City scheduled promotional interviews for early February 2023. **Pa62.**

On February 2nd, 2023, Pamela Lacina of the Civil Service Commission requested from the City proof of “genuine” vacancies occurring prior to January 16, 2023, **Pa66.**

As per the CSC, on February 7th, 2023, CSC list PM1039V expired. **Pa60.**

On February 10th, 2023, Hoboken Director Ferrante and various chiefs met with Appellant and those who were anticipated to be promoted on February 27,

2023. **Pa67.** All were informed that as per the CSC’s definition of “genuine” vacancy, promotions would not be made from Appellant’s certification list and that, instead, any further promotions would be made from the new CSC list, Symbol PM2330C. Id.

On February 10th, the City emailed the CSC requesting a certification from the eligible roster once Symbol PM2330C was promulgated on February 16th. **Pa71.** The CSC advised Appellant that his promotional list PM2330C, was disposed of on this same date. **Pa94.**

On February 16, 2023, Symbol PM2330 became active. **Pa77.** As per the CSC, Appellant’s name was also on this list; however, also as per the CSC, Appellant had never been “bypassed” or “removed” from Certification PL221817. Id; **Pa63;** **Pa87.** Certification PL221817 was returned to the CSC with the CSC disposition code of “I4”: “Retain – Interested No Appointments (Reachable for Appointment).” **Pa72; Pa63.**

On February 15, 2023, Appellant filed an appeal with the Civil Service Commission. **Pa89.**

On March 6, 2023, Appellant notified the CSC that the City failed to provide him with documentation that was submitted to the CSC with regard to his certification for appointment. **Pa95.**

On March 7, 2023, the CSC denied Appellant's appeal stating that there were no "legitimate vacancies" and that "all incumbents remained in their positions until Retirement." **Pa84-85.**

On March 20, 2023, six promotions were made to the rank of Captain from list PM2330.

On March 22, 2023, Appellant notified the CSC requesting an opportunity to research and respond to the closing of his file. **Pa98.** The CSC advised Appellant that he was required to request such in a letter to the CSC. **Pa96.**

On April 14, 2023, Appellant requested from the CSC all documents the City forwarded regarding the issues of vacancies. **Pa99.**

On April 14, 2023, the City wrote to CSC, in part:

In 2022 the City was notified that several members of the Hoboken Fire Department would be retiring February 1, 2023 and March 1, 2023. These retirements would leave the City with vacancies in the Fire Captain position. To prepare to fill these vacancies the City requested ten (10) names from PM1039V to fill six (6) vacancies. The request for certification was submitted on December 28, 2022. The request for certification resulted in PL22187 which was received by the City on January 5, 2022.

Pa62; see, also, **Pa65.**

The City did not reference or mention the two vacancies occurring in September and October 2022, "Vacancies 1 and 2," and who filled these vacancies as none were made subsequent to the July 2022 promotions.

On April 17, 2023, per Appellant's request, Interim Fire Chief Anton Peskens provided Appellant with a list of vacancies and the dates of same. **Pa81-82.**

On or about May 19, 2023, Appellant's appeal with the Civil Service Commission was filed. **Pa15.**

On August 23, 2023, the CSC issued its Final Administrative Decision. **Pa5.**

On October 4, 2023, Appellant filed his notice of appeal with the Appellate Court. **Pa1.**

On December 11, 2023, the CSC filed its Statement of Items on Appeal. **Pa93.**

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The courts will not reverse the determination of an administrative agency unless it is arbitrary, capricious, or unreasonable, or, is not supported by substantial evidence in the record as a whole. *Dennery v. Board of Education of the Passaic County Regional High School Dist. #1, Passaic County*, 131 N.J. 626 (1993). The applicable inquiry into whether an administrative agency acted in an arbitrary, capricious, or unreasonable manner is restricted to four inquiries:

- 1) whether the agency's decision offends the State or Federal Constitution;
- 2) whether the agency's action violates express or implied legislative policies;

- 3) whether the record contains substantial evidence to support the findings on which the agency based its action; and,
- 4) 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.

George Harms Const. Co., Inc. v. New Jersey Turnpike Authority, 137 N.J. 8, 27 (1994) (citations omitted).

In the within matter, the evidence is uncontroverted that the Civil Service Commission's Final Administrative Action that there were no genuine vacancies allowing for Appellant's promotion to captain was based on erroneous facts and omissions from the City of Hoboken.

II. THE CSC'S VALIDATION OF THE CITY'S UNLAWFUL PROMOTIONS IN JULY 2022 IS ARBITRARY, CAPRICIOUS AND UNREASONABLE. THE CSC'S USE OF THESE UNLAWFUL PROMOTIONS AS A BASIS TO DENY APPELLANT'S PROMOTION IS ARBITRARY, CAPRICIOUS AND UNREASONABLE (Raised Below: PA6, PA8).

This appeal involves the City's purported inability, as per the CSC, to promote Appellant to the rank of "Captain" due to a lack of "genuine" vacancies in the rank prior to January 16, 2023, the expiration date of Appellant's CSC eligible promotional list, "PM1039V." ("Promotional List"; "List PM1039V"). **Pa5 and Pa65.** In its ruling, the CSC held that "genuine vacancies" do not include "an intention to retire" or "anticipated" retirements. (Citations omitted). **Pa8.**

The undisputed facts here establish, however, that “genuine vacancies” existed for Appellant’s promotion based on “actual retirements” but that such vacancies were, instead, unlawfully used to remedy prior unlawful promotions the City made in July 2022 when there were no “genuine vacancies.” The City’s actions were in violation of the very Civil Service precedent cited by the Civil Service Commission in the decision now on appeal. **Pa8.**

On December 28, 2022, the City requested a Certification of ten (10) eligibles from List PM1039V. On this same date, the CSC issued said Certification, which included Appellant, who was ranked number 1 on the Certification list, number PL221817 and was also designated by the Civil Service Commission as a disabled veteran. (“December 28, 2022 Certification”) **Pa5.** As per the CSC’s ruling in this matter, and pursuant to *N.J.A.C.* 4A:4-4.8(b), the December 28, 2022 Certification was valid until March 28, 2023 as long as there were “genuine vacancies”. **Pa5; Pa8; see, also, Pa84.**

While the CSC ruled that there were no “genuine vacancies” prior to January 23, 2023, such was predicated upon the City’s representations that its December 2022 request for a Certification of ten was based on retirements expected to occur in February and March 2023. **Pa84.** The City’s statement, however, is false as there were, at that time, two captain vacancies already created by the “actual” retirements of Captains Frank Daliani, (“Daliani”), on October 1, 2022, **Pa39**, and Captain

Robert Chaneski, (“Chaneski”), on September 1, 2022. **Pa28.** Notably, these retirements appear nowhere in the City’s April 24, 2023 submission to the Civil Service Commission that was provided to Appellant in response to his appeal to the CSC. **Pa62.** The reason for their omission is explained further below.

In a letter to the Civil Service Commission, the City admitted that it was unaware of the necessity to have “genuine vacancies” before promoting, **Pa62-64,** and further admitted to using the Daliani and Chaneski retirements to retroactively create “genuine vacancies” for the July 2022 promotions, contrary to Civil Service precedent.

In its decision, the CSC states,

In reply, the appointing authority indicates that the vacancies left by the retirements of Chaneski and Daliani were filled by appointments made from the April 20, 2022 certification (PL220549) and did not exist as of January 16, 2023.

Pa7.

The CSC acknowledged that the 2022 vacancies created by Daliani and Chaneski’s retirements were used for purposes of the July promotions. Accordingly, and as per Civil Service’s Final Decision here, **Pa8,** as there were no “genuine vacancies” for the July 2022 promotions, such were unlawfully made and are, therefore, invalid. **Pa8.** Notably, the Civil Service Commission closed the certification of the July 2022 promotions in August 1, 2022 notwithstanding their invalidity. *See, CSC Final Administrative Decision, footnote 3: “The disposition of*

certification of PL220549 was done July 20, 2022 and was returned August 1, 2022.”³ **Pa6.**

While it is uncontroverted that the July 2022 were made without “genuine vacancies,” and while uncontroverted that the City was using retirements that occurred AFTER the promotions were made to retroactively create the requisite “genuine vacancies,” the CSC ruling denied Appellant a promotion for lack of “genuine vacancies.” The CSC states, “The vacancies left by the retirements of Chaneski and Daliani, per the appointing authority’s unrebutted indication, had already been filled by the time certification PL221817 was issued.” **Pa8.**

The CSC cites no legal authority allowing the City to retroactively remedy its violation of CSC precedent mandating “genuine vacancies” to exist before promotions are made. The CSC further cites no legal authority permitting it to sanction violation of CSC precedent.

For the foregoing reasons, the CSC’s Final Decision that “genuine vacancies” did not exist for promotions from Certification PL221817 is false as it is an argument predicated on illegalities and/or the improper actions of the City and CSC. The Civil Service Commission’s Final Decision is, therefore, arbitrary, capricious and unreasonable.

³ A certification is “returned” to the CSC with the disposition codes. *See N.J.A.C. 4A:4-4.8(b).*

Finally, by the CSC's own admission, and as per Civil Service regulation, *N.J.A.C.* 4A:4-4.8(b), Appellant's certification for promotion remained in effect until March 28, 2023 notwithstanding that his promotional list expired on either January 16, 2023 or February 7, 2023. **Pa8.** As such, Appellant remained eligible for promotion until that time. **Pa8.** As the CSC ruled,

It is settled the 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).*

Pa8.

Further, pursuant to *N.J.A.C.* 4A:4-4.8(b),

The appointing authority shall notify the Civil Service Commission of the disposition of the certification by the disposition due date in the manner prescribed by the Chairperson or 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...

N.J.A.C. 4A:4-4.8(b) (emphasis added).

Here, it is undisputed that there were not only two "genuine vacancies" available for Appellant's promotion from retirements in September and October

2022, but a minimum of an additional three retirements on February 1, and March 1, 2023, **Pa67-68**, creating three additional “genuine vacancies” before Appellant’s Certification expired on March 28, 2023. For this reason, the CSC’s finding that “the appointing authority technically should not have requested the certification in the first place...” **Pa8**, is erroneous, as predicated upon the faulty premise that no genuine vacancies existed. It is further noted that Appellant was not “bypassed” or “removed” from his promotional list, **Pa63; Pa87**; as such, and as remaining number 1 ranked on the Certification list in effect until March 28, 2023, and, as a disabled veteran, (discussed below), Appellant should have been promoted as a matter of law.

III. THE FAILURE TO PROMOTE APPELLANT TO CAPTAIN VIOLATED CIVIL SERVICE VETERAN STATUTES AND REGULATIONS (Not Addressed In Decision Below).

Appellant is designated a disabled veteran by this State’s Civil Service Commission. *N.J.A.C. 4A:4-4.8*, “Disposition of a certification,” states, in part:

(a) Upon receipt of a certification, an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

1. Appoint the eligible whose name has been certified from the special reemployment list;
2. Appoint the eligible whose name has been certified from regular or police, sheriff's officer, or fire reemployment lists; or
3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:

- i. Disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list;
- ii. **If the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed;** and
- iii. See *N.J.A.C.* 4A:4-2.15(i) for tie scores.

N.J.A.C. 4A:4-4.8(a) (emphasis added).

In violation of the foregoing regulations, Appellant was not appointed even though ranked number 1 on an active Certification for promotion.

IV. THE CSC’S ENFORCEMENT OF *N.J.A.C.* 4A:4-4.8(b) IS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AS THE CSC APPROVED PROMOTIONS IN JULY 2022 DESPITE THE ABSENCE OF GENUINE VACANCIES FOR SUCH PROMOTIONS AND THEN ALLOWED “GENUINE VACANCIES” THAT OCCURRED AFTER SUCH PROMOTIONS TO SATISFY CSC REQUIREMENTS (Not Addressed In Decision Below).

In July, 2022, the City promoted five firefighters to the rank of captain in the absence of “genuine vacancies.” The CSC’s own ruling acknowledges the City’s admission that the September and October 2022 retirements were considered the “vacancies” for the July promotions that had already taken place months before. **Pa7.** In fact, in its April 24, 2023 letter to the CSC, the City acknowledged that it was the City’s “normal” practice to make promotions before genuine vacancies were created from actual retirements. **Pa62-64.**

The CSC was, therefore, aware that there were no “genuine vacancies” for the July 2022 promotions, and the City admitted as such. Nevertheless, it chose to

arbitrarily enforce the rule as against Appellant, who was ranked number one on the promotional list and a disabled veteran, while knowing it's decision to do so was based on the unlawful conduct of the City. Inconsistency of enforcement of CSC rules is the very definition of arbitrary, capricious and unreasonable conduct.

V. THE CITY'S VIOLATION OF CIVIL SERVICE PRECEDENT TO DENY APPELLANT A PROMOTION VIOLATES THE DOCTRINES OF EQUITABLE ESTOPPEL AND TURNING SQUARE CORNERS (Not Addressed In Decision Below).

For all the reasons set forth above, it is undisputed that as to Appellant, the City violated *N.J.A.C.* 4A:10-1.1, "General Provisions," which states:

(a) No person or appointing authority shall violate the provisions of Title 11A, New Jersey Statutes, or Title 4A, N.J.A.C.

(b) No person or appointing authority shall fail to comply with an order of the Civil Service Commission or the Chairperson of the Commission or designee.

(c) No person or appointing authority shall obstruct a person's lawful opportunity to participate in the selection and appointment process or a person's lawful pursuit of any remedy or appeal under Title 11A, New Jersey Statutes, and Title 4A, N.J.A.C.

(d) 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, N.J.A.C.

(e) No person shall pay, offer, solicit, or accept any compensation, service, or other consideration to affect any

appointment or other personnel transaction under the provisions of Title 11A, New Jersey Statutes, and Title 4A, N.J.A.C.

1. No person shall pay or offer any compensation, service, or other consideration to induce the retirement or resignation of an employee in order to gain a promotion or the opportunity for a promotion, or an advancement appointment or the opportunity for an advancement appointment.

2. No person shall solicit or accept any compensation, service, or other consideration as an inducement to retire or resign in order to allow an employee to gain a promotion or the opportunity for a promotion, or an advancement appointment or the opportunity for an advancement appointment.

(f) Appointing authorities shall timely supply all information, documents, and other materials requested by the Civil Service Commission or an appropriate representative of the Commission for the purpose of efficiently and accurately administering the merit system.

N.J.A.C. 4A:10-1.1 (emphasis added)

Appellant has established violation of the afore regulatory provisions by the City which compel Appellant's promotion to be retroactively effectuated. The doctrine of equitable estoppel compels the same result. The estoppel doctrine may be invoked against a municipality "where the interests of justice, morality and common fairness clearly dictate that course." *Gruber v. Mayor & Tp. Comm.*, 39 *N.J.* 1, 13 (1962). The courts have further held that a plaintiff need not even prove that an actual statement was made upon which he/she relied upon to prove the

element of misrepresentation. *See Ridge Chevrolet-Oldsmobile, Inc. v. Scarano*, 238 N.J. Super. 149, 154 (App. Div. 1990). (“[A] party asserting equitable estoppel may rely upon inaction, representation of the actor, misrepresentation, silence or omission.” (quoting *Fairken Assocs. v. Hutchin*, 223 N.J. Super. 274, 280 (Law Div. 1987))). Thus, principles of equitable estoppel may be applied to actions of the agency as well as to actions of a municipality.” *Id.* at 59.

Of further note:

More general equitable principles, however, may be at play here. In numerous circumstances, the courts have said that the government must ‘turn square corners’ in its dealings with others, and ‘comport itself with compunction and integrity.’ *F.M.C. Stores Co. v. Borough of Morris Plains*, 100 N.J. 418, 426–27, 495 A.2d 1313 (1985). As our Supreme Court has written, ‘even with respect to public entities, equitable considerations are relevant in evaluating the propriety of conduct taken after substantial reliance by those whose interests are affected by subsequent actions.’ *Skulski v. Nolan*, [68 N.J. 179, 198 [(1975)], 343 A.2d 721.

Sellers v. Board of Trustees of Police and Firemen’s Retirement System, 399 N.J. Super. 51, 59 (App. Div. 2008).

Here, both the CSC and the City engaged in violation of CSC precedent and rules. Such conduct should not be countenanced.

CONCLUSION

Relying on all statutes, regulations and precedent, Appellant's appeal must be granted as a matter of law, and his promotion to Captain effectuated retroactively with retroactive seniority and backpay.

Respectfully submitted,

Dated: March 25, 2024

By: /s/ Catherine M. Elston
Catherine M. Elston, Esq.

cc: Attorneys of Record – via eCourts Appellate

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-000352-23

IN THE MATTER OF
FABIO COLOGNA

ON APPEAL FROM
DECISION OF the Civil Service
Commission
CSC DKT. NO. 2023-1728

Sat Below:
Allison Chris Myers
Chairperson
Civil Service Commission

Respondent Corporation Counsel Brief and Appendix in Opposition

FLORIO PERRUCCI STEINHARDT
CAPPELLI & TIPTON, LLC.
Robert K. Devaney, Esq.
Attorneys for Respondent,
CORPORATION COUNSEL
91 Larry Holmes Drive, Suite 200
Easton, Pennsylvania 18042
Telephone: (201) 843-5858

On the Brief:
Robert K. Devaney, Esq.
Attorney ID # 322802021
Email: rdevaney@floriolaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

TABLE OF RESPONDENT’S CERTIFIED APPENDIX.....iv

PRELIMINARY STATEMENT.....1

FACTUAL AND PROCEDURAL HISTORY3

ARGUMENT AND STANDARD OF REVIEW.....5

POINT I

THE COURT SHOULD DEFER TO THE CIVIL SERVICE COMMISSION’S
DECISION.....5

 a. No Genuine Vacancies Existed at the Time Certification PL221817 was
 Promulgated.....7

 b. The Civil Service Commission has no Obligation to Approve Retroactive
 Promotions.....10

 c. Public Policy Favors CSC’s One-Time Rule Relaxation.....12

POINT II

APPELLANT’S REMAINING ARGUMENTS ARE NOT IMPLICATED BY
THE INSTANT FACT PATTERN.....13

CONCLUSION.....17

TABLE OF AUTHORITIES

Case:	Page(s):
<u>Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, Bureau of Homeowner Prot., New Home Warranty Program,</u> 186 N.J. 5, 16 (2006).....	5,6
<u>Bowden v. Bayside State Prison,</u> 268 N.J. Super. 301, 304 (App. Div. 1993).....	6
<u>Campbell v. Dep't of Civil Serv.,</u> 39 N.J. 556 (1963).....	6
<u>Competello v. LaBruno,</u> 2005 WL 1637907 (D.N.J. July 12, 2005).....	15,16
<u>Greenwood v. State Police Training Ctr.,</u> 127 N.J. 500 (1992).....	6
<u>In re Camden County Police Dept. Pilot Program,</u> 2014 WL 3928418 (N.J. Super. Ct. App. Div. Aug. 13, 2014).....	9
<u>In re Carter,</u> 191 N.J. 474 (2007).....	6
<u>In re Davis,</u> 2007 WL 2262921 (N.J. Super. Ct. App. Div. Aug. 9, 2007).....	12

In Re Martinez,
403 N.J.Super. 58 (2008).....8

In re Musick,
143 N.J. 206 (1996).....6

In re Peck,
2011 WL 242023 (N.J. Super. Ct. App. Div. Jan. 27, 2011).....10,11

Matter of Acosta,
2021 WL 1344026 (N.J. Super. Ct. App. Div. Apr. 12, 2021).....6

Mazza v. Bd. of Trs.,
143 N.J. 22 (1995).....6

Newark v. Natural Res. Council,
82 N.J. 530 (1980).....6

Statutes, Rules, and Other Authorities:	Page(s):
<u>N.J.A.C. 4A:4-4.8</u>	<u>passim</u>
<u>N.J.A.C. 4A:1-1.2</u>	8
<u>N.J.A.C. 4A:10-1.1</u>	13,14,15,16
<u>N.J.S.A. 11A:1.2</u>	9

TABLE OF RESPONDENT’S CERTIFIED APPENDIX

Competello v. LaBruno,

2005 WL 1637907 (D.N.J. July 12, 2005).....RA01

In re Camden County Police Dept. Pilot Program,

2014 WL 3928418 (N.J. Super. Ct. App. Div. Aug. 13, 2014).....RA17

In re Davis,

2007 WL 2262921 (N.J. Super. Ct. App. Div. Aug. 9, 2007).....RA22

In re Peck,

2011 WL 242023 (N.J. Super. Ct. App. Div. Jan. 27, 2011).....RA27

Matter of Acosta,

2021 WL 1344026 (N.J. Super. Ct. App. Div. Apr. 12, 2021).....RA32

PRELIMINARY STATEMENT

This matter involves a good faith administrative error made by the City of Hoboken (the “City”) with respect to its long-standing past hiring practices, which was cured by the Civil Service Commission (the “CSC”) pursuant to their statutorily delegated authority to do so. N.J.A.C. 4A:4-4.8(b) requires there to be a “genuine vacancy,” i.e. a “current vacancy,” in a municipality’s fire department in order for a fire officer to be promoted to fill that vacancy. Therefore, “expected” or “anticipated” vacancies cannot be used as a justification for promotion. Prior to being aware of that statute, the City had a long standing past practice of requesting certifications and promoting officers to fill expected vacancies, to account for potentially lengthy bureaucratic red tape and its own thorough internal interview and hiring process. The City did so in good faith, and were ignorant of any laws or regulations to the contrary.

The CMC was not aware and had no reason to be aware of the City’s good faith past practice of requesting certifications and promoting in advance of expected vacancies until January of 2023, when Appellant’s promotion eligibility happened to expire. Once it advised the City of the impermissible nature of promoting officers to fill expected vacancies, the CSC utilized its statutory authority to “relax” civil service regulations in order to cure the City’s good-faith administrative error and allow July 2022 promotions to fill vacancies created in September and October of

2022. Now that the City has been advised of the impermissible nature of this practice, it will no longer utilize it. The relief sought by Appellant, to retroactively demote the fire officers who were promoted to fill the September and October 2022 vacancies, would unfairly prejudice those officers since they are otherwise entirely qualified to hold those positions. Additionally, the public policy supporting the CSC's prohibition of promotions to fill expected or anticipated vacancies has not been offended by CSC's relaxation of its own rules, since the anticipated vacancies ended up being actually created, and qualified officers filled those vacancies.

In support of his position, Appellant argues that he should have been promoted based on actual vacancies that existed at the time certification PL221817 was issued, due to retirements which occurred on September 1, 2022 and October 1, 2022. However, no such vacancies existed at the time that certification was promulgated. Next, Appellant argues that the City violated regulations by failing to promote him when he appeared first on a certification, since he holds the classification of a disabled veteran. However, the regulation cited by Appellant is not implicated, since at the time PL221817 was issued, there were no genuine vacancies for him to fill. Finally, Appellant asserts that the City's good faith administrative error, and the CSC's curing of same using their statutorily delegated authority, violate notions of equitable estoppel.

FACTUAL AND PROCEDURAL HISTORY¹

By way of passing the promotional exam for Fire Captain, Appellant was placed on eligible list PM1039V, which had an expiration date of January 16, 2023. (Pa. 5). Per Civil Service Regulations, this expiration date could only be extended if “genuine vacancies” existed at the time of the proposed extension. N.J.A.C. 4A:4-4.8(b). On December 28, 2022, the City received a Certification of eligible firefighters for promotion to Captain from the Civil Service Commission, PL221817. (Pa. 72). That Certification had a disposition (expiration) date of March 28, 2023, which was over two (2) months passed the expiration date of Appellant’s eligibility for promotion under list PM1039V. (Id.) On February 2, 2022, the Division of Human Resources Information Services (“HRIS”) advised the City by way of a letter that since the Certification had been issued within three (3) months of the expiration of the eligibility list, the City would need to verify that “genuine vacancies” for Fire Captains existed in the Hoboken Fire Department as of the expiration date of the eligibility list, January 16, 2023, in order to determine whether the expiration date of Appellant’s eligibility list should be extended. (Pa. 66). Since Appellant’s promotion eligibility expired before the Certification expiration date, the eligibility could only be extended if there was a “genuine vacancy” for a Fire Captain within

¹ Respondent has combined the Factual and Procedural History of this matter for the purposes of consistency and the Court’s ease of reference, as there is intersection between the two sections.

the Hoboken Fire Department. There was no such genuine vacancy prior to the expiration date of Appellant's eligibility, so the eligibility expired.

In its February 2, 2023 letter, HRIS advised the City that anticipated vacancies were not considered "genuine" for purposes of extending the expiration of the eligibility list. (Pa. 66). Until that point, the City had a genuine, good-faith past practice of initiating the promotion process for Fire Captains one (1) to two (2) months in advance of "expected vacancies," since that is how long its internal screening, promotion, and interview process took. (Pa. 71). The City undertook this practice to ensure that there were no gaps in service wherein they would be understaffed of Fire Captains, and/or incur significant financial obligations by staffing fire captain openings with officers on overtime.

Once notified that it was not permitted to promote Fire Captains to fill anticipated vacancies by way of HRIS's February 2, 2023 letter, the City advised HRIS that the Certification was requested in order to fill vacancies which were expected to be created on February 1, 2023 and March 1, 2023, and that no "genuine vacancies" existed prior to January 16, 2023. (Pa. 71). The City then returned the Certification without making any appointments, and on February 16, 2023, a new eligibility list for Fire Captain for the Hoboken Fire Department was promulgated. (Id.) The City then met with each effected fire fighter from the expired eligibility

list and explained the situation and that they would not be promoted, as their eligibility for promotion had expired and the City was not permitted to extend it.

In denying Appellant's appeal, the CSC determine that N.J.A.C. 4A:4-4.8(b) was not unfairly enforced against Appellant by distinguishing the situation concerning PL221818 and PL220549. (Pa. 9). Specifically, the CSC found that N.J.A.C. 4A:4-4.8(b) was not enforced when promotions were made in July of 2022 from PL220549 because the corresponding eligibility list did not expire until well after the certification was issued, therefore it was not "confronted with the issue" of verifying actual vacancies when certification was requested to make the July 2022 promotions. (Id.). Once "confronted with the issue" in the case of PL221817, the CSC had no choice but to enforce N.J.A.C. 4A:4-4.8(b), as all parties involved were now aware of its prohibition of promoting fire officers to fill "anticipated vacancies." (Id.)

LEGAL ARGUMENT

I. The Court Should Defer to the Civil Service Commission's Decision

In matters involving decisions made by administrative agencies, courts generally grant those decisions and the "agency's expertise and superior knowledge in a particular field" a great deal of deference, giving them a "strong presumption of reasonableness." Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, Bureau of Homeowner Prot., New Home Warranty Program, 186 N.J. 5, at 16 (2006), quoting

Newark v. Natural Res. Council, 82 N.J. 530, 539 (1980); Greenwood v. State Police Training Ctr., 127 N.J. 500 (1992). Such decisions should not be upset unless this Court finds that it is “arbitrary, capricious, or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies expressed or implicit in the enabling legislation” and is done so only in “rare circumstances.” Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, Bureau of Homeowner Prot., New Home Warranty Program, 186 N.J. 5, at 16 (2006) quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963); In re Musick, 143 N.J. 206, 216 (1996).

In determining whether an agency’s action meets the “arbitrary, capricious, or unreasonable” threshold, courts should consider:

(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.

Matter of Acosta, 2021 WL 1344026, at 4 (N.J. Super. Ct. App. Div. Apr. 12, 2021), citing In re Carter, 191 N.J. 474, 482 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)). The lofty burden of proving that the agency’s decision was “arbitrary, capricious, or unreasonable” is on the Appellant. Id. quoting Bowden v. Bayside State Prison, 268 N.J. Super. 301, at 304 (App. Div. 1993).

Here, the CSC's decision that Appellant was not entitled to a promotion due to the expiration of the eligibility list was not arbitrary, capricious, or unreasonable. Rather, the CSC correctly applied the law which requires promotions to come from current eligible lists, unless genuine vacancies exist, and exercised its statutory discretion to "relax" certain regulations in order to cure administrative errors.

a. No Genuine Vacancies Existed at the Time Certification PL221817 was Promulgated

Certification PL221817, on which Appellant was ranked as number one, was issued to the City, at the City's request, on December 28, 2022. (Pa. 72). During the timeframe between when the Certification was issued by and returned to the CSC, there were no "genuine vacancies" for Hoboken Fire Captains. Appellant points to retirements which occurred in September and October of 2022 as supposedly creating the "genuine vacancies" which he could have been appointed to fill, however those positions had already been retroactively filled by appointments to Fire Captain that the City had made in July of 2022, in anticipation of those retirements. While the Appellant claims there is "no legal authority" for the CSC to permit the retroactive appointment of fire officers to fill anticipated vacancies, the CSC does in fact have that authority under New Jersey law, to use at its discretion. The CSC appropriately utilized that discretion in this matter.

Pursuant to N.J.A.C. 4A:1-1.2, the CSC is permitted to “relax” the rules prescribed by the Civil Service statutes “for good cause in a particular situation.” The situation wherein the City appointed new fire captains to fill anticipated vacancies, whilst ignorant of rules to the contrary, was an appropriate situation for the CSC to discretionally “relax” the requirement for certifications to be requested in order to fill “genuine vacancies,” because at all relevant times the City acted in good faith and the vacancies actually occurred at the time they were anticipated to. Once the issue was flagged, the City notified the CSC that it was totally unaware that this practice was not permitted, and the CSC had no reason to dispute that contention. (Pa. 71).

This Court has held that instances of the CSC exercising its statutorily delegated discretion to “relax” its own rules is especially appropriate when the utilization of that discretion is in furtherance of the policy goals which underlie the Civil Service Statutes. See In Re Martinez, 403 N.J.Super. 58 (2008). The policy declaration for the Civil Service Statutes provides that the legislature’s intent in enacting those Statutes was that:

- a.** It is the public policy of this State to select and advance employees on the basis of their relative knowledge, skills and abilities;
- b.** It is the public policy of this State to provide public officials with appropriate appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities;

c. It is the public policy of this State to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance;

d. It is the public policy of this State to ensure equal employment opportunity at all levels of the public service; and

e. It is the public policy of this State to protect career public employees from political coercion and to ensure the recognition of such bargaining and other rights as are secured pursuant to other statutes and the collective negotiations law.

N.J.S.A. 11A:1-2.

Therefore, the CSC properly issued a one-time “relaxation” of its own rules, by allowing the City to make promotions in good faith based on anticipated vacancies in July of 2022, thereby furthering the established underlying policy to “provide public officials with appropriate appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities.” N.J.S.A. 11A:1-2(b). This Court has also found instances of CSC “relaxing” its own rules to be reasonable when it is to address the “compelling public safety concerns of expeditiously staffing” public safety entities. In re Camden County Police Dept. Pilot Program, 2014 WL 3928418 at 3 (N.J. Super. Ct. App. Div. Aug. 13, 2014). Here, the City had a long-standing good faith past practice of requesting certifications from the CSC in advance of anticipated vacancies, in order to account for its thorough internal hiring process, and any potential delays in the process on CSC’s end. This process, albeit faulty, served a legitimate public policy of ensuring seamless appropriate levels of staffing and supervision of its fire department, thereby making it ripe for a one-time relaxation of Civil Service rules.

The City never knowingly violated the Civil Service statute, and the CSC had no reason to know of the City's unwitting violations until the City requested a certification that would have expired after the eligible list upon which the certification would have been based.

b. The Civil Service Commission has no Obligation to Approve Retroactive Promotions

Appellant argues that the CSC's one-time relaxation of its rules in order to cure the City's good-faith administrative error was invalid, therefore he should have been promoted to fill one of the September or October 2022 vacancies. However, this argument assumes that the September and October 2022 vacancies existed at the time of the December 2022 certification, which it has been established that they did not. Once the CSC had used its discretion to craft a one-time "relaxation" of its rules to cure the City's good-faith administrative error, it was under no obligation to retroactively re-classify the errors as "unlawful" and promote Appellant.

This Court has previously held that the CSC "is not required to approve a retroactive appointment even where there is an administrative error." In re Peck, 2011 WL 242023 at 3 (N.J. Super. Ct. App. Div. Jan. 27, 2011). In Peck, a police officer (Peck) was promoted to sergeant in 2006, over a year later than he would have been, if not for an administrative error on the part of the appointing authority. Due to time in service requirements stemming from the appointing authority's error,

Peck was not eligible to sit for the lieutenant's exam in 2006. After Peck filed complaints with the law division, the appointing authority agreed to seek the CSC's permission to retroactively move Peck's appointment date to sergeant back to 2005, where it would have been if not for their error. The authority also agreed to seek permission to retroactively move back Peck's appointment date to lieutenant, in the event that Peck took the lieutenant's exam and scored higher than the three who were promoted in 2006. Peck eventually took the lieutenant's exam and received a score that had he received in 2006, would have made him second on the eligible list. The CSC ultimately decided not to approve Peck's retroactive appointment to lieutenant, because it found that in addition to time in service requirements not being met, "no other factors" existed sufficient to justify retroactive appointment. (Id. at 2).

In finding that the CSC's decision was not arbitrary, capricious, or unreasonable, this Court recognized that circumstances may exist wherein it would be reasonable for the CSC to decide to relax its rules, however such instances are to be considered by the CSC on a case-by-case basis and just because such discretion is exercised in one case, does not mean that it must be exercised in others. (Id.)

Here, as in Peck, the CSC was faced with two similar, though not identical fact patterns, and decided that good cause existed sufficient to "relax" its rules for one of the cases, but not the other. While technically there were no "genuine vacancies" when the City made its July 2022 appointments, the City acted in good-

faith at all times and appointed perfectly qualified individuals to fill vacancies which did in fact come to pass. The CSC did not flag the “genuine vacancies” issue for those promotions, because it had no reason to do so. (Pa. 5-9). Unlike when the December 2022 certification was requested, the April 2022 certification was requested almost a full year prior to the expiration date of the eligible list, thereby not triggering a CSC inquiry into whether “genuine vacancies” existed. Therefore, the CSC made the reasonable determination to retroactively relax its “genuine vacancies” requirement and allow the July 2022 appointments to fill the September and October 2022 vacancies.

c. Public Policy Favors CSC’s One-Time Rule Relaxation

Generally, appointments to fill “anticipated vacancies” are disfavored due to the uncertainty of the vacancy actually occurring. When vacancies are anticipated due to voluntary retirements, the public policy concern is that those retirements “are subject to change at the prerogative of the retiring firefighter.” In re Davis, 2007 WL 2262921, at 3 (N.J. Super. Ct. App. Div. Aug. 9, 2007). Stated differently, if appointing authorities were permitted to fill expected vacancies due to voluntary retirements, a situation could arise where the anticipated retiree changes their mind and decides not to vacate their position. If that were to happen after the authority already appointed someone else to fill the anticipated vacancy, the parties would be

in the undesirable position where there would be too many appointees for too few positions, thereby necessitating layoffs or demotions.

In the instant matter, such a concern did not manifest itself when the CSC was faced with the decision to relax its rules in order to permit a one-time promotion to fill an anticipated vacancy, because the retirements actually occurred at the times they were expected, and the vacancies were filled by entirely qualified individuals from a then-active eligibility list. (Pa. 28, 39). These unique circumstances were ripe for the CSC to relax its rules due to the City's good faith and the fact that the situation that the public policy underlying N.J.A.C. 4A:4-4.8(b) was meant to avoid, never came to pass. Therefore, the CSC's actions and decision were entirely reasonable and should not be disturbed.

II. **Appellant's Remaining Arguments are Not Implicated by The Instant Fact Pattern**

Appellant's remaining arguments, that he was improperly passed over for promotion as a disabled veteran, and that he is entitled to appointment under the doctrine of equitable estoppel are not applicable to the genuine issues raised. Although N.J.A.C. 4A:4-4.8(a) does provide that disabled veterans must be appointed if they are ranked number one on a certification, Appellant was not ranked number one on the certification from which the September and October 2022

vacancies were filled. This issue boils down to whether there existed “genuine vacancies” at the time certification PL221817 was promulgated by CSC, and it has been established that due to CSC’s reasonable exercise of its legislatively delegated discretion, that no genuine vacancies existed.

Finally, the doctrine of “equitable estoppel” does not apply to the instant matter. Appellant asserts that the City and/or CSC did not “turn square corners” with respect to this matter, in violation of N.J.A.C. 4A:10-1.1(c),(d), and (f). That statute provides that an appointing authority cannot “obstruct a person’s lawful opportunity to participate in the selection and appointment process;” that “no person shall make any false statement or perform any fraudulent act in connection with any examination, certification, appointment . . .”; and that appointing authorities must “timely supply all information, documents, and other materials requested by the Civil Service Commission” in connection with “administering the merit system.” N.J.A.C. 4A:10-1.1.

Appellant has not and cannot point to any “false statement” or “fraudulent act in connection with” this matter. N.J.A.C. 4A:10-1.1(a). As has been demonstrated in the Respondent’s papers, the City acted in good faith at all times relevant to this matter, therefore section (a) does not apply. Similarly, this matter contains no allegations by either Appellant or the CSC that the City ever withheld any “information, documents [or] other materials” from the CSC for the purpose of

“accurately administering the merit system.” N.J.A.C. 4A:10-1.1(f). To the contrary, the documents and information that was exchanged between the City and CSC which underly this matter were provided quite expeditiously. On February 2, 2023, the CSC requested information that it required in order to advance the appointment process, i.e. verification of genuine vacancies, and approximately one week later the City provided its candid response that there were no vacancies and that they had been operating in ignorance of N.J.A.C. 4A:4-4.8. (Pa. 66, 71).

Finally, Appellant alleges that the City and the CSC violated N.J.A.C. 4A:10-1.1(d), presumably referencing the City’s good-faith mistaken past practice of requesting certifications to fill anticipated vacancies, and the CSC’s one-time relaxation of its rules against same. When Civil Service employees have challenged the actions of their appointing authority as violative of N.J.A.C. 4A:10-1.1(d), courts have found that a successful claim must show that there is a “close connection” between the complained of conduct and the deprivation of his “right to participate in the selection and appointment process” of the Civil Service. Competello v. LaBruno, 2005 WL 1637907, at 8 (D.N.J. July 12, 2005).

In Competello, plaintiff police officer took a promotional exam for promotion to sergeant. The defendant police chief suspected that several takers of that exam cheated, so he asked the CSC to delay the publishing of the scores so he could investigate the suspected cheating and take remedial action. Plaintiff accused

defendant of interfering with his right to “participate in the selection and appointment process” by way of defendant’s “lobbying” for the test results to be discarded or delayed, in violation of N.J.A.C. 4A:10-1.1(d). (Id.) In ruling against plaintiff by finding that there was not a “sufficiently close connection between delay of publishing results and a public policy against interfering with participation in the selection process,” the court observed that plaintiff was not actually denied an opportunity to participate in the selection and appointment process. (Id.) Plaintiff was permitted to take the exam, was eventually promoted, and the complained of conduct (the delay of the publishing of scores) was based on a legitimate purpose; investigating the reasonable suspicion of cheating. (Id.)

Here, similar to Competello, Appellant was afforded the opportunity to “participate in the selection and appointment process” by taking the promotional exam and being considered for promotion. The fact that there were no genuine vacancies at the time Appellant was ranked first on a certification does not constitute interference with those rights on the part of the City or CSC, nor is there a “significantly close connection” between the City’s good-faith mistake in filling anticipated vacancies, the CSC’s one-time relaxation of its rules, and Appellant’s rights under N.J.A.C. 4A:10-1.1(d).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Civil Service Commission's thorough and well-reasoned opinion, the instant appeal should be denied.

Respectfully submitted,

**FLORIO, PERRUCCI, STEINHARDT,
CAPPELLI & TIPTON, LLC.**

*Attorneys for Respondent,
Corporation Counsel*

Dated: May 23, 2023

By: /s/ Robert Devaney
Robert K. Devaney, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000352-23

IN THE MATTER OF FABIO
COLOGNA

Civil Action
On Appeal from a Final Agency
Decision of the Civil Service
Commission

STATEMENT IN LIEU OF BRIEF ON BEHALF OF
THE NEW JERSEY CIVIL SERVICE COMMISSION

MATTHEW J. PLATKIN
Attorney General of New Jersey
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625
(609)376-2955
Bernadette.Dronson@law.njoag.gov
NJ Attorney ID No. 034551989
Attorney for Respondent,
Civil Service Commission

Bernadette Dronson
Deputy Attorney General
On the Statement

This Statement in Lieu of Brief is filed on behalf of the Civil Service Commission pursuant to Rule 2:6-4(c). Appellant, Fabio Cologna, appeals the August 23, 2023 Final Administrative Determination of the Commission upholding Respondent City of Hoboken's decision not to appoint him to the position of Fire Captain because no genuine vacancies existed prior to the January 16, 2023 expiration of the eligible list. (Pa5-Pa9).¹

Cologna, after passing the promotional exam for Fire Captain for Hoboken, was placed on eligible list PM1039V with an expiration date of January 16, 2023. (Pa5). The disposition due date of an eligibles list may not be extended beyond the expiration date of the list when vacancies do not exist. N.J.A.C. 4A:4-4.8(b). An anticipated vacancy is not considered the same as an existing vacancy. Ibid.

On January 5, 2023, Hoboken received from the Commission a Certification of Eligibles as of December 28, 2022 for Promotion to Fire Captain (PL221817). (Pa62; Pa72). This list had a disposition date of March 28, 2023, which was two months beyond the expiration of Cologna's eligibility under

¹ "Pa" refers to Petitioner's Appendix.

PM1039V. Ibid. Via February 2, 2023 correspondence, the Commission's Division of Human Resources Information Services advised Hoboken that, in order to extend the expiration of the Appellant's eligibility list, Hoboken would need to verify that "genuine vacancies" for Fire Captains existed in the Hoboken Fire Department as of the January 16, 2023 expiration of PM1039V. (Pa66). Because no genuine vacancy existed, Cologna's eligibility expired on January 16, 2023, and he was not promoted to the position of Fire Captain. (Pa5; Pa6). Hoboken returned the Certification without making any appointments. (Pa71). On February 16, 2023, a new eligibility list for Hoboken Fire Captain was promulgated. (Pa6).

Cologna appealed his non-appointment from the December 28, 2022 certification of the Fire Captain eligible list to the Commission, claiming that there were multiple genuine vacancies as of the expiration of the list and challenging the Commission's alleged failure to raise similar concerns about genuine vacancies in other cases involving Hoboken. (Pa6).

In its Final Administrative Determination, the Commission upheld Hoboken's position that no genuine vacancies existed prior to the expiration of PM1039V as required by N.J.A.C. 4A:4-4.8(b). (Pa7-Pa9). In addition, the

Commission found that, of the genuine vacancies claimed by Cologna, two were filled before the certification of PM1039V, and the impending retirements on February 1, 2023 and March 1, 2023 could not be considered current vacancies pursuant to N.J.A.C. 4A:4-4.8(b). Ibid.

Cologna also questioned why similar concerns regarding genuine vacancies were not raised in connection with the two prior retirements. (Pa8-Pa9). Hoboken acknowledged that it filled those two vacancies in July 2022 in anticipation of retirements to take place in September 2022 and October 2022. (Pa55). This was consistent with Hoboken's then-normal practice of filling positions based on pending retirements, which were not ultimately genuine vacancies. (Pa63). However, because the certification for these positions was issued and disposed of before the expiration of PM1039V, the Commission's Division of Human Resource Information Services never confronted whether a disposition due date required extension in connection with these promotions. (Pa9). They therefore did not involve the same concerns as the present matter and have little relevance. (Ibid.).

This appeal from the August 23, 2023 Final Administrative Action by the Commission followed.

Having reviewed the merits briefs filed by the primary parties, the Commission has determined that the factual and legal issues involved in this appeal do not warrant the filing of a separate brief. The primary issue raised on appeal is whether the Commission's decision to uphold the Hoboken's non-appointment of Cologna to Fire Captain was arbitrary, capricious or unreasonable. Because this matter does not involve a challenge to the validity of the Civil Service statutes or the rules promulgated thereunder, a separate brief on the merits is unnecessary; the primary parties to this appeal have adequately addressed the relevant issues, and the public interest does not require the Commission's participation.

Nevertheless, the Commission's decision should be affirmed. It is well-established that an agency's determination will not be upset unless it is affirmatively shown that it is arbitrary, capricious, or unreasonable or that it lacks fair support in the record as a whole. Karins v. City of Atl. City, 152 N.J. 532, 540 (1998). A strong presumption of reasonableness attaches to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). Thus, a court must affirm the decision if the evidence supports it, even if

the court may question its wisdom or would have reached a different result.
Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001).

The Commission, the body with the expertise to evaluate, interpret, and administer the Civil Service Act, was in the best position to analyze the facts and issues and determine that, based upon N.J.A.C. 4A:4-4.8(b), Cologna was not entitled to a promotion due to expiration of the eligibility list since no genuine vacancies existed prior to its expiration.

For these reasons, the Commission's decision should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: s/Bernadette Dronson
Bernadette Dronson
Deputy Attorney General
NJ Attorney ID #34551989
Bernadette.Dronson@law.njoag.gov

Dated: July 3, 2024

Superior Court of New Jersey – Appellate Division
Reply Letter Brief
Appellate Division Docket Number: A-000352-23

C. ELSTON & ASSOCIATES, LLC
309 Morris Avenue
Suite E
Spring Lake, New Jersey 07762
Telephone: (732) 280-6911

Of Counsel
and On the Brief: Catherine M. Elston, Esq. (ID #015051990)
cmelston@elstonlaw.com

Date of Submission: July 24, 2024

Reply Letter Brief on behalf of Petitioner-Appellant Fabio Cologna

IN THE MATTER OF FABIO COLOGNA

Case Type: Civil
Agency: Civil Service Commission
Agency Docket No.: 2023-1728

Your Honors:

Pursuant to *R. 2:6-2(b)*, please accept this reply letter brief on behalf of
Petitioner-Appellant Fabio Cologna (“Appellant”).

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS ii

TABLE OF AUTHORITIES..... iii

REPLY STATEMENT OF FACTS 1

LEGAL ARGUMENT..... 2

 I. *THE CIVIL SERVICE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, AND UNREASONABLY, AND CONTRARY TO RESPONDENT CITY’S CONTENTION, IN VIOLATION OF N.J.A.C. 4A:10-1.1, BY IMPLICITLY CONDONING, IN ITS FINAL ADMINISTRATIVE DECISION HERE, THE CITY’S RETROACTIVE APPLICATION OF RETIREMENT VACANCIES TO PROMOTIONS MADE IN VIOLATION OF N.J.A.C. 4A:4-4.8(b), WITHOUT PREVIOUSLY ISSUING A FINAL ADMINISTRATIVE DECISION FROM WHICH APPELLANT COULD HAVE APPEALED..... 2*

 II. *EQUITABLE ESTOPPEL APPLIES TO THE FACTS OF THIS CASE..... 4*

 III. *RESPONDENTS’ REMAINING ARGUMENTS ARE WITHOUT MERIT..... 7*

CONCLUSION..... 9

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Pa5 Civil Service Commission (CSC) Final Administrative Action, issued
August 23, 2023

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<u>Fairken Assocs. v. Hutchin</u> , 223 N.J. Super. 274, 280 (Law Div. 1987).....	5
<u>Kyer v. City of East Orange</u> , supra, 315 N.J. Super. at 534, 719 A.2d 184, [315 N.J. Super. 524 (1998)].....	6
<u>Ridge Chevrolet-Oldsmobile, Inc. v. Scarano</u> , 238 N.J. Super. 149, 154 (App. Div. 1990).....	4
<u>Sellers v. Board of Trustees of the Policed and Firemen’s Retirement System</u> , 399 N.J. Super. 51 (App. Div. 2008).....	5
<u>Sellers v. Board of Trustees of the Policed and Firemen’s Retirement System</u> , 399 N.J. Super. 62.....	6
 <u>New Jersey Regulations</u>	
<i>N.J.A.C.</i> 4A:4-4.8(b).....	1,2,8
<i>N.J.A.C.</i> 4A:10-1.1.....	2,3

REPLY STATEMENT OF FACTS

The City made Captain promotions in the Hoboken Fire Department in July 2022. The City conceded that at that time, there were no “actual” vacancies for captains, as required by civil service regulations, specifically, *N.J.A.C.* 4A:4-4.8(b). **Pa63; Pa55.** While the Civil Service Commission, (“CSC”), acknowledged that in the absence of “actual” vacancies, the July 2022 promotions violated civil service regulations, (CSC¹ Brf-3), there is no evidence that the CSC took any action against the City for such violation. Nor is there any evidence that the CSC later approved the City’s retroactive application of September and October 2022 vacancies to the July 2022 promotions.

While failing to enforce *N.J.A.C.* 4A:4-4.8(b) as to the July 2022 promotions, the CSC enforces the very same regulation to deny Appellant’s promotion to the rank of Captain even though, unlike the July 2022 promotions, there were actual vacancies in the rank. Appellant, who is a disabled veteran as per Civil Service, occupied the number one spot of ten eligibles certified by the Civil Service Commission in December 2022. **Pa72.** Two prior captain retirements, one in October 2022, and one in November 2022, created the necessary “actual” vacancies for Appellant’s promotion. **Pa39; Pa28.**

Before the expiration of Appellant’s CSC Certification on March 28, 2023,

¹“CSC” refers to the Civil Service Commission’s opposition brief.

Pa5, three more captains retired: Captains Ronald Miltner, **Pa52**, Vincent DePinto, **Pa51**; and Baron Ballester, **Pa50**. Accordingly, there were three additional genuine vacancies prior to the expiration of Appellant's promotional list on February 7, 2024, **Pa60**, and prior to the expiration of his certification on March 28, 2023. **Pa5, page 1**. The CSC also confirmed that Appellant was never removed from, nor bypassed on, his CSC Certification, **Pa63; Pa87**, but, instead, retained for future promotion. **Pa72; Pa63**.

LEGAL ARGUMENT

- I. **The Civil Service Commission acted arbitrarily, capriciously, and unreasonably, and, contrary to Respondent City's contention, in violation of *N.J.A.C.* 4A:10-1.1, by implicitly condoning, in its Final Administrative Decision here, the City's retroactive application of retirement vacancies to promotions made in violation of *N.J.A.C.* 4A:4-4.8(b), without previously issuing a Final Administrative Decision from which Appellant could have appealed.**

The facts are uncontroverted that the City promoted to the rank of captain in the Hoboken Fire Department in July 2022. At that time, there were no actual vacancies for the promotions. The facts are also uncontroverted that the City admitted to the CSC that such promotions violated *N.J.A.C.* 4A:4-4.8(b), the City advising the CSC that it had always promoted in *anticipation of* retirements instead of after *actual* retirements that created vacancies. The CSC took no action with respect to the unlawful July 2022 promotions.

It is further uncontroverted that the City neither sought nor obtained approval

from the CSC to retroactively apply latter vacancies to the July 2022 promotions. It is also uncontroverted that the CSC did not authorize the City's retro-application of the September and October 2022 vacancies to the July promotions. There is no Civil Service determination issued stating as such; further, neither the City nor the CSC have provided statutory or regulatory authority, or precedent, authorizing retroactive application. Notably, the CSC did not state that it approved the City's retro-application, stating, instead, "The vacancies left by the retirements of Chaneski and Daliani [September and October 2022 retirements] per the appointing authority's *unrebutted indication*, had already been filled by the time certification PL221817 was issued." **Pa8**. Accordingly, despite the City's argument that the CSC "relaxed" the rules to provide for retroactivity, (City's brief-8), there is no proof of such.

The CSC's failure to issue a Final Administrative Decision addressing and approving the City's retroactive application of actual vacancies to promotions, that had already been made months before, deprived Appellant and others similarly situated of the ability to appeal the agency's ruling which indisputably prejudiced their promotional opportunities.

The CSC's failure to issue a formal decision and the City's failure to notify Appellant of its actions are in violation of *N.J.A.C. 4A:10-1.1*, contrary to the City's argument. (City's brief-14). The rule states, in part, "... (c) No person or appointing authority shall obstruct a person's lawful opportunity to participate in the selection

and appointment process or a person's lawful pursuit of any remedy or appeal under Title 11A, New Jersey Statutes, and Title 4A, N.J.A.C.” The failure to notify Appellant that the City had, without authority, retroactively applied actual vacancies to promotions that had already occurred, and which were vacancies applicable to Appellant’s promotion, via Final Administrative Decision or otherwise, indisputably obstructed Appellant’s promotional opportunities.

For these same reasons, and contrary to the CSC’s findings, Appellant could not rebut the City’s “indication” that the vacancies of September and October 2022 had already been filled. Despite Appellant’s requests from the City for the reasons for the failure to promote him, the City never stated that it retroactively applied the September and October vacancies to the July 2022 promotions which caused the lack of “actual” vacancies. **Pa55; 58; 62; 74; 81-82; 85; 90; 95; 99.** Appellant was not notified of such until the CSC rendered the subject Final Administrative Decision.

II. Equitable Estoppel applies to the facts of this case.

In a number of cases addressing the application of equitable estoppel, the courts have held that employees should not be penalized in their employment for their employer’s mistakes, misrepresentations, or omissions. *See, Ridge Chevrolet-Oldsmobile, Inc. v. Scarano*, 238 N.J. Super. 149, 154 (App. Div. 1990). (“[A] party

asserting equitable estoppel² may rely upon inaction, representation of the actor, misrepresentation, silence or omission." Id., quoting *Fairken Assocs. v. Hutchin*, 223 N.J. Super. 274, 280 (Law Div. 1987); See also, *Sellers v. Board of Trustees of the Police and Firemen's Retirement System*, 399 N.J. Super. 51 (App. Div. 2008).

In *Sellers*, the Petitioner had been hired as a firefighter despite being over the age of 35, the maximum for such enrollment for firefighters. Both Sellers and the Township thought Sellers' military service adjusted his age to meet the statutory requirements for enrollment in PFRS, but they were mistaken, and enrollment was denied. Id. at 53.

The appellate court reversed the PFRS' denial of enrollment. In so doing, the court looked not only to equitable powers to waive the age requirement, Id. at 55-57, but found that it was the Township that erred by hiring Sellers when he failed to meet the age requirements for the position. Id. at 59. The court held that municipalities will continue to make hiring decisions based upon their understanding of the pension law, which may be the result of reasonable mistake based on past confusion. Id. at 61.

The court further found that although a person's age is a readily ascertainable fact, the application of adjustments depends on the numerous statutes which are not

² The estoppel doctrine may be invoked against a municipality "where the interests of justice, morality and common fairness clearly dictate that course." *Gruber v. Mayor & Tp. Comm.*, 39 N.J. 1, 13 (1962).

always properly understood. *Id.* at 61. The court noted that it was only after further legal review that a determination was made that Sellers did not meet these requirements thereby attesting to the complex determinations involving compliance with the enrollment criteria. The court held,

People accepting public employment should be able to do so without hiring lawyers to assure that they qualify for the position. *See Kyer v. City of East Orange, supra*, 315 N.J. Super. at 534, 719 A.2d 184, [315 N.J. Super. 524 (1998)] (stating that “persons employed by civil service municipalities ought not to have to retain counsel for advice as to their job rights”). People accepting the firefighter positions in good faith should not be putting their careers and the financial well-being of their families in jeopardy by giving up their current jobs and accepting public employment only to find out later that they do not meet the age requirements for the positions, particularly when all of the relevant information was available to the State and municipality before the commencement of employment.

Sellers v. Bd. of Trustees of Police & Firemen's Ret. Sys., 399 N.J. Super. at 62.

Here, even if the City’s argument that it was “ignorant of any laws or regulations” of the necessity of having “actual” vacancies in order to promote, (City Brief-1), is accepted by this Court, for reasons set forth in *Sellers, supra*, the resultant harm to Appellant should not be. The City has the duty to be knowledgeable of, and abide by, Civil Service laws. Appellant is not required to know the nuances of civil service regulations regarding promotions, and the City’s failure to know, and its’ attempt to rectify those mistakes without the statutory or regulatory authority to do so, resulting in Appellant being deprived of a promotion, is contrary to the court’s ruling in *Sellers*. Particularly offensive here is that while Appellant inquired of the

City as to its reason for failing to promote him, as set forth above, the City never advised Appellant that it retroactively applied the September and October 2022 retirements to the July 2022 promotions.

III. Respondents' remaining arguments are without merit.

The CSC's statement that in December 2022 it inquired as to the City's existing vacancies because it had issued the City a certification of promotional candidates "within three months of the expiration of the list," PA9, is both specious and irrelevant as neither the City, nor the CSC, has provided statutory or regulatory authority requiring confirmation of existing vacancies upon issuance of a certification issued within three months of the expiration of a promotional list. The CSC's attempt to use this theory to justify its actions in enforcing the subject regulation as to Appellant's promotion, but not to any other invalid promotions, including the July 2022 promotions, is, therefore, misplaced.

The City's characterization of Appellant's deprivation of a promotion as an "administrative error" is also specious as: 1) incompatible with its prior statements of its ignorance of civil service law; and 2) there was no "error." The City had a duty to know the law as to promotions; it did not, and when notified of its improper July 2022 promotions, it attempted to "cure" the mistake via unauthorized action. Such was clearly intentional conduct in an effort to remediate its prior improper conduct and, therefore, not an "error."

The City's arguments that there were no actual vacancies for Appellant's promotion because the September and October 2022 vacancies no longer existed, (City Brief-10-16), is especially arrogant as the only reason such vacancies no longer existed was because the City unlawfully retroactively applied them to the July 2022 promotions.

Finally, Respondents' arguments that the CSC's failure to enforce *N.J.A.C.* 4A:4-4.8(b) as to the City's July 2022 promotions was because the eligibility list did not expire until after the certification for such promotions was issued, (City Brief-5), is irrelevant and senseless. Similarly, Appellant's eligibility list did not expire until March 2023, and the certification of promotions for his civil service remained active until February 7th, after additional actual vacancies occurred.

CONCLUSION

For all the foregoing reasons, and relying on regulation and precedent cited, the Final Administrative Decision of the Civil Service Commission must be reversed, and Appellant promoted retroactively, with corresponding seniority and backpay.

Respectfully submitted,

By: /s/ Catherine M. Elston

Catherine M. Elston, Esq.