

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2369-20**

**GABRIELE SPALLACCI, VICTOR
LORA, NOVAR VIDAL, LILLIAN
SANCHEZ, JUAN GARCIA,
PEDRO BORERRO, ROBERT
KLEIN, JUAN COSME, FELIPE
DIAZ, JOSE CASTELLANOS,
MARQUIS BROCK, MOHAMAD
DIABATE, ANGEL PARED,
VALERIA SANCHEZ-BERMUDEZ,
and ISABEL REYES,¹**

Petitioners-Appellants,

v.

CIVIL SERVICE COMMISSION,

Defendant-Respondent.

Submitted May 9, 2023 – Decided August 7, 2023

Before Judges Sumners and Susswein.

**On appeal from the New Jersey Civil Service
Commission, Docket Nos. 2020-1895, 2020-1897,**

¹ Gabriele Spallacci improperly plead as Gabriel Spallacci and Valeria Sanchez-Bermudez improperly plead as Valeria Sanchez.

2020-1898, 2020-1899, 2020-1901, 2020-1902, 2020-1903, 2020-1904, 2020-1905, 2020-1936, 2020-1993, 2020-1994, 2020-1995, 2020-1996, and 2020-2330.

Law Offices of Steven A. Varano, PC, attorneys for appellants (Albert J. Seibert, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Craig S. Keiser, Deputy Attorney General, on the brief).

PER CURIAM

In February 2019, fifteen petitioners—Gabriele Spallacci, Victor Lora, Novar Vidal, Lillian Sanchez, Juan Garcia, Pedro Borerro, Robert Klein, Juan Cosme, Felipe Diaz, Jose Castellanos, Marquis Brock, Mohamad Diabate, Angel Pared, Valeria Sanchez-Bermudez, and Isabel Reyes—took the police sergeant exam administered by the New Jersey Civil Service Commission (Commission). After the exam, the Commission's Division of Test Development and Analytics (TDA) analyzed the examination's raw data results and recommended that, in accordance with a consent decree reached with the United States Department of Justice (DOJ),² the last ten questions should not be scored because they had a

² In 2010, the DOJ filed a complaint against New Jersey and the Commission, alleging "the selection process used to test and appoint candidates to Police Sergeant title between 2000 and 2008 had a disparate impact on African American and Hispanic candidates in violation of Title VII of the Civil Rights

disparate impact on the scores of racial minority candidates. The Commission agreed and released the scoring results, excluding the last ten questions.

Petitioners, thirteen of whom are racial minorities, challenged the validity of the exam's scoring. The Commission issued a final agency decision denying their challenge. Petitioners appeal, arguing the Commission's action was arbitrary and capricious, "adversely impact[ing] the examinees that followed the instructions, managed their time properly, and completed the exam in the allotted time."

We reverse and remand because the raw data supplied by the Commission to support its decision was indiscernible, lacking explanation and interpretation regarding the adverse impact on racial minorities by scoring the last ten exam questions. Remand shall be in accordance with procedure set forth below.

Act of 1964, 42 U.S.C. § 2000e to -17. See Complaint, United States v. State of New Jersey & New Jersey Civil Service Commission (D.N.J. Jan. 7, 2010). The matter was settled through a consent decree that the district court approved on June 12, 2012, which was affirmed by the Court of Appeals in 2013. United States v. New Jersey, No. 12-2964, 2013 U.S. App. LEXIS 11885 (3d Cir. 2013). The consent decree provided that the State, in consultation with the DOJ, would develop a new police sergeant examination and scoring process. The consent decree detailed when it would expire but the parties dispute whether it had occurred when the examination in question was administered. We need not resolve that disagreement due to the reasons for which we are remanding.

I.

Under the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, the Commission is delegated broad power over all aspects of the public employment career service. See Mullin v. Ringle, 27 N.J. 250, 256 (1958). The Commission is charged with announcing and administering examinations to test the knowledge, skills, and abilities (KSAs) required to satisfactorily perform job duties, N.J.S.A. 11A:4-1(a). The Commission also must establish jobs, set qualifications for those jobs, administer tests to fill those jobs, and oversee and administer the candidate selection process. N.J.S.A. 11A:4-8; N.J.A.C. 4A:3-3.1.

After entry of the consent decree in 2010 and prior to the 2019 police sergeant exam, the same exam at issue here was administered by the Commission on three occasions without the elimination of any questions. In its analysis of the 2019 police sergeant exam results, the TDA, used the Four-Fifths rule³ advocated by the United States Equal Employment Opportunity

³ The rule measures the adverse impact of tests, meaning the passing rate of any group must be at least four fifths of the rate of a race, sex, or ethnic group with the highest passing rate. Paradise v. Prescott, 580 F. Supp. 171, 172 (M.D. Ala. 1983), aff'd, United States v. Paradise, 480 U.S. 149, 185-86 (1987). "This '4/5ths' or '80%' rule of thumb is not intended as a legal definition, but is a

Commission. It determined fewer candidates were able to complete the questions toward the end of the exam, which disproportionately affected African Americans, thereby revealing a disparity in the performance of racial minority and non-racial minority candidates. Claiming compliance with the consent decree and existing law, the TDA recommended that omission of the final ten questions addresses the disparity and establishes adequate testing of the KSAs needed for the police sergeant title. The Commission agreed.

When petitioners learned the last ten questions of the exam were not scored, they appealed to the Commission, challenging the validity of scoring. After being advised when their appeal would be considered, petitioners requested to be heard and present evidence at a Commission meeting. The request was denied, but petitioners were advised there would be public comment at the meeting where they could address the Commission. However, for reasons unexplained in the record, public comment was not allowed.

II

Before us, petitioners contend the Commission did not provide any evidence supporting its conclusion that not scoring the final ten exam questions

practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions." 29 C.F.R. § 1607 (1979).

remedied the exam's disparate impact on racial minorities. The Commission provided raw data consisting of several spreadsheets, outlining the 2019 exam and previous examination scores. These spreadsheets included, but were not limited to, mean scores for male candidates versus female candidates, as well as score breakdowns across different ethnicities. Petitioners stress the raw data has no corresponding explanation, analysis, or interpretation enabling them to understand and, in turn, challenge the Commission's final agency decision. They further assert "it is incumbent upon [the Commission] to provide such analysis in order to enable the [c]ourt to conduct a "careful and principled consideration of the agency record" and to "facilitate judicial review." Chou v. Rutgers, The State Univ., 283 N.J. Super. 524, 539 (App. Div. 1995).

Petitioners contend they relied upon the instructions in the Multiple-Choice Exam Orientation Guide and the 2018-2019 Police Sergeant Orientation Guide (the Guides) provided by the Commission, which stated:

The scoring of the written examination will be based on the number of correct responses. There will be no penalties for wrong answers. That is, points will not be deducted for wrong answers. Therefore, it is in the candidate's best interest to answer all questions. If the answer to a question is not known, choose the BEST choice. Candidates should budget their time so that they can respond to all questions within the allotted time.

Therefore, in studying for and taking the exam, petitioners maintain they placed emphasis on time management and answering every question to ensure as many correct answers as possible in a timely manner. They argue:

The random and arbitrary decision to remove the final ten questions unfairly punished those who followed the instructions and budgeted their time and rewarded those who spent additional time to respond to the more difficult questions preceding the final ten, irrespective of whether they even finished the examination. This directly conflicts the instructions provided to the examinees that it was in their "best interest to answer all questions" and "to budget their time so that they can respond to all questions within the allotted time." . . . Due to the elimination of the final ten questions, this was clearly not the case.

Petitioners assert the Commission's reliance on the discretion ordinarily accorded to agency decisions and the consent decree is misplaced because it failed to address "the blatant conflict between their own instructions provided to the examinees to manage their time so as to complete the entire exam, and the ex post facto decision to eliminate the final ten questions of the examination." They argue further that the consent decree expired and the Commission's reliance on it "is an ineffective attempt to divert attention from the actual issues in this appeal."

Petitioners maintain the arbitrariness of the Commission's decision is reflected in the fact that the scores of thirteen petitioners—who are racial

minorities—would have been higher had the last ten exam questions been scored. Thus, the elimination of the final ten questions created, rather than eradicated, an adverse impact.

In sum, petitioners contend this court's nullification of the exam results is justified because they have "affirmatively shown that the examination was corrupt, arbitrary, capricious, or conspicuously unreasonable." See Rox v. Dep't of Civ. Serv., 141 N.J. Super. 463, 467 (App. Div. 1976).

III

Our review of a final agency decision is limited given their executive functions. Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). Accordingly, "[a]n agency's determination on the merits 'will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). We generally limit our review to three inquires:

- (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.

[Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field."

In re Herrmann, 192 N.J. 19, 28 (2007).

The party challenging the administrative action bears the burden of showing the agency decision was arbitrary, capricious, unreasonable, or lacked fair support in the record. Lavezzi v. State, 219 N.J. 163, 171 (2014). However, where the information presented by an agency to support its decision does not allow the challenger or the court to adequately assess the decision, the agency—despite its expertise—must provide more specific information. See Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 203 (App. Div. 2003) (holding that in reviewing an agency decision, we "insist that the agency disclose its reasons for any decision, even those based upon expertise, so that a proper, searching, and careful review may be undertaken"). This so because our review is not designed

"to merely rubberstamp an agency's decision," but rather, "we are constrained 'to engage in a careful and principled consideration of the agency record and findings.'" Sullivan v. Bd. of Rev., Dep't of Labor, 471 N.J. Super. 147, 156 (App. Div. 2022) (quoting Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 191 (App. Div. 2010)).

We dismiss the Commission's contention that petitioners have not taken steps to understand the raw data it provided to substantiate its final agency decision. The raw data affords neither petitioners nor us the ability to consider if scoring the final ten exam questions disparately impacted racial minorities, or whether, as petitioners suggest, the remedy adopted by the Commission unwittingly amplified rather than ameliorated the purported disparate impact it sought to correct. Under these circumstances, we cannot grant the Commission the deference we normally confer to an administrative agency. Accordingly, given the insufficient record before us, we do not pass judgment on whether the elimination of the ten questions was proper.

Remand is necessary for the Commission to provide an explanation and interpretation of how the raw data demonstrates the adverse impact on racial minorities by scoring the last ten exam questions. Within sixty days of this decision, the Commission must provide petitioners with an explanation and

interpretation of how the raw data demonstrates racial minorities were adversely impacted, in violation of the consent decree and existing law, if the last ten exam questions were scored. The petitioners may renew their challenge to the Commission's scoring in accordance with the agency's guidelines. The Commission must then issue another final agency decision within ninety days of the renewed challenge.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION