

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO EX REL. JAY JOHNSTONE,	:	APPEAL NO. C-190263 TRIAL NO. A-1801800
Relator-Appellee,	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
CITY OF CINCINNATI,	:	
Respondent-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Respondent-appellant the city of Cincinnati appeals the decision of the Hamilton County Court of Common Pleas granting a petition for a writ of mandamus filed by relator-appellee Jay Johnstone. Johnstone was a lieutenant in the Cincinnati Police Department who took the November 18, 2016 captain promotional exam. He had two years of service as a lieutenant when he took the exam. He ranked third on the promotion-eligible list behind an individual who only had one year of service. Only the first two individuals on the list were promoted, leaving Johnstone one spot shy of a promotion. In his petition, Johnstone alleged that he should have been promoted to captain because the civil service commission had illegally waived the two-year time-in-grade requirement. The trial court found that the commission's decision to waive the two-year requirement was arbitrary and capricious, and granted Johnstone's motion for summary judgment.

In its sole assignment of error, the city contends that the trial court erred in granting the writ of mandamus. It argues that the commission did not act arbitrarily and capriciously in waiving the two-year time-in-grade requirement for the 2016 captain promotional exam. This assignment of error is not well taken.

First, the city argues that because Johnstone failed to seek injunctive relief before the promotion list's expiration date, there is no longer any controversy between the parties and the case is moot. We have rejected that argument by the city in our prior cases.

We have held that the right to promotion vests in the highest ranked person from the eligibility list when a vacancy occurs. Thus, the subsequent expiration of the list does not does not render the case moot. *See York v. Cincinnati*, 194 Ohio App.3d 517, 2011-Ohio-3921, 957 N.E.2d 67, ¶ 27 (1st Dist.). Also, we have stated that nothing limits a "trial court's inherent authority to order promotion to a vacancy that had arisen after the expiration of a promotion list, as long as the prevailing plaintiff had demonstrated a clear legal right to a vacancy created before the expiration of a promotion list." *State ex rel. Kilgore v. Cincinnati*, 1st Dist. Hamilton No. C-110007, 2012-Ohio-4406, ¶ 23.

Thus, as long as Johnstone can demonstrate a clear legal right to a vacancy created before the expiration of the list, the expiration of the list does not prohibit a court from granting him relief, and there is still a justiciable issue between the parties. *See Cincinnati v. State*, 2018-Ohio-4498, 121 N.E.3d 897, ¶ 2-3 (1st Dist.); *In re Bailey*, 1st Dist. Hamilton Nos. C-040014 and C-040479, 2005-Ohio-3039, ¶ 9-10. Whether Johnstone moved for injunctive relief is irrelevant.

On the merits of the mandamus action, mandamus is an appropriate remedy in wrongful-denial of promotion cases. *State ex rel. Hipp v. Canton*, 70 Ohio St.3d

102, 103, 637 N.E.2d 317 (1994); *State ex rel. Kilgore* at ¶ 10. Because the trial court granted summary judgment, which only involves questions of law, we review the court's decision de novo. *State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608, ¶ 7; *State ex rel. Kilgore* at ¶ 11.

While we review the propriety of the trial court granting summary judgment de novo, we give some deference to decisions of the civil service commission. State courts will generally not intervene in municipal civil service commission matters in the absence of an abuse of discretion. *State ex rel. Brenders v. Hall*, 71 Ohio St.3d 632, 636, 646 N.E.2d 822 (1995). An abuse of discretion contemplates an attitude that is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 218, 450 N.E.2d 1140 (1983); *Vontz v. Miller*, 2016-Ohio-8477, 111 N.E.3d 452, ¶ 55 (1st Dist.).

On the facts of this case, we hold that the civil service commission abused its discretion by waiving the two-year time-in-grade requirement for the November 18, 2016 exam. During a meeting the night before the exam, the commission allowed lieutenants who had only one year of service to take the exam, but it stated, "This determination does not establish precedent." Two months later, it issued a ruling acknowledging its decision to waive the two-year requirement for the November 18, 2016 exam. It added, "[t]his decision is set on a one-time basis, under the principles of equity, diversity and equal opportunity, without establishing any precedent or practice for the future police promotional examinations." It specifically stated that it found that the amended language of R.C. 124.44 was not "applicable or determinative for the current dispute * * *."

The commission's decision to waive the two-year requirement was not based on any legal analysis or interpretation. It was "without an adequate determining

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principle” and “without fair, solid and substantial cause.” Thus it was arbitrary and not a proper exercise of the commission’s discretion. *See Thomas v. Mills*, 117 Ohio St. 114, 121, 157 N.E. 488 (1927); *Toman v. State Farm Mut. Auto Ins. Co.*, 8th Dist. Cuyahoga No. 102483, 2015-Ohio-3351, ¶ 30; *State v. Jones*, 2013-Ohio-3559, 996 N.E.2d 569, ¶ 13 (6th Dist.).

The parties agree that no issues of fact exist. Johnstone has shown that he has a clear legal right to the promotion to police captain, which he earned based on his scores on the promotional examination, and that the city had a clear legal duty not to deny him that promotion based upon an arbitrary decision of the commission to waive the two-year time-in-grade requirement solely for the November 18, 2018 examination. Johnstone has no adequate remedy at law, and therefore, the trial court did not err in granting his motion for summary judgment and issuing a writ of mandamus ordering the city to promote him to the position of captain effective April 9, 2017. *See State ex rel. Manley*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608, at ¶ 18; *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983). Consequently, we overrule the city’s sole assignment of error and affirm the trial court’s judgment.

A certified copy of this judgment entry constitutes the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS and MYERS, JJ.

To the clerk:

Enter upon the journal of the court on May 20, 2020
per order of the court _____.
Presiding Judge