

PREPARED BY THE COURT

**ROBERT HARTMAN, JR. and DOUGLASS
WHITTEN,**

Plaintiffs,

v.

**THE TOWNSHIP OF LOWER, MAYOR
FRANK SIPPEL, DEPUTY MAYOR DAVID
PERRY, and TOWNSHIP MANAGER
JAMES RIDGWAY,**

Defendants.

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION - LAW
CAPE MAY COUNTY

CPM-L-385-20

Civil Action

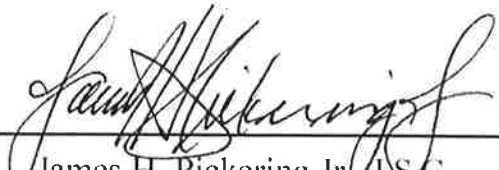
ORDER

THIS MATTER having come before the Court by way of Defendant’s Motion to Dismiss the Complaint filed on December 10, 2020, and the court having heard oral argument by Zoom on Friday, January 8, 2021 at which time Michelle Douglass, Esq. and Philip Burnham, II, Esq. appeared for Plaintiffs, and John Grady, Esq. appeared for Defendants, and for reasons stated on the record,

IT IS ON THIS 12th DAY OF MARCH, 2021 ORDERED that:

1. Defendant’s Motion to Dismiss the Complaint without prejudice and transfer the matter to the Civil Service Commission is GRANTED; and
2. Defendant’s Motion to Dismiss the Complaint under the doctrine of qualified immunity is DENIED; and
3. This Order shall be deemed automatically served upon all counsel of record and parties if served personally in court, and if not so served in court shall be deemed automatically served upon all counsel of record simultaneously with its online posting in E-Courts;

otherwise, all other parties shall be served by the party obtaining this Order or Judgment within seven (7) days after this Order or Judgment was signed. See Rule 1:5-1(a).



James H. Pickering Jr. J.S.C.

Opposed
 Unopposed



**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE
COMMITTEE ON OPINIONS**

JAMES H. PICKERING, JR., J.S.C.

9 North Main Street
Cape May Court House, NJ 08210
609-402-0100 ext. 47730

**MEMORANDUM OF DECISION
PURSUANT TO RULE 1:6-2(f)**

CASE: Robert Hartman, Jr. & Douglass Whitten v. Township of Lower,
et al.

DOCKET #: CPM L-385-20

RETURN DATE: January 8, 2021

MOTION: Motion to Dismiss

MOVANT: Defendants

BACKGROUND

On November 4, 2020, Plaintiffs filed a Complaint in the NJ Superior Court alleging claims under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (“LAD”) and the Civil Rights Act of New Jersey, N.J.S.A. 10:6-2 (“CRA”). Plaintiffs allege that they were discriminated against based on age and reverse military discrimination for provisional promotions.

In lieu of an Answer, Defendants filed this Motion to Dismiss the Complaint on December 10, 2020.

On December 14, 2020 Plaintiffs filed Opposition.

On December 29, 2020 Defendants filed a Reply.

Oral argument was held via Zoom on January 8, 2021 at which time Michelle Douglass, Esq. and Philip Burnham, II, Esq. appeared for Plaintiffs, and John Grady, Esq. appeared for Defendants.

FACTS

Plaintiffs Robert Hartman, Jr. and Douglas Whitten were both employees of Defendant The Township of Lower in Cape May County, New Jersey. Plaintiff Hartman was hired as a police officer for Lower Township on September 19, 1994 and was employed around 26 years until his retirement from the Lower Township Police Department (LTPD). Plaintiff Whitten was also hired as a police officer with the LTPD on September 19, 1994 and was also employed over 25 years until his retirement.

Plaintiff Hartman served as a patrol officer, was promoted to Corporal in January 2012, then promoted to Acting Sergeant in July 2015, was reappointed to Corporal in January 2017 and was promoted to Sergeant First Class in August 2019 where he stayed until his retirement.

Plaintiff Whitten served as a patrol officer, was promoted to Detective Sergeant in January 2017, and was promoted to Police Lieutenant on June 10, 2019.

The Township of Lower is governed by the New Jersey Civil Service Statute, N.J.S.A. 11A:1-1 et seq. for appointments and promotions. Under Article VII, Section I of the New Jersey Constitution of 1947, appointments and promotions in civil service positions are to be done based on merit and fitness which is determined by examination. The New Jersey Administrative Code, N.J.A.C. 4A:4-1.5, governs provisional appointments. Provisional appointments are made when appointments are needed, there is not a complete list of eligible candidates, and the person appointed meets the minimum qualifications for the appointment.

In June/July 2020, the LTPD had vacant positions for Captain, Lieutenant, and Sergeant open on a provisional basis until the Civil Service test was available. The LTPD Chief, Chief Mastriana recommended that Plaintiff Whitten fill the provisional position for Captain, and that Plaintiff Hartman fill the provisional position of Lieutenant.

On August 20, 2020, the Township Manager promoted two other Lower Township police officers to the positions of Provisional Captain and Provisional Lieutenant despite the recommendations of Chief Mastriana. Plaintiffs Whitten and Hartman did not receive a provisional promotion at that time.

Plaintiffs Hartman and Whitten were the oldest applicants in both age and seniority for the available positions. Officers who were younger in age and had less years of experience on the job were promoted to the positions over them.

Plaintiff filed the current action on November 4, 2020 alleging under count one: Disparate Treatment and Failure to Promote in Violation of the New Jersey Law Against Discrimination; count two: Reverse Military Discrimination in Violation of the New Jersey Law Against Discrimination; and count three: violations of constitutional rights under the New Jersey Civil Rights Act.

ANALYSIS

Defendant's motion seeks to dismiss Plaintiffs' Complaint and requests that it be transferred to the Civil Service Commission. Defendant argues that this court is the improper venue for hearing the matter because "the Civil Service Commission has primary jurisdiction over provisional and permanent appointments and the associated testing." Defendant also argues that additionally, the Defendants are protected by qualified immunity and if the case is not transferred, it should be dismissed on those grounds.

Plaintiff argues that the Complaint alleges causes of action under the New Jersey Law Against Discrimination (NJLAD) and New Jersey Civil Rights Act (NJCRA). Under these statutes, they are provided an “election of remedies” and there is no requirement to “exhaust administrative remedies”. Therefore, the matter should stay in the Superior Court and there is no requirement that it first be heard by the Civil Service Commission.

Defendant also argues that the Legislature gave the Civil Service Commission the jurisdiction to hear matters such as these under N.J.S.A. 11A:2-6 to promote consistent rulings throughout the State. Also, Defendants argue that the Civil Service Commission has the “expertise and superior knowledge of a particular field” and is well fit to hear this matter.

Plaintiffs’ argument is that their claims under the NJLAD can be made first in the Superior Court without going to a division or municipal office pursuant to N.J.S.A. 10:5-13(2). Plaintiffs also contend that under the NJCRA, N.J.S.A. 10:5-2(d) and (f), they are able to bring claims in the Superior Court as well. They state that although they reference the NJ Civil Service Act in the Complaint, they do not make claims under the NJ Civil Service Act, but only under the NJLAD, NJCRA, and the state constitution.

The fundamental question which must be addressed is whether or not the matter should stay in the Superior Court or whether the Civil Service Commission possesses primary jurisdiction to hear the matter. The Court takes guidance from Muise vs. GPU, Inc., 332 N.J. Super 140, 157-161 (App. Div. 2000). As expressed by the Court in Muise, the two fundamental purposes of primary jurisdiction are to allow an agency to apply its expertise to questions within its domain and to preserve uniformity in the interpretation and application of an Agency’s regulations. As noted by the Court in Muise:

The general test for when a court should defer to an agency’s primary jurisdiction is: deference is appropriate only if “to deny the agency’s power to resolve the issues

in question” would be inconsistent with the “statutory scheme” which vested the agency “with the authority to regulate [the] industry or activity” it oversees. United States ex rel. Haskins v. Omega Inst., Inc., 11 F. Supp. 2d 555, 561 (D.N.J. 1998). We recently have described four prongs for the test:

The factors to be considered in deciding whether to invoke the doctrine include 1) whether the matter at issue is within the conventional experience of judges; 2) whether the matter is peculiarly within the agency’s discretion, or requires agency expertise; 3) whether inconsistent rulings might pose the danger of disrupting the statutory scheme; and 4) whether prior application has been made to the agency.

332 N.J. Super at 160 (citations omitted).

The court will analyze the current matter under this framework.

1. Is the matter within the conventional experience of Judges?

Defendants assert that violations of the Civil Service Act, N.J.S.A. 11A:1-1 to 12:6, are within the purview of the Civil Service Commission and not “within the conventional experience of Law Division judges.”

Defendants specifically challenge the Veteran’s preference provision in the Civil Service Statute, N.J.S.A. 11A:5-5 and claim that would satisfy prong one under Muise. Plaintiffs, however, contend that this argument misconstrues the claims made by Plaintiffs. They contend that they do not challenge the Veteran’s provision in the Civil Service statute. They argue that the employment decisions and provisional promotions were made based on age and past military friendship with those making the promotions and not based on merit and fitness.

Although the parties question the Veteran’s preference provision, this court also finds that there is a general underlying issue of jurisdiction over provisional appointments which must be addressed. Plaintiffs allege discrimination because they were passed over for provisional appointments. Provisional appointments fall under the jurisdiction of the Civil Service Commission and generally, provisional appointments to civil service positions are not within the conventional experience of judges

Plaintiffs' claims are brought under N.J.S.A. 10:5-1, the New Jersey Law Against Discrimination and N.J.S.A. 10:6-2, the New Jersey Civil Rights Act. Although Plaintiffs claims are not brought as violations under N.J.S.A. 11A:1-1 et seq., Lower Township is governed by the New Jersey Civil Service Statute in regards to appointments and promotions. The issue in this case is the failure of Defendant to promote Plaintiffs to provisional positions, a failure which Plaintiffs contend violated NJLAD and NJCRA.

This court, however, cannot analyze the NJLAD and NJCRA claims without also understanding the role of the New Jersey Civil Service Statutes. The New Jersey Civil Service Commission is established under N.J.A.C. 4A:1-3.1. The Commission is charged with interpreting the application of Title 11A of the New Jersey Statutes to any public body or entity. N.J.A.C. 4A:1-3.3. It can be safely presumed, based on the Legislature giving them jurisdiction over these claims through statute, that the Commission has an expertise in interpreting claims falling under Title 11A. Also, because it is the Civil Service Commission which adopted and amended Title 4A of the New Jersey Administrative Code, it is clear that it also has the expertise in hearing claims that fall under this Title.

Therefore, although issues under the NJLAD and NJCRA fall under the conventional expertise of judges, matters under Title 4A of the New Jersey Administrative Code, such as provisional appointments, do not.

2. Is the matter peculiarly within the agency's discretion, or require agency expertise?

As stated above, while claims under the NJLAD and NJCRA are within the conventional experience of judges, matters regarding provisional appointments to civil service positions are not. Those appointments fall within the agency's discretion; the agency adopted Title 4A of the New Jersey Administrative Code. Provisional appointments, which are the jobs at issue. These

jobs fall under N.J.A.C. 4A:1-3.3. Therefore, it is the finding of the court that matters regarding provisional appointments fall under the discretion and expertise of the Civil Service Commission.

3. Would inconsistent rulings pose a danger of disrupting the statutory scheme?

Defendants, in their reply, assert that the primary reason that this court should decline jurisdiction is to avoid a conflict of law and established practice by the Civil Service Commission. Their argument is that it is the Civil Service Commission that defines provisional appointments and regular appointments. The law governing provisional appointments falls under the Civil Service Commission regulations at N.J.A.C. 4A:4-1.5.

The court agrees with Defendants. The Legislature established the Civil Service Commission under N.J.S.A. 11A:2-1. Title 11A of the New Jersey Revised Statutes, concerns Civil Service in the state, including the appointment and promotion of civil service employees. See N.J.S.A. 11A:1-2. Under N.J.S.A. 11A:2-6(d) the Civil Service Commission is provided the authority to “adopt and enforce rules to carry out [Title 11A] and to effectively implement a comprehensive personnel management system.” Title 11A also gives the Commission the ability to “supervise the selection process” of employees. N.J.S.A. 11A:2-11(f).

The facts of the case are that two police officers did not receive provisional promotions in the Lower Township Police Department. Because the Lower Township Police Department follows the New Jersey Civil Service Statutes for promotions and appointments, and provisional appointments fall under Title 4A of the N.J.A.C., which fall under the jurisdiction of the Civil Service Commission, the New Jersey Civil Service Commission has primary jurisdiction over provisional appointments.

It is clear that the Legislature has created the Civil Service Commission as a means to oversee Civil Service employment. Since the Commission is given that authority by the Legislature, it would be disruptive to bypass the Commission for the Court to hear these matters which the Legislature intends the Commission to handle.

Therefore, the Civil Service Commission is in the best position to handle matters relating to provisional appointments of civil service employees to ensure consistent rulings and that the Legislative purpose in enacting Title 11A is fulfilled.

4. Has prior application been made by the Agency.

At this time, no prior application has been filed with the Commission.

While this court might have the expertise to hear claims under NJLAD and NJCRA, it does not have expertise in issues arising out of N.J.A.C. 4A:1-3.3. Muise states that if there are multiple issues, and some fall under the agency's "special expertise" but others do not, then the court should refer those issues to the agency and apply their findings when determining the remaining issues. Id. at 161.

While the Court may have jurisdiction to hear matters under NJLAD and NJCRA, the issue of the provisional appointments falls under the primary jurisdiction of the Civil Service Commission. In applying the four part test from Muise, these matters do not fall within the conventional experience of judges, it is within the expertise of the agency, and keeping it within the agency is important to ensure consistency. Because of this, it is imperative for the Commission to hear these matters before the courts can apply its findings to the remaining issues of whether there were violations of NJLAD and NJCRA.

Administrative Remedies

Defendant also argues that so long as an administrative agency has a right of review, that remedy must be exhausted before the judiciary can provide relief. Therefore, when there are violations of the Civil Service Act, the parties should go before the Civil Service Commission before coming before the judiciary.

Plaintiffs contend that the NJ Civil Service Commission has no right of review for claims brought under NJLAD or NJCRA; therefore, this argument is misplaced.

As stated above, this court finds that the New Jersey Civil Service Commission does have a right of review for these claims because they concern provisional appointments under N.J.A.C. 4A:4-1.5. It is well established that administrative remedies are to be exhausted before the issues are brought to the courts. Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 558-59 (1979). This requires “exhausting available procedures, that is ‘pursuing them to their appropriate conclusion, and correlatively *** awaiting their final outcome before seeking judicial intervention.’” Id. at 559, quoting Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947).

Because the Civil Service Commission has a right of review, Plaintiffs must first pursue their claims in front of the Commission before they can come before the court. Therefore, because Plaintiffs have not yet exhausted their administrative remedies, the matter is dismissed without prejudice and transferred to the Civil Service Commission.

Qualified Immunity

Defendant argues that in addition to the points made above, Defendants are protected by the doctrine of qualified immunity. Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability for civil

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800 (1982) (citations omitted). Defendant contends that they were using discretion in making these appointments and did not knowingly violate law. Because their conduct was reasonable, they are protected from civil suit under the qualified immunity doctrine.

Plaintiffs argue that the provisional promotions were made based on age and favoritism and were therefore not discretionary, but were instead discriminatory; therefore, qualified immunity does not apply. They contend that “intentional employment discrimination claims are not subject to qualified immunity.” They also allege that even if these were discretionary, qualified immunity does not apply because the claims fall under the NJLAD and NJCRA. For qualified immunity to apply, the action needs to have violated a constitutional right and violated a clearly established law. Because NJLAD is not a constitutional remedy, qualified immunity cannot apply to those claims. For the claims under the NJCRA, Plaintiff claims that they are to be merit based decisions and therefore qualified immunity does not apply.

At this time, the Court will not rule on this issue. Because the matter must first go before the Civil Service Commission, and all administrative remedies must be exhausted, the court will decline to rule on this issue until the Civil Service Commission has had the opportunity to hear the matter in full and there is a final outcome on the matter. The court denies this portion of Defendant’s Motion to Dismiss without prejudice.

CONCLUSION

In applying the four-part test from Muise, it is clear to this court that the Commission has the expertise and primary jurisdiction to determine if there was improper conduct in the provisional appointments of two officers other than Plaintiffs to the positions of Lieutenant and

Captain. For this reason, the court finds that the matter should be dismissed without prejudice and transferred to the Civil Service Commission to determine whether those appointments were proper or improper. As stated above, because the Commission has primary jurisdiction, that administrative remedy must be exhausted before the matter is brought back in front of the court.

As for Defendants argument that the matter be dismissed on the grounds of qualified immunity, that motion is DENIED without prejudice as the matter will be transferred to the Civil Service Commission.



James H. Pickering Jr. J.S.C.

Date: 3/15/2021

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ROBERT HARTMAN, JR., and DOUGLAS
WHITTEN,

Plaintiffs,

v.

TOWNSHIP OF LOWER et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION/CAPE MAY COUNTY

DOCKET NO.: CPM-00385-20

Civil Action

NOTICE OF MOTION TO DISMISS

TO: Philip S. Burnham, II, Esquire
Michelle J. Douglass, Esquire
Burnham Douglass
450 Tilton Road, Suite 200B
Northfield, NJ 08225

PLEASE TAKE NOTICE that on Friday, January 8, 2021 at 9:00 a.m. or as soon thereafter as counsel may be heard, the undersigned counsel for Defendants Township of Lower, Mayor Frank Sippel, Deputy Mayor David Perry and Township Manager James Ridgway shall move before the above-named Court at the Cape May County Courthouse, 9 North Main Street, Cape May Court House, NJ 08210, New Jersey for an Order dismissing the Complaint of Plaintiffs Robert Hartman, Jr. and Douglas Whitten without prejudice for failure to exhaust administrative remedies and that this matter be transferred to the Civil Service Commission under Rule 1:13-4A.

In support of this Motion, Defendants shall rely upon the attached Brief and Certification of Counsel.

A form of Order is attached.

No oral argument is requested unless timely opposition to this Motion is filed and served.

CRAIG, ANNIN & BAXTER, LLP

1st John C. Grady

John C. Grady, Esquire
Attorney for Defendants

Dated: December 10, 2020

John C. Grady, Esquire (027581982)
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Attorneys for Defendants

ROBERT HARTMAN, JR., and DOUGLAS
WHITTEN,

Plaintiffs,

v.

TOWNSHIP OF LOWER et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION/CAPE MAY COUNTY

DOCKET NO.: CPM-00385-20

Civil Action

CERTIFICATION OF COUNSEL

John C. Grady, of full age, upon his oath, certifies and says:

1. I am the attorney responsible for the defense of Defendants Township of Lower, Mayor Frank Sippel, Deputy Mayor David Perry, and Township Manager James Ridgway in this matter.

2. Attached as Exhibit A is a copy of the Complaint.

3. Attached as Exhibit B is a copy of Chapter 90 of the Lower Township Municipal Code.

4. Attached as Exhibit C is a copy of Lower Township's General Order 2007-008.

5. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

CRAIG, ANNIN & BAXTER, LLP

s/John C. Grady
John C. Grady, Esquire

Date: December 9, 2020

BURNHAM DOUGLASS

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ROBERT HARTMAN, JR. and DOUGLAS WHITTEN,

Plaintiffs,

v.

THE TOWNSHIP OF LOWER, MAYOR FRANK SIPPEL, DEPUTY MAYOR DAVID PERRY, and TOWNSHIP MANAGER JAMES RIDGWAY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

CAPE MAY COUNTY

Docket No. CPM-L-000385-20

Civil Action

SUMMONS

THE STATE OF NEW JERSEY TO:

**THE TOWNSHIP OF LOWER
2600 Bayshore Road
Villas, NJ 08251**

YOU ARE HEREBY SUMMONED in a civil action in the Superior Court of New Jersey, instituted by the above-named plaintiff, and required to serve on the attorneys for the plaintiff, whose name and address appears above, a written answer to the annexed complaint within 35 days after the service of this summons and the complaint upon you exclusive of the day of service. If you fail to answer, judgment by default may be entered against you for the relief demanded in the complaint. You shall promptly file your answer and proof of service with the Clerk of the Cape May County Court House at 9 North Main Street, Cape May Court House, NJ 08210.

If you cannot afford an attorney, you may call the Legal Services Office of the County where you reside in this State or the Legal Services of New Jersey Statewide Hotline at

1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf. Also, see the following information: Deputy Clerk of the Superior Court 9 N. Main Street Cape May Court House, NJ 08210; LAWYER REFERRAL (609) 463-0313; LEGAL SERVICES (609) 465-3001.

/s/ Michelle M. Smith

Michelle M. Smith, Esquire
Clerk Superior Court of New Jersey

Dated: November 05, 2020

Defendant to Be Served: THE TOWNSHIP OF LOWER

**Address For Service: 2600 Bayshore Road
Villas, NJ 08251**

BURNHAM DOUGLASS

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ROBERT HARTMAN, JR. and DOUGLAS WHITTEN,

Plaintiffs,

v.

THE TOWNSHIP OF LOWER, MAYOR FRANK SIPPEL, DEPUTY MAYOR DAVID PERRY, and TOWNSHIP MANAGER JAMES RIDGWAY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

CAPE MAY COUNTY

Docket No.

Civil Action

COMPLAINT & JURY DEMAND

PRELIMINARY STATEMENT

This Complaint, brought by Robert Hartman, Jr. and Douglas Whitten, alleges claims under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 et seq. (“LAD”) for age discrimination and reverse military discrimination including: disparate treatment and failure to promote. Plaintiffs also allege claims under the Civil Rights Act, *N.J.S.A.* 10:6-2. (“CRA”) for violations of New Jersey State Constitution and laws that govern merit-based appointments and promotions in the civil service of the state and of such political subdivisions, such as Title 11A of the New Jersey statutes and Title 4A of the New Jersey Administrative Code.

JURISDICTION.

1. This Court has subject matter jurisdiction over Plaintiff's claims under N.J. Const., Art. VII §1, ¶3 et seq., *N.J.S.A.* 10:5-13, *N.J.S.A.* 10:6-2, and other applicable law.
2. This Court has personal jurisdiction over Defendants pursuant to N.J. Ct. R. 4:4-4 and other applicable law.
3. Plaintiffs reside in Cape May County at the time of the filing of this Complaint, and did work for Defendants in, among other places, Cape May County.
4. Venue is appropriate in this Court pursuant to N.J. Ct. R. 4:3-2, and other applicable law.

THE PARTIES AND KEY WITNESSES

5. Plaintiff, Robert Hartman, Jr., ("Plaintiff" and/or "Hartman") is a resident and citizen of the state of New Jersey.
6. Plaintiff, Douglas Whitten, ("Plaintiff" and/or "Whitten") is a resident and citizen of the state of New Jersey.
7. Defendant, Township of Lower, ("Defendant" and/or the "Township"), is a township in Cape May County, New Jersey and according to the United States Census Bureau, the township had a total area of 31.06 square miles and includes within it partially or wholly the unincorporated communities such as: Diamond Beach, Erma, North Cape May, Villas, Cold Spring, Ephraims Island, Fishing Creek, Higbees Landing, Miami Beach, Schellingers Landing, Sewells Point, South Cape May, Sunset Beach, Town Bank, Weeks Landing, and Wildwood Gables.

8. At all times relevant, the Township was the employer of Plaintiffs.
9. At all times relevant to this Complaint, Plaintiffs were “employees” of Defendant who was the “employer” of Plaintiffs within the meaning of N.J.S.A. 10:5-5.
10. At all times relevant, the Township operates under a Council-Manager form of government. N.J.S.A. 40:69A-81, et. seq.
11. The council is composed of five council members (Mayor, Council Member-at-Large, and 3 Wards), each elected on a partisan basis, serving the Township for a four-year term.
12. The Mayor presides over Council at all Council meetings and has a voice and vote in the proceedings.
13. The Defendant, Mayor Frank Sippel, (“Defendant” and/or “Sippel”), a former deputy sheriff of Cape May County, and retired Command Sgt. Maj., Army National Guard, was elected January 2017 to Township council as Deputy Mayor, and in January 2020 was appointed to replace former Mayor Erik Simonson, who was elected to the state Assembly in November 2019.
14. Defendant Sippel has publicly vowed to help and favor members of the military.
15. Defendant Sippel has publicly stated that one of the reasons he decided to run for elected office was to “help soldiers and their families.”
16. The Defendant, Deputy Mayor David Perry (“Defendant” and/or “Perry”), was elected to the Township’s council in or about 2014 and became Deputy Mayor after the seat was vacated by now Mayor Sippel and for all times relevant, holds the position of Township Deputy Mayor
17. At all times relevant, the son of Deputy Mayor Perry is a police officer holding the rank of Detective (Patrolman equivalent) .

18. The Defendant, Township Manager James Ridgway (“Defendant” and/or “Ridgway”) is the chief executive and administrative official of the Township and as such, he either appoints all subordinate personnel not otherwise provided for or delegates the appointive power to department heads.
19. Pursuant to the Township Ordinance No. 2019-07, §90-2 the Township Manager is the appointing authority with power to appoint and promote police officers subject to the merit based rules of the New Jersey Civil Service Commission.
20. At all times relevant, the Township maintains a Public Safety Department which consists of a police force known as the Lower Township Police Department, (“LTPD”) which has adopted, in part, the mission to “enhance the quality of life in the Township of Lower by working cooperatively with the public and within the framework of the Constitution.”
21. The Chief of Police is the head of the LTPD and, at all relevant times, the Chief of Police is William Mastriana (“The Chief” and/or “Mastriana”).
22. All the preceding and subsequently mentioned current and former employees of the Defendant were working within the course and scope of their employment, as agents, and/or on the basis of delegated authority during times relevant to the Complaint.

STATEMENT OF FACTS

23. On or about September 19, 1994, Plaintiff Hartman was hired to work as a permanent appointed police officer for the Township within the LTPD.
24. Hartman has been employed for 26 years with the LTPD.
25. Hartman has nearly 26 years service credit in the New Jersey Police and Fire Pension Fund.
26. On or about September 19, 1994 Plaintiff Whitten was hired to work as a permanent appointed police officer for the Township within the LTPD.

27. Whitten has been employed with the LTPD for 25 years and also has 25 years service credit in the New Jersey Police and Fire Pension Fund.
28. The only other officers employed with the LTPD who have more seniority than Hartman and Whitten are Chief Mastriana with a little more than 27 years of service and Captain William Priole ("Priole") with 29 years of service.
29. Chief Mastriana is scheduled to resign/retire from the LTPD effective December 31, 2020.
30. Hartman started his employment with the LTPD as a patrol officer, thereafter became a member of the Tactical Squad, was promoted to Corporal in January 2012, was promoted to Acting Sergeant in July 2015 and reappointed to Corporal January 2017 and was promoted permanent Sergeant First Class in August 2019 through to the present.
31. Whitten started his employment with the LTPD as a patrol officer, and thereafter was promoted to Detective Sergeant in January 2017. Then, he was supposed to be promoted to Police Lieutenant on or about April 17, 2019. However, the promotions were postponed without good reason, and then, on June 10, 2019, Whitten was finally promoted to Police Lieutenant.
32. In or about December 2019 the LTPD Command structure consisted of one (1) Chief of Police, two (2) Captains (Executive and Administrative), three (3) Lieutenants (Patrol Commander, Investigative and Administrative), and a Sergeant First Class.
33. In or about December 2019, one of the Captains (Martin Biersbach) had unexpectedly passed away leaving one of the two Captain's positions vacant.
34. In December 2019, before Captain Martin Biersbach died, the LTPD Command Staff was as follows:

RANK	NAME	DOB	AGE	SERVICE YEARS	HIRE DATE
Chief	William Mastriana	01/11/66	54	27y, 1m, 15d	07/19/93
Captain	William Priole	08/14/67	53	28y, 10m, 21d	10/13/91
Captain	Martin Biersbach	N/A	N/A	N/A	N/A
Lieutenant	Douglas Whitten	03/22/64	56	25y, 11m, 14d	09/19/94
Lieutenant	Donald Vanaman	04/15/73	47	17y, 5m, 24d	03/10/03
Lieutenant	Kevin Lewis	05/27/69	51	14y, 7m, 25d	01/09/06
Sgt. First Class	Robert Hartman, Jr.	03/17/73	47	25y, 11m, 14d	09/19/94

35. As of December 31, 2019 there were also approximately six (6) Detectives, four (4) Patrol Sergeants, two (2) Corporals, thirty (30) Patrol Officers and two (2) School Resource Officers. In total, the LTPD consisted of approximately fifty one (51) sworn employees.
36. The LTPD Table of Organization is established by Ordinance, Article I, § 90-1.
37. The Township has adopted the New Jersey Civil Service Act.
38. The Township is therefore governed by the New Jersey Civil Service Statute for appointments and promotions. *N.J.S.A. 11A:1-1 et seq.*; Ordinance, Article I, § 90-5 through 8.
39. New Jersey's Civil Service governs the hiring, promotion, classification and discipline of employees of the State of New Jersey, and employees of the majority of counties, municipalities and governmental boards and commissions which have chosen to be governed by Civil Service.

40. The Civil Service System is governed by the New Jersey Constitution and New Jersey's Civil Service Act and the regulations issued by New Jersey's Civil Service Commission which implement the Civil Service Act.
41. New Jersey's Civil Service System is based on a strong constitutional foundation. Article VII, section I of New Jersey's Constitution of 1947 provides that:
- o Appointments and promotions in the Civil Service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.
42. Thus, the 1947 New Jersey Constitutional Convention thus provides a constitutional requirement for the principal of merit based employment decisions upon which the Civil Service System is based.
43. New Jersey's Civil Service System is governed by the Civil Service Act, codified in Title 11 of New Jersey Statutes. In 1986, Title 11A replaced the former Title 11 (in fact, the Civil Service Act takes up all of Title 11A). The Civil Service Act sets out the framework of New Jersey's merit based system of government employment.
44. New Jersey's Civil Service Act is also governed by Title 4A of the New Jersey Administrative Code. The Civil Service Act provides for the establishment of the Civil Service Commission (previously called the Merit System Board), and for its adoption of these regulations.
45. The public policy behind New Jersey's Civil Service Act is explained as follows:

- a. to select and advance employees on the basis of their relative knowledge, skills and abilities;
- b. ...to provide public officials with appropriate appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities;
- c. ...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. ...to ensure equal employment opportunity at all levels of the public service; and
- e. ...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.

46. New Jersey's Supreme Court explained the reasons behind the adoption of New Jersey's Civil Service protections. In a state which had a long history of corruption, the purpose was to make sure that New Jersey's people got the best government possible. In the 1963 case of *Loboda v. Clark Township*, the Court explained:

Primarily it was to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment. Therefore it behooves the judicial branch of the government to give the widest possible range to the application of the law.... Many decisions have recognized that the purpose of the Civil Service Law is to procure efficient public service and to secure tenure during good behavior for public officers and that the law should be given a broad construction to bring employees within its operation.

47. The LTPD also has in place a Promotional Process Procedures for all promotions within the department and are set out in written General Orders in accordance with the New Jersey Department of Personnel, the IACP Policy Standards and Title 4A Rules and Regulations of the New Jersey Administrative Code.

48. The purpose for the creation and implementation of the written directives within the LTPD is to “establish a fair and consistent procedure in conjunction with New Jersey Civil Service Commission requirements to enable the Lower Township Police Department to select qualified officers who will best serve the Township of Lower in the capacity of a Sergeant, Lieutenant or Captain. To familiarize department personnel with responsibilities of the department in the promotional process, to guarantee that all candidates are treated equally, and to ensure that all elements of the selection process are administered, evaluated and interpreted in a uniform manner.”
49. In December 2019 there had been a list of eligible candidates for promotions to fill vacancies within the ranks of Captain and Lieutenant with the promotion of Lewis, Whitten, and Priole, in June of 2019, those lists have been exhausted of candidates.
50. In December 2019, there was still in effect a current Sergeants Certification List of Eligible Candidates for Promotion to Sergeant approved by the NJ Civil Service Commission.
51. In December 2019, after the death of Captain Beirsbach, a vacancy for the rank of Captain was created which would, in turn, upon being filled by the next qualified candidate would open up a vacancy, and hence a promotional opportunity for the positions of Lieutenant and Sergeant.
52. That is, the filling of the vacant Captain’s position caused by the death of Captain Biersbach from the ranks of Lieutenant would create a vacancy for Lieutenant and hence, that would create a vacancy for the position of Lieutenant to be filled by a qualified Sergeant and the vacancy created by that promotion would in turn create a promotional opportunity for Sergeant.

53. Late Spring of 2020, Chief Mastriana announced his retirement to be effective January 1, 2021.
54. In addition, circling the department was word that Lieutenant Vanaman was going to retire from the LTPD in or around October 2021.
55. Accordingly, and in keeping with past practice, Chief Mastriana provided his recommendations to Township Manager Ridgway in or about June/July 2020 with the names of the people to fill the positions of Captain, Lieutenant and Sergeant on a provisional basis until proper Civil Service based testing went into effect.
56. Chief Mastriana recommended that Lieutenant Whitten fill the vacant Captain position (Captain Biersbach) on a provisional basis.
57. Chief Mastriana recommended that First Class Sergeant Hartman fill the vacant Lieutenant position (Lieutenant Whitten) on a provisional basis.
58. Chief Mastriana recommended that one of the officers on the current Sergeants Certification list fill the vacant Sergeant position (to backfill the vacant Sergeant First Class position created by the promotion of First Class Sergeant Hartman) on a provisional basis.
59. The top three ranked officers on the Police Sergeant Eligible List approved by the NJ Civil Service Commission were in order of ranking : 1) Michael Majane, 2) Michael Perry and 3) Anthony Greto.
60. As of August 20, 2020 the Township Manager, influenced by and in collaboration with Mayor Sippel and Deputy Mayor Perry, made the decision to promote Lewis to Provisional Captain and disregarded the other recommendations of Chief Mastriana for promotion to Captain and Lieutenant.

61. Hartman and Whitten are both the oldest in age/seniority (Sgt. Robert Smith is older but has less time at the department) and titles and were not promoted.
62. Instead, Lieutenant Kevin Lewis ("Lewis") was promoted over Whitten.
63. Instead, Sergeant Charles Ryan ("Ryan") was promoted over Hartman.
64. Lewis is at least 5 years younger than Whitten.
65. Ryan is at least 8 years younger than Hartman.
66. Lewis has a total service of 15 years compared to Whitten who has 25+ years of experience/service.
67. Ryan has a total service of 13 years compared to Hartman who has 25+ years of experience/service.
68. Lewis is very good friends with Mayor Sippel and Deputy Mayor Perry and refer to each other as "family."
69. Lewis's past scores on the Civil Service examinations are far lower than that of Whitten. Whitten has scored Number 1 on the Sergeants Exam in the entire state and Number 10 on the Lieutenants Exam in the entire state. However, Whitten scored Number 1 on both Sergeant and Lieutenant exam competing against members of the Lower Township Police Department including Lewis.
70. Lewis was below or junior to Whitten in the title of Lieutenant.
71. Lewis worked under Sippel's command in the Army National Guard for many years.
72. Sippel was a Command Sergeant Major in the Army National Guard. Lewis is also a retired Command Sergeant Major in the Army National Guard.
73. Lewis's wife is also a ranking officer in the Army.
74. Sippel has pledged to promote the interests of military members.

75. While the merit based Civil Service criteria for promotions permits some limited preferences to veterans, it prohibits a complete disregard for the consideration of those non-veteran officers who are more qualified and who have ranked higher in the test process.
76. Ryan is also a National Guard member.
77. Chief Mastriana expressed concerns to Defendants about Ryan's ability to effectively manage the patrol division.
78. On the other hand, Chief Mastriana expressed confidence in the ability of Hartman to manage and assume the leadership role of provisional Lieutenant.
79. In fact, on or about August 3, 2020 Chief Mastriana stated to Defendants that Whitten should be elevated to the position of provisional Captain and that while Lewis is the future of the LTPD, he needs more time to become acclimated in the role of Captain.
80. It is common knowledge that Defendants want to promote Lewis to the position of Chief of Police because of his connection to Mayor Sippel.
81. Mayor Sippel favors Lewis because of his military status.
82. New Jersey public policy prohibits favoritism as a factor in public employment.
83. Defendants favor Lewis because he is younger than Whitten.
84. The laws prohibit age as a factor in the decision making process for employment.
85. Defendants disfavor Whitten and have factored into their decision making the eligibility of Whitten to retire from the LTPD with a full pension and seek to force his retirement to make room for Lewis to become the Chief of Police.
86. Defendants disfavor Hartman and have factored into their decision making the eligibility of Hartman to retire from the LTPD with a full pension and seek to force his retirement to

make room for Ryan, a younger military member and for Officer Perry, a younger officer and son of Deputy Mayor Perry to accelerate quicker to the higher ranks and command staff of the LTPD.

87. New Jersey laws, rules and regulations prohibit age, non-merit based and reverse military discrimination as factors into the decision making process for employment.
88. Moreover, Defendants seek to force Plaintiffs to retire to make way for the much younger Patrolman, Anthony Greto who is also in the Army National Guard and is close friends with Mayor Sippel's son.
89. Upon information and belief, Deputy Mayor Perry also favors Lewis for promotional opportunities because they reciprocate with each other as Lewis is a licensed plumber in the State of New Jersey and Perry is a licensed electrician in the State of New Jersey.
90. In addition to the above, there was no legitimate and uniform merit based process put into place and/or used in the selection for promotions by the Manager/Council, and the selections made a point to benefit the members of Council's friends and family.
91. The Defendants have intentionally used their public offices to "get the old guys out."
92. Indeed, the Township Manager told the Chief that promoting the Plaintiffs would not guarantee that they would retire in 1 year (basically getting out of the way).
93. The Chief advised the Manager that under *N.J.A.C. 4A:4-1.5* governing provisional promotions, the positions are only for 12 months and that thereafter, the Civil Service Testing process would be utilized to make merit based promotions to these positions.
94. Nonetheless, the Manager still denied the Chief's requests for Plaintiffs to be promoted as the best qualified candidates for the provisional appointments.

LEGAL CLAIMS

COUNT ONE

*New Jersey Law Against Discrimination-
Disparate Treatment and Failure to Promote in Violation of N.J.S.A. 10:5-1 et seq.
(Against all Defendants)*

95. All of the foregoing and subsequent paragraphs are incorporated herein by this reference as if stated here in their entirety.
96. The LAD, at *N.J.S.A. 10:5-12(a)*, prohibits among other things, an employer from discriminating against employees on the basis of AGE.
97. Defendants are “employers,” “supervisors,” and/or “persons” under the definitions contained within the LAD.
98. Plaintiffs were, at all times relevant, an employee who could and did perform her job functions satisfactorily.
99. Plaintiffs are older than the employees who were promoted over them.
100. *N.J.S.A. 10:5-4* prohibits discrimination in the workplace and states: “All persons shall have the opportunity to obtain employment ... without discrimination because of ... age ... subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.”
101. Defendants did subject Plaintiffs to differential, worse, and intentionally discriminatory treatment based on age, as set forth in the preceding and subsequent paragraphs, including a failure to promote.

102. As a direct and proximate cause of Defendants' LAD violations, Plaintiffs have suffered damages because of it including, but not limited to: loss of status, a diminution in authority, reputational and financial loss, back pay, and front pay.
103. The adverse employment actions by Defendants also caused Plaintiff to suffer stress, unnecessarily so, which in turn caused and continues to cause anxiety, depression, sleeplessness, worry, high blood pressure, exacerbation of intestinal illness, and loss of everyday enjoyment of life.
104. Any reason proffered by Defendants for their disparate treatment of Plaintiffs shall be shown to be pretext.

COUNT II

*New Jersey Law Against Discrimination-
Reverse Military Discrimination in Violation of N.J.S.A. 10:5-1 et seq.
(Against all Defendants)*

105. All of the foregoing and subsequent paragraphs are incorporated herein by this reference as if stated here in their entirety.
106. The Defendants have failed to promote the best and/or most qualified candidates for the positions to provisional Captain and provisional Lieutenant.
107. A rational employer would wish to promote the most qualified candidate, because it is in the employer's best interest to do so. When an employer acts contrary to its best interests, then it is proper to infer a discriminatory motive. *See, Harding v. Gray*, 9 F.3d 150, 153 (D.C.Cir.1993); *DeCapua v. Bell Atlantic New Jersey Inc.*, 313 N.J.Super 110 (Law Div. 1998).

108. Instead, Defendants favored friends who had a military background to the exclusion of fair and proper consideration to better suited non-military employees.
109. The New Jersey Supreme Court has held that a plaintiff can pursue claims of reverse discrimination under the New Jersey Law Against Discrimination (NJLAD). The NJLAD includes as a protected classification "military status." *See, Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999).
110. The above demonstrates as well, background circumstances supporting the suspicion that the Defendants are the unusual employers who discriminate against the majority.
111. Plaintiffs were performing at and above a level that met the employer's legitimate expectations.
112. Nonetheless, Plaintiffs were bypassed for promotion.
113. The promotions were provided to less qualified employees based in whole or in part on military status, not primarily qualifications such as experience, seniority, years in title and past record for performance of job duties and/or past merit based testing.
114. The above demonstrates an inference that but for Plaintiffs' non-military backgrounds, they would or should have been promoted.
115. As a direct and proximate cause of Defendants' LAD violations, Plaintiffs have suffered damages because of it including, but not limited to: loss of status, a diminution in authority, reputational and financial loss, back pay, and front pay.
116. The adverse employment actions by Defendants also caused Plaintiff to suffer stress, unnecessarily so, which in turn caused and continues to cause anxiety, depression, sleeplessness, worry, high blood pressure, exacerbation of intestinal illness, and loss of everyday enjoyment of life.

COUNT III

New Jersey Civil Rights Act, N.J.S.A. 10:6-2

(Against all Defendants)

117. All of the foregoing and subsequent paragraphs are incorporated herein by this reference as if stated here in their entirety.
118. Defendants are public employers and/or public officials with final policy making authority as it pertains to the operations of the LTPD and the Township of Lower and/or supervisors who had personal involvement in the wrongs as alleged in this matter.
119. *N.J.S.A.10:6-2(c)* provides relief for either the deprivation of a statutory substantive right or the interference with such a right by threats, intimidation or coercion. *Tumpson. v. Farina.*
120. *N.J.S.A. 10:6-2(c)* provides: Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.
121. The New Jersey Constitution, Art. VII §1, ¶3 provides: Appointments and promotions in the Civil Service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in

appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.

122. Moreover, Title 11A of the New Jersey Civil Service Act sets out the framework of New Jersey's merit based system of government employment.
123. Also, New Jersey's Civil Service Act is also governed by Title 4A of the New Jersey Administrative Code which sets out regulations designed 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.
124. These laws were primarily established to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment.
125. Plaintiffs are intended beneficiaries of the laws cited herein.
126. As a direct and proximate result of Defendants' violation of Plaintiff's rights, Plaintiff has been caused to suffer damages.
127. As policy makers, Defendants are collectively liable for the intentional violation of Plaintiff's NJ constitutional and statutory rights as identified above.
128. Defendants engaged in a deliberate indifference to the fact that employees are entitled to merit based decision making as it affects the terms and conditions of their employment.
129. The illegal actions of Defendants have caused Plaintiffs to suffer serious and grave economic consequences such as loss of financial income, back pay, front pay, and other losses.
130. The adverse employment actions by Defendants also caused Plaintiffs to suffer stress, unnecessarily so, which in turn caused, and continues to cause anxiety, sleeplessness,

worry, loss of every day enjoyment in life due to interference from the worry and anxiety about the bad acts of Defendants as well as the stress and worry about their respective future.

PRAYER FOR RELIEF

WHEREFORE, these premises considered, Plaintiffs request this court enter judgment in their favor on all counts and specifically:

1. Award Plaintiffs compensatory damages for all monetary and financial losses, including (but not limited to): past and future loss of income and benefits of employment, lost career and business opportunities and advancement, and other past and future pecuniary losses in an amount to be determined by an enlightened jury;
2. Award Plaintiffs compensatory damages for non-pecuniary injuries including (but not limited to): emotional stress, anxiety, shame, embarrassment, humiliation, powerlessness, and indignity, in an amount to be determined by an enlightened jury;
3. Award Plaintiffs exemplary and punitive damages in an amount to be determined by an enlightened jury;
4. Award Plaintiffs reasonable attorneys' fees and costs of this action, including expert fees, and other fees and costs permitted by law;
5. Award Plaintiffs other monetary damages, including treble damages, to which she may be entitled to under law;
6. Award Plaintiffs appropriate pre-judgment and post-judgment interest; and
7. Award Plaintiffs such other relief, including equitable relief and costs, as may be appropriate, fair, and just.

DESIGNATION OF TRIAL COUNSEL

Michelle J. Douglass, Esq., and Philip S. Burnham, II, Esq. are hereby designated as trial counsel in the above-captioned matter.

CERTIFICATION OF NO OTHER ACTIONS PURSUANT TO RULE 4:5-2

I certify that the dispute about which I am suing is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification.

CERTIFICATION OF COMPLIANCE WITH R. 1:38-7(c)

I certify the Confidential Personal Identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future in accordance with R. 1:38-7(b).

NOTICE OF LITIGATION HOLD

The parties are hereby required to preserve all physical and electronic information that may be relevant to the issues to be raised, including but not limited to, Plaintiff's employment, to Plaintiff's cause of action, and/or prayers for relief, to any defenses to same, and pertaining to any party, including but not limited to, electronic data storage, close circuit TV footages, digital images, computer images, cache memory, searchable data, emails, spreadsheets, employment files, memos, text messages and any and all online social or work related websites, entries on social networking sites (including, but not limited to, Facebook, Twitter, LinkedIn, etc.,) and any

other information and/or data and/or things and/or documents which may be relevant to any claim or defense in this litigation.

Failure to do so may result in separate claims for spoliation of evidence and/or for appropriate adverse inferences.

The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation. You are on notice of litigation and therefore have an obligation to suspend your routine document retention/destruction policy and put in place a 'litigation hold' to ensure preservation of relevant documents." Failure to do so has been found to be 'grossly negligent' and may subject you to punishment.

JURY DEMAND

The plaintiff hereby demands a trial by jury on all of the triable issues of this complaint, pursuant to New Jersey Court *Rules* 1:8-2(b) and 4:35-1(a).

Respectfully submitted,

BURNHAM DOUGLASS
Attorneys for Plaintiffs, Robert Hartman
and Douglas Whitten

/s/ Michelle J. Douglass
Michelle J. Douglass, Esq.

/s/ Philip S. Burnham, II
Philip S. Burnham, II, Esq.

Date: November 04, 2020

Civil Case Information Statement

Case Details: CAPE MAY | Civil Part Docket# L-000385-20

Case Caption: HARTMAN, JR. ROBERT VS THE TOWNSHIP OF LOWE R

Case Initiation Date: 11/04/2020

Attorney Name: PHILIP SMITH BURNHAM II

Firm Name: BURNHAM DOUGLASS

Address: 8000 SAGEMORE DR STE 8303
MARLTON NJ 08053

Phone: 8567515505

Name of Party: PLAINTIFF : HARTMAN, JR., ROBERT

Name of Defendant's Primary Insurance Company
(if known): Unknown

Case Type: LAW AGAINST DISCRIMINATION (LAD) CASES

Document Type: Complaint with Jury Demand

Jury Demand: YES - 6 JURORS

Is this a professional malpractice case? NO

Related cases pending: NO

If yes, list docket numbers:

Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

Are sexual abuse claims alleged by: ROBERT HARTMAN, JR.? NO

Are sexual abuse claims alleged by: DOUGLAS WHITTEN? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Employer/Employee

Does the statute governing this case provide for payment of fees by the losing party? YES

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO

If yes, please identify the requested accommodation:

Will an interpreter be needed? NO

If yes, for what language:

Please check off each applicable category: Putative Class Action? NO Title 59? NO Consumer Fraud? NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule 1:38-7(b)*

11/04/2020
Dated

/s/ PHILIP SMITH BURNHAM II
Signed

Chapter 90

POLICE DEPARTMENT

GENERAL REFERENCES

**Mutual aid for police and fire — See Ch. 73,
Art. I.**

ARTICLE I
Establishment; Organization

§ 90-1. Creation; composition. [Amended 4-9-2018 by Ord. No. 2018-06; 5-20-2019 by Ord. No. 2019-07]

There is hereby created a Police Department for the Township of Lower, County of Cape May, State of New Jersey, the head of which shall be the Chief of Police, and which may consist of up to two Captains; up to four Lieutenants; up to seven Sergeants; up to 40 full-time patrolmen; and such number of civilian employees as the Township may designate.

§ 90-2. Appointing authority.

The Chief of Police, other superior officers, police officers and employees shall be appointed by the Township Manager from a list of candidates supplied by the Civil Service Commission.

§ 90-3. Appropriate authority; head of Department; adoption of rules and regulations.

- A. The appropriate authority, as said term is used in N.J.S.A. 40A:14-118, shall be the Township Manager of the Township of Lower.
- B. The Chief of Police shall be the head of the Police Department and shall be directly responsible to the Township Manager for the efficiency and routine day-to-day operations of the Police Department.
- C. The Township Manager shall be responsible for the overall performance of the Police Department. The Township Manager, with the advice of the Chief of Police, shall adopt and promulgate rules and regulations for the government of the Police Department and for the discipline of its members. The Township Manager, with the advice of the Chief of Police, may from time to time amend and repeal such rules and regulations as he may deem necessary for the government and efficient working of the Police Department. Failure to post rules and regulations shall in no way invalidate such rules and regulations.

§ 90-4. Powers and duties of Chief of Police.

- A. The Chief of Police shall have the following duties and responsibilities:
 - (1) Administer and enforce the rules and regulations and special emergency directives for the disposition and discipline of the Department, its officers and personnel.
 - (2) Have, exercise and discharge the functions, powers and duties of the Police Department.
 - (3) Prescribe the duties and assignments of subordinates and other personnel.

- (4) Delegate such of his authority as may be necessary for the efficient operation of the force to be exercised under his direction and supervision.
 - (5) Report at least monthly to the Township Manager, in such form as shall be prescribed by the Township Manager, on the operation of the Police Department during the preceding month, and make such other reports as may be requested from time to time by the Township Manager.
- B. The Chief of Police shall be responsible for coordinating all public safety functions in the Township. In this role, he shall coordinate with the local Fire Districts regarding services and equipment they obtain from the Township to the extent not otherwise provided by law, resolution or ordinance. The Chief of Police shall be in charge of the Township's emergency dispatch system, and all personnel assigned to the same shall report to him through the Police Department's chain of command.

§ 90-5. Rules and regulations.

The Township hereby authorizes and approves the implementation of the attached Lower Township Police Rules and Regulations adopted by the Township Manager for the purpose of providing a general guideline for the Lower Township Police Department.¹ These rules and regulations shall be followed and enforced in accordance with the laws of the State of New Jersey and any Lower Township Police Department policies and procedures consistent therewith.

§ 90-6. Special officers.

- A. The regular Police Department may be augmented by resolution of the Mayor and Council by the appointment of special officers, to serve at the will of the Mayor and Council during periods of emergency or public necessity.
- B. During their period of service, such special officers shall serve at a salary determined by the Mayor and Council and shall be governed by and under the rules and regulations of the Police Department, and under the direction and supervision of the Chief of Police.

§ 90-7. Temporary and permanent appointments.

- A. Prior to any permanent appointment for an indefinite term in the Police Department, any appointee except a police officer must serve a four-month working test period (probationary term), at the expiration of which the appointment shall either be made permanent or terminated or the working test period extended consistent with the then current New Jersey Civil Service statute² and implementing regulations.

1. Editor's Note: A copy of said Rules and Regulations is on file in the Township offices.

Temporary and probationary appointments shall be distinguished as such by a written communication to the person appointed, setting forth the classification of the appointment, and a copy of the communication shall be entered in the records of the Chief of Police and the Township Clerk.

- B. Prior to any police officer receiving a permanent appointment for an indefinite term in the Police Department, an appointee must serve a one-year working test period (probationary term), after graduation from an accredited basic police training academy, at the expiration of which the appointment shall either be made permanent or terminated or the working test period extended consistent with the then current New Jersey Civil Service statute and implementing regulations.³

§ 90-8. Appointments; promotions.

All applicants for appointment to or for promotion within the Police Department shall be qualified for appointment or promotion as required by law, ordinance and civil service rules and regulations. All applicants for appointment shall be residents of the Township of Lower and must maintain continuous residency within the Township of Lower until the announced closing date of the Department of Personnel examination.

2. Editor's Note: See N.J.S.A. 11A:1-1 et seq.

3. Editor's Note: See N.J.S.A. 11A:1-1 et seq.

ARTICLE II
Special Law Enforcement Officers

§ 90-9. Creation.

There is hereby created in the Township of Lower the position of Class 1 and Class 2 special law enforcement officers.

§ 90-10. Definitions.

As used in this article, the following terms shall have the meanings indicated:

SPECIAL LAW ENFORCEMENT OFFICER — Any person appointed pursuant to the Special Law Enforcement Officers' Act (N.J.S.A. 40A:14-146.8 et seq.) to temporarily or intermittently perform duties similar to those regularly performed by the members of the municipal police force or to provide assistance to a police force during seasonal periods or in times of emergency.

§ 90-11. Designation of classes.

There shall be two classes of special law enforcement officers employed by the Township of Lower, pursuant to the Special Law Enforcement Officers' Act:

- A. Class 1: Officers of this class shall be authorized to perform routine traffic detail, spectator control and similar duties. Class 1 officers shall have the power to issue summonses for disorderly persons and petty disorderly persons offenses, violations of municipal ordinances and violations of Title 39 of the New Jersey Revised Statutes. The use of a firearm by an officer of this class shall be strictly prohibited, and no Class 1 officer shall be assigned any duties which may require the carrying or use of a firearm.
- B. Class 2: Officers of this class shall be authorized to exercise full powers and duties similar to those of a permanent regularly appointed full-time police officer. The use of a firearm by an officer of this class may be authorized only after the officer has successfully completed training as prescribed by the Police Training Commission and has been fully certified.

§ 90-12. Requirements.

Each Class 1 and Class 2 special law enforcement officer shall meet, at a minimum, the following requirements:

- A. He or she must be a resident of the State of New Jersey during his or her term of appointment.
- B. He or she must be able to read, write and speak the English language with reasonable proficiency.

- C. He or she must have a high school diploma or its equivalent.
- D. He or she must be sound in body and of good health, which must be certified by a physician licensed to practice in the State of New Jersey.
- E. He or she must be of good moral character.
- F. He or she may not have been convicted of any offense involving dishonesty as would make him or her unfit to perform the duties of his or her office.
- G. He or she must successfully undergo the same psychological testing as required of all full-time police officers in the Township of Lower, except that officers hired for a seasonal period may alternately undertake a program of psychological testing approved by the Police Training Commission of the State of New Jersey.

§ 90-13. Appointment; eligibility.

The Township Manager of the Township of Lower shall appoint each special law enforcement officer. Prior to each appointment, the Chief of Police must conduct a background investigation in order to ascertain the eligibility of the applicant and must report his findings, in writing, to the Township Council and the Township Manager. Fingerprints must be taken and filed with the State Police and the Federal Bureau of Investigation.

§ 90-14. Terms of appointment; termination.

- A. All special law enforcement officers shall be appointed for terms not to exceed one year.
- B. Any special officer appointed for a term of four months or more may only be terminated for cause and after a public hearing.
- C. Any special officer appointed for a term which is less than four months shall serve at the pleasure of the Township Manager and may be terminated by him without cause and without a public hearing.

§ 90-15. Hours of employment.

- A. No special law enforcement officer may be employed for more than 20 hours per week by the Township of Lower, except that special law enforcement officers may be employed by the Township of Lower for those hours as the Township Council may determine necessary in accordance with the limits prescribed below:
 - (1) Not to exceed 48 hours per week during any seasonal period. A seasonal period, as defined in N.J.S.A. 40A:14-146.9(g), means one period of six consecutive months during the calendar year. It is understood that the Township of Lower qualifies as a resort municipality as defined in N.J.S.A. 40A:14-146.9(f).
 - (2) Without limitation as to hours during periods of emergency.

(3) In addition to not more than 20 hours per week, including duties assigned pursuant to provisions of N.J.S.A. 40A:14-146.14, a special law enforcement officer may be assigned for not more than 20 hours per week to provide public safety and law enforcement services to another public entity.

B. The Township of Lower may designate one special law enforcement officer to whom the limitations on hours employed set forth in Subsection A of this section shall not be applicable in accordance with N.J.S.A. 40A:14-146.16(c).

§ 90-16. Restrictions on appointment.

No Class 1 or Class 2 special law enforcement officer appointed to serve in the Township of Lower may serve in a similar capacity in any other municipality. No public official with responsibility for setting law enforcement policy or exercising authority over the budget of the Police Department or supervision of the Police Department shall be appointed as a Class 1 or Class 2 special law enforcement officer.

§ 90-17. Supervision.

All Class 1 and Class 2 special law enforcement officers shall function under the supervision and direction of the Chief of Police or, in the absence of the Chief, such other chief law enforcement officer as may function in his place and stead.

§ 90-18. Replacement of full-time police officer prohibited.

Class 1 and Class 2 special law enforcement officers shall be employed only to assist the regularly employed police officers of the Township of Lower and may not be employed to replace full-time regular police officers or in any way diminish the number of full-time officers employed by the Township of Lower.

§ 90-19. Number of special law enforcement officers.

Not more than 10 Class 1 and 12 Class 2 special law enforcement officers may be employed by the Township of Lower at any given time.

ARTICLE III
Off-Duty Police Services

§ 90-20. Terms and conditions for performance of extra-duty details.

All patrol officers, sergeants and superior officers ("Lower Township police officers") employed by the Township of Lower Police Department may be permitted to perform extra-duty details for police-related matters for private or public entities subject to all of the following terms and conditions:

- A. The compensation from the private persons or entities to the Township of Lower police officers shall be fixed at \$60 per hour. In addition, the private person or entity shall also pay the Township of Lower the sum of \$5 per hour worked by each Lower Township police officer to offset the cost of administration. For the use of Lower Township Police Department vehicles, the private person or entity shall pay the Township of Lower the sum of \$50 per day (or fraction thereof), which fee may be waived when vehicles are used by other public entities.
- B. The Township of Lower shall make arrangements, with the person or entity for whom such services are to be provided, for the collection of amounts on a periodic basis, which may be weekly, biweekly or monthly. All extra details will be covered by contract between the Township of Lower and the requesting party, and contracts will be executed by the Chief of Police and the Township Manager or their designees.
- C. The Lower Township Police Department shall submit time reports on a weekly, biweekly or monthly basis, as determined by agreement between the private person or entity and the Township of Lower. The private person or entity shall then validate the time reports and submit copies to the Township of Lower Treasurer for payment. An escrow account shall be established with the Township of Lower for the estimated cost of the services based upon the hourly rate set forth in Subsection A above, and all payments to the Lower Township police officer and reimbursement of administrative costs shall be made from such account. In the event that such account falls below a level which is determined by the Township of Lower Treasurer to be reasonably necessary to insure continued payment, no additional services will be provided.
- D. The Township of Lower shall exercise direction and control over the Lower Township police officers performing work for the private person or entity. The Lower Township police officer assigned to such outside work will remain within the chain of command of the Lower Township Police Department. The Chief of Police shall define the duties to be performed by Lower Township police officers in consultation with the private person or entity and the Lower Township Manager.
- E. The outside work shall not interfere with the regular duties and scheduling of the Lower Township police officers, including any

necessary overtime for police matters. No Lower Township police officer shall be scheduled for any outside work on the same day or within 12 hours of any tour of duty.

- F. In order to be eligible for off-duty employment, a police employee must be in good standing with the Department.

§ 90-21. Written agreement required.

The Township of Lower and the private person or entity requesting the services hereunder shall enter into a written agreement, consistent with the provisions of this article, in form and content satisfactory to the Township of Lower Solicitor, prior to the provision of any services hereunder.

§ 90-22. Right to reject assignments; discontinuance of policy.

- A. Both the Township of Lower and each of the Lower Township police officers reserve the right, in their sole and absolute discretion, to reject any and all assignments for outside work by any private persons or entities contemplated by this article.
- B. The Township of Lower further reserves the right, in its sole and absolute discretion, to modify or discontinue this policy at any time, and it shall be deemed an absolute and unilateral right of the Township of Lower and not an established past practice for collective bargaining purposes.

Lower Township Police Department

General Order 2007-08




SUBJECT: Police Officer Promotional Process Procedures

REFERENCE: IACP Policy Standards, NJ Dept. of Personnel, Title 4A Rules and Regulations, Cape May Police Department

SPECIAL INSTRUCTIONS:

NUMBER OF PAGES: 8

EFFECTIVE DATE:	REVISION DATE	SECTION	PAGE #
April 24, 2019			
REEVALUATION DATE: See PowerDMS	04/24/2019	Reissue	
BY THE ORDER OF: Police Chief William Mastriana 	02/13/2015	Revision	
	01/23/2013	NJCSC Revision	
	05/01/2007	Original	

Accreditation Standards: 2.3.1

The written directives developed by the Lower Township Police Department are for internal use only and do not enlarge an Officer's civil or criminal liability in anyway. They should not be construed as to the creation of a higher standard of safety or care in an evidentiary sense, with respect to third party claims. Violations of written directives can only be the basis of a complaint by this department and then only in an administrative disciplinary setting.

PURPOSE:

To establish a fair and consistent procedure in conjunction with New Jersey Civil Service Commission requirements to enable the Lower Township Police Department to select qualified officers who will best serve the Township of Lower in the capacity of a Sergeant, Lieutenant or Captain. To familiarize department personnel with responsibilities of the department in the promotional process, to guarantee that all candidates are treated equally, and to ensure that all elements of the selection process are administered, evaluated and interpreted in a uniform manner.

POLICY:

A selection process generally acknowledges a key event in the operational effectiveness of the Law Enforcement Agency. The Lower Township Police Department will attempt to identify officers who best possess the proper communication and leadership skills, along with the experience, knowledge and ability necessary to effectively manage his/her fellow officers. The promotional process will comply with the requirements set forth in prevailing law, local codes and New Jersey Civil Service Commission requirements.

PROCEDURE:

- I. New Jersey Civil Service Commission Eligibility List
 - A. The Chief of Police will be responsible for administering the department's role in the promotion process. Upon receiving authorization from the Township Manager and governing body to promote, the Chief of Police will request that the Township Clerk, as the official custodian of records, obtain an eligibility list from the (NJCSC). Eligibility list must be obtained prior to all promotions.
 - B. The (NJCSC) Eligibility/Certification List contains the names of those members who passed the (NJCSC) promotional exam. Candidates are listed beginning with the highest score attained and/or candidates utilizing Veteran's status and following descending order thereafter. In accordance with law, all promotions must be made off the eligibility list.

FX

- C. When the Department desires to select a candidate for promotion, the Chief of Police will abide by all rule and regulations promulgated by the NJCSC. In accordance with those rules, the department will adhere to the "Rule of Three" and select one of the top three eligible candidates. However, it should be noted that the township reserves the right to disqualify any ranked candidate upon a finding of any of the reason set forth in N.J.A.C. 4A:4-6.1 during the selection process.
 - 1. Regulations regarding those candidates having Veteran's status must be complied with in accordance with statutory provisions afforded to all military associated candidates.
- D. Eligibility lists are good for three (3) years with an expiration date determined by the (NJCSC). Under certain circumstances (NJCSC) may extend a list to a maximum of one (1) additional year. Any review or appeals of the results of the test shall be done in compliance with (NJ CSC) rules and regulations.

II. THE NEW JERSEY CIVIL SERVICE COMMISSION:

- A. The (NJCSC) is responsible for administering the promotional exams. The exams shall be administered in accordance with all existing state laws and regulations and shall be validated to ensure they are job related and non-discriminatory.
 - 1. The (NJCSC) is responsible for the following:
 - 2. Processing the request for a promotional exam to include evaluation of the promotional candidate and eligibility for testing.
 - 3. Mailing the promotional announcement and applications for the promotional exam to the township for dissemination by the Chief of Police or his designee.
 - 4. Receiving applications from the officers for promotional examination and determining their eligibility.
 - 5. Developing and administering the written promotional examination. The promotional examination shall be validated by the Commission to ensure that it measures those significant job traits and characteristics necessary for success.
 - 6. The Commission may, in addition to written examinations utilize assessment centers. They shall notify candidates in advance of the date and time of the assessment center.
 - 7. Scoring the promotional examinations, promulgating a list of eligible officers for promotion, posting eligibility lists on the NJ CSC website and delivering a copy of the list to the Township Clerk's office.
 - 8. The NJCSC shall establish procedures for candidates to review their examination and an appeals process for each element of the promotional process.
 - 9. The NJCSC shall establish procedures for reapplication and retesting if reevaluation is necessary.

III. SELECTION:

- A. Upon receipt of the certified list of eligible candidates by the Township Clerk, all information shall be forwarded to the Chief of Police who will be responsible for the following:
 - 1. Determine how many vacancies exist in the rank the exam was held for.

2. Review the personnel folders of eligible candidates and compile a list of their qualifications to include the following:
 - i. Candidate performance, including but not limited to officer evaluations
 - ii. Leadership
 - iii. Time Management
 - iv. Interpersonal skills
 - v. Knowledge of Departmental policies and procedures
 - vi. Seniority
 - vii. Formal education and training
 - viii. Disciplinary actions, if any
 - ix. Other information that may have a bearing on how the officer would perform in a higher rank

3. The information gathered during the review period may not only impact the Township's consideration of the candidate, but also the candidate's eligibility to remain on the NJCSC candidate list in accordance with NJCSC regulations and procedures.

4. The Executive Officer will oversee the Command Staff in conducting an assessment of the qualified candidates in relation to the areas consistent with this policy. (See Appendix A: Promotional Assessment Form and Instructional guide) The Executive Officer will submit the findings of the assessment in writing to the Chief of Police

5. Once the review is successfully completed, the Chief of Police and/or his designee will conduct formal interviews of each candidate. The Chief of Police will review all information from the selection process and make a determination of which candidate's qualifications best meet the current needs of the department. Using the above as a guide, the Chief of Police will make a recommendation(s) to the appointing authority on the officer(s) to be promoted. The final decision regarding promotions will rest with the appointing authority.

6. In the event a higher scoring candidate, as determined by the JNCSC promotional list, is not selected, the department shall submit a statement of reason to the NJCSC documenting the specific reasons the particular candidate was not selected.



Promotional Assessment Instructional Guide

*William Mastriana
Chief of Police
January 2015*

Promotional Assessment Instructional Guide

Review of Performance Appraisals

1. **Poor:** Performance ratings have been well below average. The officer has serious documented deficiencies in his/her performance.
2. **Below Average:** Performance ratings have been below average. Close supervision is required to ensure acceptable performance.
3. **Acceptable:** Performance ratings have shown acceptable level of performance. Supervision needed for only specific problem/or unique issues.
4. **Superior:** Performance ratings have shown acceptable level of performance. Supervision is seldom required.
5. **Exemplary:** Performance ratings have always shown acceptable level of performance. Requires little or no supervision.

Knowledge of Department Policies and Procedures

1. **Poor:** Never displays competence in knowledge of department policies and procedures. Extensive training and close supervision is needed.
2. **Below Average:** Seldom displays competence in knowledge of department policies and procedures. Additional training is necessary. Close supervision is appropriate.
3. **Average:** Displays competence in knowledge of department policies and procedures. Supervision needed only for specific problem areas.
4. **Superior:** Often displays competence in knowledge of department policies and procedures. Performs in a confident and professional manner. Seldom requires supervision.
5. **Exemplary:** Officer always displays competence in knowledge of department policies and procedures. Exceptional working knowledge and ability to apply them carefully. Requires little or no supervision.

Interpersonal Skills

1. **Poor:** Listens poorly. Speaks softly, timidly, or too loud. Confuses or angers persons. Training mandatory.
2. **Below Average:** Listening skills need improvement. Often acts without thinking things through. Choice of words and tone result in friction with other department members.
3. **Average:** Listening skills are adequate. Seldom acts without thinking things through. Organization of thoughts and choice of words and tone are effective with other department members.
4. **Superior:** Listening skills are above average. Rarely acts without thinking things through. Organization of thoughts, choice of words and tone are communicated clearly, calmly, and concisely.

Promotional Assessment Instructional Guide

5. **Exemplary:** Listening skills are excellent. Never acts without thinking things through. Organization of thoughts, choice of words and tone are communicated clearly, calmly, and concisely.

Leadership Skills

1. **Poor:** Is not effective in achieving the department's mission through subordinates.
2. **Below Average:** Is somewhat effective in achieving the department's mission through subordinates. Relies heavily on the authority of his/her position and fear of punishment.
3. **Average:** Is effective in achieving the department's mission through subordinates. Uses authority appropriately and occasionally inspires subordinates to work hard towards the department's mission.
4. **Superior:** Is effective in achieving the department's mission through subordinates. Uses authority appropriately and frequently inspires subordinates to work hard toward the department's mission.
5. **Exemplary:** Is effective in achieving the department's mission through subordinates. Uses authority appropriately and always inspires subordinates to work hard toward the department's mission.

Time Management Skills

1. **Poor:** Is not effective in completing tasks in a timely manner. Loses focus on the task at hand, becomes distracted easily and is frequently tardy.
2. **Below Average:** Is somewhat effective in completing tasks in a timely manner. Loses focus and becomes distracted at times. Occasionally tardy.
3. **Average:** Is effective in completing tasks in a timely manner. Supervision required in some problem/unique situations. Rarely tardy.
4. **Superior:** Is effective and efficient in completing tasks in a timely manner. Multi-tasks well and seldom requires supervision or follow-up.
5. **Exemplary:** Is effective and efficient in completing tasks in a timely manner. Multitasks well and never requires supervision or follow-up.

Promotional Assessment Instructional Guide

Formal Education/Training

1. **Poor:** No high school diploma or GED and no specialized law enforcement training or supervision courses.
2. **Below Average:** No high school diploma or GED. Very little specialized law enforcement training or supervision/leadership courses.
3. **Average:** At least a high school diploma or GED, some specialized law enforcement training courses or supervision/leadership courses.
4. **Superior:** At least two specialized law enforcement training courses or supervision/leadership courses, and some successfully completed courses from an accredited university or college.
5. **Exemplary:** At least three specialized law enforcement training courses and/or supervision/leadership courses and a Bachelors Degree or above from an accredited university or college.

Promotional Assessment Instructional Guide

Review of Performance Evaluations

Poor	Below Average	Average	Superior	Exemplary
1	2	3	4	5

Knowledge of Department Policies and Procedures

Poor	Below Average	Average	Superior	Exemplary
1	2	3	4	5

Interpersonal Skills

Poor	Below Average	Average	Superior	Exemplary
1	2	3	4	5

Leadership Skills

Poor	Below Average	Average	Superior	Exemplary
1	2	3	4	5

Time Management Skills

Poor	Below Average	Average	Superior	Exemplary
1	2	3	4	5

Education/Training

Poor	Below Average	Average	Superior	Exemplary
1	2	3	4	5

Comments: _____

Candidate: _____

Total Score: _____

Evaluator: _____

Date: _____

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ROBERT HARTMAN, JR., and DOUGLAS
WHITTEN,

Plaintiffs,

v.

TOWNSHIP OF LOWER et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION/CAPE MAY COUNTY

DOCKET NO.: CPM-00385-20

Civil Action

**BRIEF IN SUPPORT OF MOTION TO
DISMISS**

PRELIMINARY STATEMENT

Lower Township Police Lieutenant Douglas Whitten and Lower Township Police Sergeant Robert Hartman, Jr. are pursuing claims for relief under the New Jersey Law Against Discrimination and the New Jersey Civil Rights Act. Plaintiffs do so despite alleging and acknowledging that the New Jersey Civil Service statute and regulations control the promotion of eligible candidates to the positions of Captain and Lieutenant they seek. ¶ 38 Exhibit A. The Plaintiffs have failed to disclose to this Court that Lieutenant Whitten is retiring January 1, 2021 and Sergeant Hartman worked his last day December 1, 2020. As such, neither plaintiff can sit for the necessary civil service testing for promotion to their desired positions. Even if the Plaintiffs had been provisionally appointed to these positions, they would have to take the tests, pass them, and score higher than other eligible candidates who took the test, to be permanently appointed to the positions.

The Defendants move to dismiss the Complaint because the Civil Service Commission has primary jurisdiction over provisional and permanent appointments and the associated testing. Defendants request that the Court dismiss this case and transfer the matter to the Civil Service Commission under the doctrine of primary jurisdiction. Moreover, the Defendants are protected by qualified immunity and the suit should be dismissed.

STATEMENT OF FACTS

1. A Copy of the Complaint is Exhibit A.
2. The Lower Township Police Department operates under N.J.S.A. 40A:14-118 and the Lower Township Municipal Ordinances. A copy of Chapter 90 of the Lower Township Municipal Code, referenced in the Complaint ¶ 36, is Exhibit B.
3. The Lower Township Police Department is subject to Civil Service Commission standards, statutes and regulations and operates in compliance with them.
4. Subject to the Civil Service Commission standards, Lower Township has an internal procedure for promotions, General Order 2007-008, referenced in the Complaint ¶47, a copy is Exhibit C.

LAW AND ARGUMENT

- A. **The Civil Service Commission has primary jurisdiction to determine the eligibility for promotion of either plaintiff thus this matter should be transferred there.**

On motion of a party, the Court may act under Rule 1:13-4A to transfer an action with the record and all papers on file to the proper administrative agency in the State for disposition. Challenges to civil service statutes and regulations belong before the Civil Service Commission. This action specifically challenges the veteran's preference provision in the Civil Service statute, N.J.S.A. 11A:5-5. The plaintiffs quixotically assert

that Lower Township's compliance with the statute violated the New Jersey Law Against Discrimination and the New Jersey Civil Rights Act.

The factual context and circumstances satisfy the four-part test established in Muise v. GPU, Inc., 332 N.J. Super. 140, 161 (App. Div. 2000) which this Court must employ to determine whether a transfer is called for. The Supreme Court in the Estate of Kotsovska ex rel. v. Liebman, 221 N.J. 568, 588 (2015) (quoting Magic Petroleum Corp. v. Exxon Mobile Corporation, 218 N.J. 390, 407 (2014)) described these four parts as:

- (1) whether the matter at issue is within the conventional experience of judges;
- (2) whether the matter is peculiarly within the agency's discretion or requires agency expertise;
- (3) whether inconsistent rulings might pose a danger disrupting the statutory scheme; and
- (4) whether the prior application has been made to the agency.

Violations of the Civil Service Act N.J.S.A. 11A:1-1 to 12-6 are not within the conventional experience of Law Division judges. Instead, the Civil Service Commission routinely hears questions of promotions, removal, suspension, or demotion of police officers in Civil Service jurisdictions. The New Jersey Supreme Court has recognized that the Civil Service Commission has been entrusted by the Legislature to assure fairness in the promotional process. In re Stallworth, 208 N.J. 182, 192 (2011)

Equally, the second factor favors the Civil Service Commission's exclusive jurisdiction because the Commission possesses the "expertise and superior knowledge of a particular field." Id., 208 N.J. at 195.

The Legislature explicitly gave the jurisdictional authority to address such issues to the Civil Service Commission. N.J.S.A. 11A:2-6. The Commission is in the best position

to ensure consistent rulings when addressing violations of the Act based on its expertise and this satisfies the third factor. There is an intimate connection between allegations of a violation of the Act and the Commission's role in supervising all aspects of appointments in the Civil Service. No prior application to the Commission has been filed.

For these reasons, this Court should decline original jurisdiction over Whitten's and Hartman's claims.

B. The Plaintiffs have not exhausted their administrative remedies.

This action is not maintainable as long there is available a right of review before an administrative agency that has not been exhausted. The mere allegation that a constitutional issue is involved will not relieve a plaintiff of the exhaustion requirement. See Pressler and Veniero, Current N.J. Court Rules (Gann) Comments R. 4:69-7(6) at page 2183-2184, citing Reven Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 116-117 (App. Div.), certif. denied 208 N.J. 366 (2011) (exhaustion of remedies required when allegations raised substantive due process claims).

This Court must not excuse Plaintiffs from the requirement that they exhaust their administrative remedies before the Civil Service Commission before seeking relief from the judiciary.

Any constitutional question employed to justify relief from the exhaustion requirement must not only be substantial, meritorious, and ripe for decision but also must involve no factual question requiring administrative determination. Not so here, as both Plaintiffs must factually establish an entitlement to the property or constitutional right, each claims the Defendants impaired.

Exhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle. Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549,

558-59 (1979) citing Cent. v. Neeld, 26 N.J. 172, 178, cert. den. 357 U.S. 928, 78 S. Ct. 1373, 2 L. Ed. 2d 1371 (1958). This principle requires exhausting available procedures, that is, “pursuing them to their appropriate conclusion and, correlatively * * * awaiting their final outcome before seeking judicial intervention.” Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767, 67 S. Ct. 1493, 1500, 91 L. Ed. 1796, 1806 (1947), *Id.*

The intent is to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts. Patterson Redevelopment Agency v. Shulman, 78 N.J. 378 (1979), cert. denied 444 U.S. 900, 100 Sup. Ct. 210, 62 L. Ed. 2d 136 (1979). Exhaustion of administrative remedies is justified by:

- (1) having claims addressed first by a body with expertise in the area;
- (2) allowing the parties to create a factual record necessary for meaningful appellate review; and
- (3) pursuing whether an agency decision may satisfy the parties and obviate the need for resort to the courts.

Abbott v. Burke, 100 N.J. 259, 297-98 (1985).

The legislature has vested the Civil Service Commission with jurisdiction over Civil Service issues, see N.J.S.A. 11A:2-1, which created the Civil Service Commission and

The proper course for parties aggrieved by an alleged violation of the Civil Service Act is to refer those parties to the administrative agency for initial determination as a matter of primary jurisdiction. The New Jersey Supreme Court held that the State Constitution and the Civil Service Act charge the [Commission] . . . with primary jurisdiction in these matters. In re Police Sergeant (P.M. 3776V), 176 N.J. 49, 67 (2003).

The Supreme Court's ruling parallels Ferraro v. City of Long Branch, 314 N.J. Super. 268, 286 (App. Div. 1998) and should be followed by this Court. (Affirming dismissal of complaint alleging violations of Civil Service Act regulations "for failure to exhaust administrative remedies," and noting, "the breach of administrative regulations does not of itself give rise to a private cause of action."). Ferraro although not involving a police officer also involved a plaintiff who was neither discharged nor suffered a reduction in pay, and his rank and status within the civil service hierarchy were unaffected by defendants' actions. Thus, he suffered no deprivation of a property interest. Ferraro v. City of Long Branch, 314 N.J. Super. 268, 284 (App. Div. 1998). The United States District Court and the Third Circuit found that Ferraro had no constitutionally protected claim. Ferraro asserted, that "he was deprived of the rights, duties and privileges of [his] job," The district court rejected Ferraro's claim because it found that he had not shown that he had a right which the federal courts should protect and which the appellees had violated. Ferraro v. City of Long Branch, 23 F.3d 803, 805 (3d Cir. 1994)

For these reasons, this Court should decline primary jurisdiction over Plaintiff's claims, dismiss the matter without prejudice, and transfer it to the Civil Service Commission.

C. Alternatively, the Defendants are entitled to qualified immunity and this action should be dismissed.

The qualified immunity doctrine is an affirmative defense that "shields government officials from a suit for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Gormley v. Wood-El, 218 N.J. 72 (2014) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)). New Jersey

courts recognize the defense of qualified immunity under the New Jersey Civil Rights Act and apply federal case law to qualified immunity claims. See Ramos v. Flowers, 429 N.J. Super. 13, 24 (App. Div. 2012) (“We conclude that the Legislature anticipated that New Jersey courts would apply the well-established law concerning the affirmative defense of qualified immunity in adjudicating damage claims under the Act.”)

The doctrine of qualified immunity provides that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (U.S. 1982) (citing Procunier v. Navarette, 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 (1978) and Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975)).

When government officials exercise their discretion to make provisional appointments triggering the processes under the Civil Service Act as set forth below, they follow established law and cannot be considered to have acted knowing that doing so was unlawful in the context confronted.

§ 4A:4- 1.5 Provisional appointments

(a) A provisional appointment may be made only in the competitive division of the career service when all of the following conditions are met:

1. There is no complete list of eligibles, and no one remaining on an incomplete list will accept provisional appointment;
2. The appointing authority certifies that the appointee meets the minimum qualifications for the title at the time of the appointment; and
3. The appointing authority certifies that failure to make the provisional appointment will seriously impair its work.

(b) Any employee who is serving on a provisional basis and who fails to file for and take an examination that has been announced for his or her title shall be separated from the provisional title. The appointing authority shall be notified by the Chairperson or designee and shall take necessary steps to separate the employee within 30 days of

notification, which period may be extended by the Chairperson or designee for good cause.

N.J.A.C. 4A:4-1.5

“The qualified immunity standard ‘gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.’” Gilles v. Davis, 427 F.3d 197, 203-04 (3d Cir. 2005) (citing Hunter v. Bryant, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991)). When applying qualified immunity, the court first asks whether “the facts alleged, viewed in the light most favorable to the party asserting the injury, show that the [official's] conduct violated a constitutional right.” Curley v. Klem, 298 F.3d 271, 277 (3d Cir. 2002). The second question asks whether it would be objectively reasonable for the official to have known his conduct was unlawful in the situation he confronted. Saucier v. Katz, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

“The defense of qualified immunity is a recognition of the fact that subjecting public officials to personal liability for their discretionary actions results in the distraction of those officials from their public duties, inhibits their discretionary actions and, quite possibly, deters qualified people from accepting public service.” Ryan v. Burlington County, N.J., 889 F.2d 1286, 1292 (3d Cir. 1989). The Court should balance the “interest in allowing public officials to perform their discretionary functions without fear of suit against the public's interest in vindicating important federal rights.” *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) and Hynson v. City of Chester, 864 F.2d 1026 (3d Cir. 1988)).

In Harlow, the Supreme Court held that “[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established

law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.” 457 U.S. at 818. In evaluating qualified immunity, the court examines the reasonable conduct of the official when the official acted and determines whether the official acted with reasonable knowledge that his conduct violated an established law. See Harlow, 457 U.S. at 818.

Qualified immunity “is an immunity from suit rather than a mere defense to liability. . . .” Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Thus, all public officials and employees are shielded from liability for claims arising under the NJCRA, “except those who are ‘plainly incompetent or those who knowingly violate the law.’” 230 N.J. at 98. Kelly v. Simpson, No. A-0190-16T3, 2018 N.J. Super. Unpub. LEXIS 2658, at *18 (App. Div. Dec. 4, 2018)

CONCLUSION

For the reasons set forth in this brief, this Court should grant the relief sought by the Defendants and transfer this matter to the Civil Service Commission or dismiss the matter on qualified immunity grounds.

Respectfully submitted,

CRAIG, ANNIN & BAXTER, LLP

s/ John C. Grady

John C. Grady, Esquire

Attorneys for Defendants

Date: December 9, 2020

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ROBERT HARTMAN, JR. and DOUGLAS WHITTEN,

Plaintiffs,

v.

THE TOWNSHIP OF LOWER, MAYOR FRANK SIPPEL, DEPUTY MAYOR DAVID PERRY, and TOWNSHIP MANAGER JAMES RIDGWAY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

CAPE MAY COUNTY

Docket No. CPM-L-000385-20

Civil Action

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND TO TRANSFER CASE TO CIVIL SERVICE COMMISSION

On the Brief: Michelle J. Douglass, Esq.
Return Date: January 8, 2021

I. STATEMENT OF THE CASE

Defendants' misconstrue this case either intentionally or have failed to thoroughly read the Complaint which alleges, on its face, that Defendants have made age-based provisional (not permanent) promotions in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("NJLAD") and the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 ("NJCRA"), New Jersey Constitution, Article VII, Section I, which prohibits non-merit based appointments and promotions.¹

The Plaintiffs, two Lower Township senior police officers, are not required to file an age discrimination claim or a Constitutional violation claim with the New Jersey Civil Service Commission for being intentionally passed over for provisional promotion in favor of younger, less qualified policemen thereby forcing their retirement. Although the Township of Lower has opted to be governed by the New Jersey Civil Service Act, the Complaint does not raise issues subject to adjudication by the Civil Service Commission.² (See Complaint, ¶ 19, *Exhibit "A"*)

The Complaint raises issues based on the employer's illegal promotion of two younger, less experienced and less qualified police officers (Lt. Lewis and Sergeant Ryan). (See Complaint, ¶¶ 61-67; Counts 1-3, *Exhibit "A"*) These same younger, lesser qualified officers (also were National Guardsmen who worked with the Mayor of Lower Township when he too was a National Guardsmen. (See Complaint, ¶¶ 68; 71-76, *Exhibit "A"*) Mayor Sippel had

¹ Article VII, section I of New Jersey's Constitution of 1947 provides that: "Appointments and promotions in the Civil Service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive."

² New Jersey's Supreme Court explained the reasons behind the adoption of New Jersey's Civil Service protections. In a state which had a long history of corruption, the purpose was to make sure that New Jersey's people got the best government possible. In the 1963 case of *Loboda v. Clark Township*, the Court explained: **Primarily it was to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment.**

vowed to take care of his fellow Guardsmen. (See Complaint, ¶ 74, *Exhibit "A"*) The business of governing a public entity in the civil service of the State, however, is to make appointments and promotions based on merit and fitness, not age and friendship. (See, Article VII, section I of New Jersey's Constitution of 1947).

Thus, at issue is age discrimination in violation of the NJLAD and a failure to make merit-based provisional promotions in violation of the New Jersey Constitution for which this Court has primary jurisdiction. Even if the Civil Service Commission had concurrent jurisdiction over age discrimination and constitutional violation claims, the NJLAD and the NJCRA specifically provides for an election of remedies. N.J.S.A. 10:5-13, N.J.S.A. 10:6-2(f). In any event, there is absolutely no requirement to "exhaust administrative remedies" under the NJLAD or the NJCRA.

Defendants intentionally bypassed the Plaintiffs because of their age and chose younger men who were friendly with the Mayor and Deputy Mayor. (See Complaint, ¶¶ 84-86; 88; 91, *Exhibit "A"*) Defendants did so in order to force the retirement of the plaintiffs who both had more than 25 years of service credit in the Police and Firemen Retirement Pension Fund knowing that the Civil Service Commission would not offer any testing process for a permanent promotional appointment for at least a full year (based, in large part on Covid-19)³. (*Id.*)

The Lower Township Chief of Police recommended both Whitten and Hartman for the respective provisional promotions stating that both men were experienced, had the most seniority and were the best qualified and should be able to serve in the provisionally appointed positions until they chose to retire because they had earned it. (See Complaint, *Exhibit "A,"* ¶¶ 5-59; 61, 66-67; 69; 77-79; 94) The Chief reasoned that all candidates could eventually sit for the Civil

³ On March 16, 2020 The New Jersey Civil Service Commission announced that it was suspending civil service examinations and training until further notice in the wake of COVID-19. See, <https://www.state.nj.us/csc/about/news/2020/Examinations%20and%20Trainings%20Suspended.pdf>

Service examinations for permanent promotion. (See Complaint, *Exhibit "A,"* ¶¶ 92-93) The Chief explained that the younger officers could eventually be permanently promoted off of a list of eligibles certified by the Civil Service Commission following a promotional examination. (*Id.*) The certified list of eligible candidates remain in effect for three years but had expired for the rank of lieutenant and captain for Lower Township. (See, New Jersey Civil Service Eligibility Lists, state.nj.us/csc). The Chief further explained that his proposal and recommendation would afford the older, more senior and experienced officers (plaintiffs) to work a year in grade in the provisional promoted ranks and retire several years later. (See Complaint, *Exhibit "A,"* ¶¶ 55; 92-93). The Mayor responded that he did not want to wait, and stated that "the future is now" with the two younger police officers. The provisional promotions were thereafter immediately given to the two younger friends of the Mayor. (See Complaint, *Exhibit "A,"* ¶ 60)

Provisional appointments do not require Civil Service testing or approval and can be unilaterally made by the employer at any time when there is a need and in the absence of a current list of Civil Service certified eligible candidates. N.J. Admin. Code § 4A:4-1.5. Therefore, the appointments to the respective provisional ranks of Lieutenant and Captain which adversely affected Plaintiffs Hartman and Whitten, respectively, were made without an examination administered by Civil Service. Yet, those appointments were nonetheless required to be made based on objective, merit-based criteria and were not.

This Court unequivocally has jurisdiction (primary) to adjudicate this case under the NJLAD and the NJCRA. See, N.J.S.A. 10:5-13 and N.J.S.A. 10:6-2 (f).

II. LEGAL ARGUMENT

A. **THE NEW JERSEY STATE SUPERIOR COURT HAS PRIMARY JURISDICTION TO ADJUDICATE VIOLATIONS OF THE NEW JERSEY LAW AGAINST DISCRIMINATION AND THE NEW JERSEY CIVIL RIGHTS ACT FOR CONSTITUTIONAL VIOLATIONS.**

Defendants hinge their argument that the Civil Service Commission has “primary jurisdiction” over this matter on its characterization of the Complaint as being one challenging “the veteran’s preference” provision of the Civil Service statute, N.J.S.A. 11A:5-5. This is a gross misconstruction of the claims made by the plaintiffs.

The Complaint, boiled down to its core, alleges that Lower Township, a public entity governed by the Civil Service Act, made provisional promotions to the rank of Sergeant and to the rank of Captain at a time when there was no civil service list in effect and at a time when there was no civil service examinations for these promotional ranks in the foreseeable future; and, that age and friendship based on a past shared military experience were the determining factors in the selection of the officers to be provisionally promoted which is a violation of the anti-age discrimination laws (NJLAD) and in violation of the New Jersey State Constitution Article VII, Section 2, which mandates merit and fitness based promotions within political subdivisions of the State.

We do not challenge in any shape or manner the veteran’s provision of the Civil Service statute. We do challenge the fact that the defendants made unilateral employment decisions in the provisional promotion process which were based on age, and based on past military friendship with Mayor Sippel and as such, were not based on merit and fitness criteria as required by the State Constitution.

New Jersey's Law Against Discrimination has rightly been called one of the strongest employee protection laws in the nation. This is true both because of the broad range of inherent characteristics which it protects from discrimination, and the strong legal protections and remedies it provides. In short, the Law Against Discrimination prohibits employers from discriminating against employees because of a wide range of inherent qualities which make them who they are. It specifically prohibits discrimination because of an employee's age. N.J.S.A. 10:5-3.

In terms of jurisdiction and remedies, the New Jersey Law Againsts Discrimination, N.J.S.A. 10:5-13 (2) provides in relevant part: "Any complainant, including any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination... **may initiate suit in Superior Court *without*** first filing a complaint with the division (the division on civil rights) or any municipal office...All remedies available in common law tort actions shall be available to prevailing plaintiffs."

The New Jersey Civil Rights Act, N.J.S.A. 10:6-2 (d) and (f) similarly provides in relevant part: "An action brought pursuant to this act may be filed in Superior Court. Upon application of any party, a jury trial shall be directed...In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs."

In short, we do not claim a violation of the New Jersey Civil Service Act. We do indeed reference the New Jersey Civil Service Act for purposes of pointing out that Lower Township is an entity governed by the Act and that, even in the absence of a certified civil list and foreseeable civil service examination process, the public policy underpinnings of the Civil Service Act still apply; that is, promotions and appointments are still managed to be made based on merit, not

favoritism and friendship, nor for that matter age (unless a bona fide qualification exists, which in this case has no bearing). The fact that the Civil Service Act is mentioned for these educational purposes does not somehow bestow jurisdiction upon the Civil Service Commission to adjudicate discrimination and Constitutional violations. Our claims have a rightful place before this Court.

Defendants' argument is therefore without merit and must be denied.

B. PLAINTIFFS HAVE NO OBLIGATION TO EXHAUST ADMINISTRATIVE REMEDIES

There is no right of review by the New Jersey Civil Service Commission of claims asserted based on violations of the NJLAD or NJCRA. As stated above, Plaintiffs do not challenge the validity of any Civil Service provision, regulation or action.

Accordingly, defendants' argument is misplaced and must be denied.

C. QUALIFIED IMMUNITY IS AN OUTDATED DEFENSE AND IS NOT APPLICABLE BECAUSE THE ACT OF MAKING A PROMOTION BASED ON AGE AND FAVORITISM IS NOT A DISCRETIONARY ACT, IT IS DISCRIMINATORY AND AGAINST THE PUBLIC POLICY OF THIS STATE TO MAKE MERIT BASED PROMOTIONS IN PUBLIC EMPLOYMENT; GOVERNMENT OFFICIALS MUST ACT IN THE INTEREST OF THE PUBLIC, NOT SELF INTEREST.

It is noteworthy that qualified immunity has become a much maligned doctrine. Recent efforts have been made to abolish the doctrine in the New Jersey Legislature. See, Assembly Bill 4578. Nonetheless, defendants argue that its actions in promoting police officers are a discretionary act immune from challenge.

The doctrine of qualified immunity provides that "government officials performing discretionary functions generally are ... shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 1696, 143 L. Ed. 2d 818 (1999)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)); see also *Michaels v. State of New Jersey*, 222 F.3d 118, 120 (3d Cir.2000).

Of course, State law is guided by Federal law in the context of the NJLAD and the NJCRA. *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 211 (1999). In *Holloman v. Harland*, 370 F.3d 1252, 1282-84 (11th Cir. 2004), the court stated that "Employment by a local, county, state, or federal government is not a carte blanche invitation to push the envelope and tackle matters far beyond one's job description or achieve one's official goals through unauthorized means. Pursuing a job-related goal through means that fall outside the range of discretion that comes with an employee's job is not protected by qualified immunity." *Id.* at 1267. That is, intentional employment discrimination claims are not subject to qualified immunity.

Even if qualified immunity were to apply to the intentional discrimination claim and the claim for intentional violation of merit based public employment promotions espoused by the State Constitution, qualified immunity really turns on two issues: (1) whether the action in question violated a constitutional right and (2) whether that action violated clearly established law. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

The actions in question in our case give rise to the operation of the NJLAD and the NJCRA. The NJLAD is not a Constitutional remedy and therefore there can be no qualified immunity defense applicable to a claim under the NJLAD. As concerns the NJCRA, at issue is the Constitutional provision, Article VII, Section 2 which prohibits appointments and promotions based on anything but merit and fitness. The underpinnings of this 1947 Constitutional provision was explained in the 1963 New Jersey Supreme Court case of *Laboda v. Clark Township*, 40 N.J. 424, 441 (1963) as follows: “Primarily it was to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment.”

There can be no doubt that the defendants, public officials operating a public entity committed to Civil Service principles, were well aware that decisions they made which selected police officers for promotion based on their age and friendship to the Mayor were antithetical to the State Constitution’s merit based promotion provision.

The right to be considered for appointment and promotion in public employment free from age discrimination, and to be based on merit and fitness factors is a clearly established right that has long, long been an established public policy of our State, and a Constitutional bullwark since 1947, a substantive right grounded in statute and regulation under the umbrella of the Civil Service Act and even in non-Civil Service public entities, Title 40A and associated regulations that make it abundantly clear that public employment appointments are to be made based on merit and fitness, not favoritism, partisanship, cronyism or politics.

Indeed, the policy behind behind New Jersey’s Civil Service Act is explained as follows:

- a. to select and advance employees on the basis of their relative knowledge, skills and abilities;
- b. ...to provide public officials with appropriate appointment, supervisory and other

personnel authority to execute properly their constitutional and statutory responsibilities;

- c. ...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. ...to ensure equal employment opportunity at all levels of the public service; and
- e. ...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.

Defendants, operating within a Civil Service community, knew full well that promotional decisions, yes, even provisional promotions, that are made based on age and friendship and/or affiliation because of past military association, are wrong. As an elected public official the obligation to the public is great. Self interest and bias must take a backstage to the greater good of the public. Hence, the long standing principles of merit based decision making in the public employment setting were well known to these defendants. The doctrine of qualified immunity is simply not available to the defendants in this case.

III. CONCLUSION

It is for all of the above stated reasons that the Defendants' motion must be denied.

Respectfully submitted,

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EXHIBIT A

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SUPERIOR COURT OF NEW JERSEY
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Docket No.

Civil Action

COMPLAINT & JURY DEMAND

PRELIMINARY STATEMENT

This Complaint, brought by Robert Hartman, Jr. and Douglas Whitten, alleges claims under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 et seq. (“LAD”) for age discrimination and reverse military discrimination including: disparate treatment and failure to promote. Plaintiffs also allege claims under the Civil Rights Act, *N.J.S.A.* 10:6-2. (“CRA”) for violations of New Jersey State Constitution and laws that govern merit-based appointments and promotions in the civil service of the state and of such political subdivisions, such as Title 11A of the New Jersey statutes and Title 4A of the New Jersey Administrative Code.

JURISDICTION.

1. This Court has subject matter jurisdiction over Plaintiff's claims under N.J. Const., Art. VII §1, ¶3 et seq., *N.J.S.A.* 10:5-13, *N.J.S.A.* 10:6-2, and other applicable law.
2. This Court has personal jurisdiction over Defendants pursuant to N.J. Ct. R. 4:4-4 and other applicable law.
3. Plaintiffs reside in Cape May County at the time of the filing of this Complaint, and did work for Defendants in, among other places, Cape May County.
4. Venue is appropriate in this Court pursuant to N.J. Ct. R. 4:3-2, and other applicable law.

THE PARTIES AND KEY WITNESSES

5. Plaintiff, Robert Hartman, Jr., ("Plaintiff" and/or "Hartman") is a resident and citizen of the state of New Jersey.
6. Plaintiff, Douglas Whitten, ("Plaintiff" and/or "Whitten") is a resident and citizen of the state of New Jersey.
7. Defendant, Township of Lower, ("Defendant" and/or the "Township"), is a township in Cape May County, New Jersey and according to the United States Census Bureau, the township had a total area of 31.06 square miles and includes within it partially or wholly the unincorporated communities such as: Diamond Beach, Erma, North Cape May, Villas, Cold Spring, Ephraims Island, Fishing Creek, Higbees Landing, Miami Beach, Schellingens Landing, Sewells Point, South Cape May, Sunset Beach, Town Bank, Weeks Landing, and Wildwood Gables.

8. At all times relevant, the Township was the employer of Plaintiffs.
9. At all times relevant to this Complaint, Plaintiffs were “employees” of Defendant who was the “employer” of Plaintiffs within the meaning of N.J.S.A. 10:5-5.
10. At all times relevant, the Township operates under a Council-Manager form of government. N.J.S.A. 40:69A-81, et. seq.
11. The council is composed of five council members (Mayor, Council Member-at-Large, and 3 Wards), each elected on a partisan basis, serving the Township for a four-year term.
12. The Mayor presides over Council at all Council meetings and has a voice and vote in the proceedings.
13. The Defendant, Mayor Frank Sippel, (“Defendant” and/or “Sippel”), a former deputy sheriff of Cape May County, and retired Command Sgt. Maj., Army National Guard, was elected January 2017 to Township council as Deputy Mayor, and in January 2020 was appointed to replace former Mayor Erik Simonson, who was elected to the state Assembly in November 2019.
14. Defendant Sippel has publicly vowed to help and favor members of the military.
15. Defendant Sippel has publicly stated that one of the reasons he decided to run for elected office was to “help soldiers and their families.”
16. The Defendant, Deputy Mayor David Perry (“Defendant” and/or “Perry”), was elected to the Township’s council in or about 2014 and became Deputy Mayor after the seat was vacated by now Mayor Sippel and for all times relevant, holds the position of Township Deputy Mayor
17. At all times relevant, the son of Deputy Mayor Perry is a police officer holding the rank of Detective (Patrolman equivalent) .

18. The Defendant, Township Manager James Ridgway (“Defendant” and/or “Ridgway”) is the chief executive and administrative official of the Township and as such, he either appoints all subordinate personnel not otherwise provided for or delegates the appointive power to department heads.
19. Pursuant to the Township Ordinance No. 2019-07, §90-2 the Township Manager is the appointing authority with power to appoint and promote police officers subject to the merit based rules of the New Jersey Civil Service Commission.
20. At all times relevant, the Township maintains a Public Safety Department which consists of a police force known as the Lower Township Police Department, (“LTPD”) which has adopted, in part, the mission to “enhance the quality of life in the Township of Lower by working cooperatively with the public and within the framework of the Constitution.”
21. The Chief of Police is the head of the LTPD and, at all relevant times, the Chief of Police is William Mastriana (“The Chief” and/or “Mastriana”).
22. All the preceding and subsequently mentioned current and former employees of the Defendant were working within the course and scope of their employment, as agents, and/or on the basis of delegated authority during times relevant to the Complaint.

STATEMENT OF FACTS

23. On or about September 19, 1994, Plaintiff Hartman was hired to work as a permanent appointed police officer for the Township within the LTPD.
24. Hartman has been employed for 26 years with the LTPD.
25. Hartman has nearly 26 years service credit in the New Jersey Police and Fire Pension Fund.
26. On or about September 19, 1994 Plaintiff Whitten was hired to work as a permanent appointed police officer for the Township within the LTPD.

27. Whitten has been employed with the LTPD for 25 years and also has 25 years service credit in the New Jersey Police and Fire Pension Fund.
28. The only other officers employed with the LTPD who have more seniority than Hartman and Whitten are Chief Mastriana with a little more than 27 years of service and Captain William Priole ("Priole") with 29 years of service.
29. Chief Mastriana is scheduled to resign/retire from the LTPD effective December 31, 2020.
30. Hartman started his employment with the LTPD as a patrol officer, thereafter became a member of the Tactical Squad, was promoted to Corporal in January 2012, was promoted to Acting Sergeant in July 2015 and reappointed to Corporal January 2017 and was promoted permanent Sergeant First Class in August 2019 through to the present.
31. Whitten started his employment with the LTPD as a patrol officer, and thereafter was promoted to Detective Sergeant in January 2017. Then, he was supposed to be promoted to Police Lieutenant on or about April 17, 2019. However, the promotions were postponed without good reason, and then, on June 10, 2019, Whitten was finally promoted to Police Lieutenant.
32. In or about December 2019 the LTPD Command structure consisted of one (1) Chief of Police, two (2) Captains (Executive and Administrative), three (3) Lieutenants (Patrol Commander, Investigative and Administrative), and a Sergeant First Class.
33. In or about December 2019, one of the Captains (Martin Biersbach) had unexpectedly passed away leaving one of the two Captain's positions vacant.
34. In December 2019, before Captain Martin Biersbach died, the LTPD Command Staff was as follows:

RANK	NAME	DOB	AGE	SERVICE YEARS	HIRE DATE
Chief	William Mastriana	01/11/66	54	27y, 1m, 15d	07/19/93
Captain	William Priole	08/14/67	53	28y, 10m, 21d	10/13/91
Captain	Martin Biersbach	N/A	N/A	N/A	N/A
Lieutenant	Douglas Whitten	03/22/64	56	25y, 11m, 14d	09/19/94
Lieutenant	Donald Vanaman	04/15/73	47	17y, 5m, 24d	03/10/03
Lieutenant	Kevin Lewis	05/27/69	51	14y, 7m, 25d	01/09/06
Sgt. First Class	Robert Hartman, Jr.	03/17/73	47	25y, 11m, 14d	09/19/94

35. As of December 31, 2019 there were also approximately six (6) Detectives, four (4) Patrol Sergeants, two (2) Corporals, thirty (30) Patrol Officers and two (2) School Resource Officers. In total, the LTPD consisted of approximately fifty one (51) sworn employees.
36. The LTPD Table of Organization is established by Ordinance, Article I, § 90-1.
37. The Township has adopted the New Jersey Civil Service Act.
38. The Township is therefore governed by the New Jersey Civil Service Statute for appointments and promotions. *N.J.S.A.* 11A:1-1 et seq.; Ordinance, Article I, § 90-5 through 8.
39. New Jersey's Civil Service governs the hiring, promotion, classification and discipline of employees of the State of New Jersey, and employees of the majority of counties, municipalities and governmental boards and commissions which have chosen to be governed by Civil Service.

40. The Civil Service System is governed by the New Jersey Constitution and New Jersey's Civil Service Act and the regulations issued by New Jersey's Civil Service Commission which implement the Civil Service Act.
41. New Jersey's Civil Service System is based on a strong constitutional foundation. Article VII, section I of New Jersey's Constitution of 1947 provides that:
- Appointments and promotions in the Civil Service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.
42. Thus, the 1947 New Jersey Constitutional Convention thus provides a constitutional requirement for the principal of merit based employment decisions upon which the Civil Service System is based.
43. New Jersey's Civil Service System is governed by the Civil Service Act, codified in Title 11 of New Jersey Statutes. In 1986, Title 11A replaced the former Title 11 (in fact, the Civil Service Act takes up all of Title 11A). The Civil Service Act sets out the framework of New Jersey's merit based system of government employment.
44. New Jersey's Civil Service Act is also governed by Title 4A of the New Jersey Administrative Code. The Civil Service Act provides for the establishment of the Civil Service Commission (previously called the Merit System Board), and for its adoption of these regulations.
45. The public policy behind New Jersey's Civil Service Act is explained as follows:

- a. to select and advance employees on the basis of their relative knowledge, skills and abilities;
- b. ...to provide public officials with appropriate appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities;
- c. ...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. ...to ensure equal employment opportunity at all levels of the public service; and
- e. ...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.

46. New Jersey's Supreme Court explained the reasons behind the adoption of New Jersey's Civil Service protections. In a state which had a long history of corruption, the purpose was to make sure that New Jersey's people got the best government possible. In the 1963 case of *Loboda v. Clark Township*, the Court explained:

Primarily it was to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment. Therefore it behooves the judicial branch of the government to give the widest possible range to the application of the law.... Many decisions have recognized that the purpose of the Civil Service Law is to procure efficient public service and to secure tenure during good behavior for public officers and that the law should be given a broad construction to bring employees within its operation.

47. The LTPD also has in place a Promotional Process Procedures for all promotions within the department and are set out in written General Orders in accordance with the New Jersey Department of Personnel, the IACP Policy Standards and Title 4A Rules and Regulations of the New Jersey Administrative Code.

48. The purpose for the creation and implementation of the written directives within the LTPD is to “establish a fair and consistent procedure in conjunction with New Jersey Civil Service Commission requirements to enable the Lower Township Police Department to select qualified officers who will best serve the Township of Lower in the capacity of a Sergeant, Lieutenant or Captain. To familiarize department personnel with responsibilities of the department in the promotional process, to guarantee that all candidates are treated equally, and to ensure that all elements of the selection process are administered, evaluated and interpreted in a uniform manner.”
49. In December 2019 there had been a list of eligible candidates for promotions to fill vacancies within the ranks of Captain and Lieutenant with the promotion of Lewis, Whitten, and Priole, in June of 2019, those lists have been exhausted of candidates.
50. In December 2019, there was still in effect a current Sergeants Certification List of Eligible Candidates for Promotion to Sergeant approved by the NJ Civil Service Commission.
51. In December 2019, after the death of Captain Beirsbach, a vacancy for the rank of Captain was created which would, in turn, upon being filled by the next qualified candidate would open up a vacancy, and hence a promotional opportunity for the positions of Lieutenant and Sergeant.
52. That is, the filling of the vacant Captain’s position caused by the death of Captain Biersbach from the ranks of Lieutenant would create a vacancy for Lieutenant and hence, that would create a vacancy for the position of Lieutenant to be filled by a qualified Sergeant and the vacancy created by that promotion would in turn create a promotional opportunity for Sergeant.

53. Late Spring of 2020, Chief Mastriana announced his retirement to be effective January 1, 2021.
54. In addition, circling the department was word that Lieutenant Vanaman was going to retire from the LTPD in or around October 2021.
55. Accordingly, and in keeping with past practice, Chief Mastriana provided his recommendations to Township Manager Ridgway in or about June/July 2020 with the names of the people to fill the positions of Captain, Lieutenant and Sergeant on a provisional basis until proper Civil Service based testing went into effect.
56. Chief Mastriana recommended that Lieutenant Whitten fill the vacant Captain position (Captain Biersbach) on a provisional basis.
57. Chief Mastriana recommended that First Class Sergeant Hartman fill the vacant Lieutenant position (Lieutenant Whitten) on a provisional basis.
58. Chief Mastriana recommended that one of the officers on the current Sergeants Certification list fill the vacant Sergeant position (to backfill the vacant Sergeant First Class position created by the promotion of First Class Sergeant Hartman) on a provisional basis.
59. The top three ranked officers on the Police Sergeant Eligible List approved by the NJ Civil Service Commission were in order of ranking : 1) Michael Majane, 2) Michael Perry and 3) Anthony Greto.
60. As of August 20, 2020 the Township Manager, influenced by and in collaboration with Mayor Sippel and Deputy Mayor Perry, made the decision to promote Lewis to Provisional Captain and disregarded the other recommendations of Chief Mastriana for promotion to Captain and Lieutenant.

61. Hartman and Whitten are both the oldest in age/seniority (Sgt. Robert Smith is older but has less time at the department) and titles and were not promoted.
62. Instead, Lieutenant Kevin Lewis (“Lewis”) was promoted over Whitten.
63. Instead, Sergeant Charles Ryan (“Ryan”) was promoted over Hartman.
64. Lewis is at least 5 years younger than Whitten.
65. Ryan is at least 8 years younger than Hartman.
66. Lewis has a total service of 15 years compared to Whitten who has 25+ years of experience/service.
67. Ryan has a total service of 13 years compared to Hartman who has 25+ years of experience/service.
68. Lewis is very good friends with Mayor Sippel and Deputy Mayor Perry and refer to each other as “family.”
69. Lewis’s past scores on the Civil Service examinations are far lower than that of Whitten. Whitten has scored Number 1 on the Sergeants Exam in the entire state and Number 10 on the Lieutenants Exam in the entire state. However, Whitten scored Number 1 on both Sergeant and Lieutenant exam competing against members of the Lower Township Police Department including Lewis.
70. Lewis was below or junior to Whitten in the title of Lieutenant.
71. Lewis worked under Sippel’s command in the Army National Guard for many years.
72. Sippel was a Command Sergeant Major in the Army National Guard. Lewis is also a retired Command Sergeant Major in the Army National Guard.
73. Lewis’s wife is also a ranking officer in the Army.
74. Sippel has pledged to promote the interests of military members.

75. While the merit based Civil Service criteria for promotions permits some limited preferences to veterans, it prohibits a complete disregard for the consideration of those non-veteran officers who are more qualified and who have ranked higher in the test process.
76. Ryan is also a National Guard member.
77. Chief Mastriana expressed concerns to Defendants about Ryan's ability to effectively manage the patrol division.
78. On the other hand, Chief Mastriana expressed confidence in the ability of Hartman to manage and assume the leadership role of provisional Lieutenant.
79. In fact, on or about August 3, 2020 Chief Mastriana stated to Defendants that Whitten should be elevated to the position of provisional Captain and that while Lewis is the future of the LTPD, he needs more time to become acclimated in the role of Captain.
80. It is common knowledge that Defendants want to promote Lewis to the position of Chief of Police because of his connection to Mayor Sippel.
81. Mayor Sippel favors Lewis because of his military status.
82. New Jersey public policy prohibits favoritism as a factor in public employment.
83. Defendants favor Lewis because he is younger than Whitten.
84. The laws prohibit age as a factor in the decision making process for employment.
85. Defendants disfavor Whitten and have factored into their decision making the eligibility of Whitten to retire from the LTPD with a full pension and seek to force his retirement to make room for Lewis to become the Chief of Police.
86. Defendants disfavor Hartman and have factored into their decision making the eligibility of Hartman to retire from the LTPD with a full pension and seek to force his retirement to

make room for Ryan, a younger military member and for Officer Perry, a younger officer and son of Deputy Mayor Perry to accelerate quicker to the higher ranks and command staff of the LTPD.

87. New Jersey laws, rules and regulations prohibit age, non-merit based and reverse military discrimination as factors into the decision making process for employment.
88. Moreover, Defendants seek to force Plaintiffs to retire to make way for the much younger Patrolman, Anthony Greto who is also in the Army National Guard and is close friends with Mayor Sippel's son.
89. Upon information and belief, Deputy Mayor Perry also favors Lewis for promotional opportunities because they reciprocate with each other as Lewis is a licensed plumber in the State of New Jersey and Perry is a licensed electrician in the State of New Jersey.
90. In addition to the above, there was no legitimate and uniform merit based process put into place and/or used in the selection for promotions by the Manager/Council, and the selections made a point to benefit the members of Council's friends and family.
91. The Defendants have intentionally used their public offices to "get the old guys out."
92. Indeed, the Township Manager told the Chief that promoting the Plaintiffs would not guarantee that they would retire in 1 year (basically getting out of the way).
93. The Chief advised the Manager that under *N.J.A.C. 4A:4-1.5* governing provisional promotions, the positions are only for 12 months and that thereafter, the Civil Service Testing process would be utilized to make merit based promotions to these positions.
94. Nonetheless, the Manager still denied the Chief's requests for Plaintiffs to be promoted as the best qualified candidates for the provisional appointments.

LEGAL CLAIMS

COUNT ONE

*New Jersey Law Against Discrimination-
Disparate Treatment and Failure to Promote in Violation of N.J.S.A. 10:5-1 et seq.
(Against all Defendants)*

95. All of the foregoing and subsequent paragraphs are incorporated herein by this reference as if stated here in their entirety.
96. The LAD, at *N.J.S.A. 10:5-12(a)*, prohibits among other things, an employer from discriminating against employees on the basis of AGE.
97. Defendants are “employers,” “supervisors,” and/or “persons” under the definitions contained within the LAD.
98. Plaintiffs were, at all times relevant, an employee who could and did perform her job functions satisfactorily.
99. Plaintiffs are older than the employees who were promoted over them.
100. *N.J.S.A. 10:5-4* prohibits discrimination in the workplace and states: “All persons shall have the opportunity to obtain employment ... without discrimination because of ... age ... subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.”
101. Defendants did subject Plaintiffs to differential, worse, and intentionally discriminatory treatment based on age, as set forth in the preceding and subsequent paragraphs, including a failure to promote.

102. As a direct and proximate cause of Defendants' LAD violations, Plaintiffs have suffered damages because of it including, but not limited to: loss of status, a diminution in authority, reputational and financial loss, back pay, and front pay.
103. The adverse employment actions by Defendants also caused Plaintiff to suffer stress, unnecessarily so, which in turn caused and continues to cause anxiety, depression, sleeplessness, worry, high blood pressure, exacerbation of intestinal illness, and loss of everyday enjoyment of life.
104. Any reason proffered by Defendants for their disparate treatment of Plaintiffs shall be shown to be pretext.

COUNT II

*New Jersey Law Against Discrimination-
Reverse Military Discrimination in Violation of N.J.S.A. 10:5-1 et seq.
(Against all Defendants)*

105. All of the foregoing and subsequent paragraphs are incorporated herein by this reference as if stated here in their entirety.
106. The Defendants have failed to promote the best and/or most qualified candidates for the positions to provisional Captain and provisional Lieutenant.
107. A rational employer would wish to promote the most qualified candidate, because it is in the employer's best interest to do so. When an employer acts contrary to its best interests, then it is proper to infer a discriminatory motive. *See, Harding v. Gray*, 9 F.3d 150, 153 (D.C.Cir.1993); *DeCapua v. Bell Atlantic New Jersey Inc.*, 313 N.J.Super 110 (Law Div. 1998).

108. Instead, Defendants favored friends who had a military background to the exclusion of fair and proper consideration to better suited non-military employees.
109. The New Jersey Supreme Court has held that a plaintiff can pursue claims of reverse discrimination under the New Jersey Law Against Discrimination (NJLAD). The NJLAD includes as a protected classification "military status." *See, Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999).
110. The above demonstrates as well, background circumstances supporting the suspicion that the Defendants are the unusual employers who discriminate against the majority.
111. Plaintiffs were performing at and above a level that met the employer's legitimate expectations.
112. Nonetheless, Plaintiffs were bypassed for promotion.
113. The promotions were provided to less qualified employees based in whole or in part on military status, not primarily qualifications such as experience, seniority, years in title and past record for performance of job duties and/or past merit based testing.
114. The above demonstrates an inference that but for Plaintiffs' non-military backgrounds, they would or should have been promoted.
115. As a direct and proximate cause of Defendants' LAD violations, Plaintiffs have suffered damages because of it including, but not limited to: loss of status, a diminution in authority, reputational and financial loss, back pay, and front pay.
116. The adverse employment actions by Defendants also caused Plaintiff to suffer stress, unnecessarily so, which in turn caused and continues to cause anxiety, depression, sleeplessness, worry, high blood pressure, exacerbation of intestinal illness, and loss of everyday enjoyment of life.

COUNT III

New Jersey Civil Rights Act, N.J.S.A. 10:6-2

(Against all Defendants)

117. All of the foregoing and subsequent paragraphs are incorporated herein by this reference as if stated here in their entirety.
118. Defendants are public employers and/or public officials with final policy making authority as it pertains to the operations of the LTPD and the Township of Lower and/or supervisors who had personal involvement in the wrongs as alleged in this matter.
119. *N.J.S.A.10:6-2(c)* provides relief for either the deprivation of a statutory substantive right or the interference with such a right by threats, intimidation or coercion. *Tumpson. v. Farina.*
120. *N.J.S.A. 10:6-2(c)* provides: Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.
121. The New Jersey Constitution, Art. VII §1, ¶3 provides: Appointments and promotions in the Civil Service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in

appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.

122. Moreover, Title 11A of the New Jersey Civil Service Act sets out the framework of New Jersey's merit based system of government employment.
123. Also, New Jersey's Civil Service Act is also governed by Title 4A of the New Jersey Administrative Code which sets out regulations designed 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.
124. These laws were primarily established to remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment.
125. Plaintiffs are intended beneficiaries of the laws cited herein.
126. As a direct and proximate result of Defendants' violation of Plaintiff's rights, Plaintiff has been caused to suffer damages.
127. As policy makers, Defendants are collectively liable for the intentional violation of Plaintiff's NJ constitutional and statutory rights as identified above.
128. Defendants engaged in a deliberate indifference to the fact that employees are entitled to merit based decision making as it affects the terms and conditions of their employment.
129. The illegal actions of Defendants have caused Plaintiffs to suffer serious and grave economic consequences such as loss of financial income, back pay, front pay, and other losses.
130. The adverse employment actions by Defendants also caused Plaintiffs to suffer stress, unnecessarily so, which in turn caused, and continues to cause anxiety, sleeplessness,

worry, loss of every day enjoyment in life due to interference from the worry and anxiety about the bad acts of Defendants as well as the stress and worry about their respective future.

PRAYER FOR RELIEF

WHEREFORE, these premises considered, Plaintiffs request this court enter judgment in their favor on all counts and specifically:

1. Award Plaintiffs compensatory damages for all monetary and financial losses, including (but not limited to): past and future loss of income and benefits of employment, lost career and business opportunities and advancement, and other past and future pecuniary losses in an amount to be determined by an enlightened jury;
2. Award Plaintiffs compensatory damages for non-pecuniary injuries including (but not limited to): emotional stress, anxiety, shame, embarrassment, humiliation, powerlessness, and indignity, in an amount to be determined by an enlightened jury;
3. Award Plaintiffs exemplary and punitive damages in an amount to be determined by an enlightened jury;
4. Award Plaintiffs reasonable attorneys' fees and costs of this action, including expert fees, and other fees and costs permitted by law;
5. Award Plaintiffs other monetary damages, including treble damages, to which she may be entitled to under law;
6. Award Plaintiffs appropriate pre-judgment and post-judgment interest; and
7. Award Plaintiffs such other relief, including equitable relief and costs, as may be appropriate, fair, and just.

DESIGNATION OF TRIAL COUNSEL

Michelle J. Douglass, Esq., and Philip S. Burnham, II, Esq. are hereby designated as trial counsel in the above-captioned matter.

CERTIFICATION OF NO OTHER ACTIONS PURSUANT TO RULE 4:5-2

I certify that the dispute about which I am suing is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification.

CERTIFICATION OF COMPLIANCE WITH R. 1:38-7(c)

I certify the Confidential Personal Identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future in accordance with R. 1:38-7(b).

NOTICE OF LITIGATION HOLD

The parties are hereby required to preserve all physical and electronic information that may be relevant to the issues to be raised, including but not limited to, Plaintiff's employment, to Plaintiff's cause of action, and/or prayers for relief, to any defenses to same, and pertaining to any party, including but not limited to, electronic data storage, close circuit TV footages, digital images, computer images, cache memory, searchable data, emails, spreadsheets, employment files, memos, text messages and any and all online social or work related websites, entries on social networking sites (including, but not limited to, Facebook, Twitter, LinkedIn, etc.,) and any

other information and/or data and/or things and/or documents which may be relevant to any claim or defense in this litigation.

Failure to do so may result in separate claims for spoliation of evidence and/or for appropriate adverse inferences.

The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation. You are on notice of litigation and therefore have an obligation to suspend your routine document retention/destruction policy and put in place a 'litigation hold' to ensure preservation of relevant documents." Failure to do so has been found to be 'grossly negligent' and may subject you to punishment.

JURY DEMAND

The plaintiff hereby demands a trial by jury on all of the triable issues of this complaint, pursuant to New Jersey Court *Rules* 1:8-2(b) and 4:35-1(a).

Respectfully submitted,

BURNHAM DOUGLASS
Attorneys for Plaintiffs, Robert Hartman
and Douglas Whitten

/s/ Michelle J. Douglass
Michelle J. Douglass, Esq.

/s/ Philip S. Burnham, II
Philip S. Burnham, II, Esq.

Date: November 04, 2020

Civil Case Information Statement

Case Details: CAPE MAY | Civil Part Docket# L-000385-20

Case Caption: HARTMAN, JR. ROBERT VS THE TOWNSHIP OF LOWE R

Case Initiation Date: 11/04/2020

Attorney Name: PHILIP SMITH BURNHAM II

Firm Name: BURNHAM DOUGLASS

Address: 8000 SAGEMORE DR STE 8303
MARLTON NJ 08053

Phone: 8567515505

Name of Party: PLAINTIFF : HARTMAN, JR., ROBERT

Name of Defendant's Primary Insurance Company
(if known): Unknown

Case Type: LAW AGAINST DISCRIMINATION (LAD) CASES

Document Type: Complaint with Jury Demand

Jury Demand: YES - 6 JURORS

Is this a professional malpractice case? NO

Related cases pending: NO

If yes, list docket numbers:

Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

Are sexual abuse claims alleged by: ROBERT HARTMAN, JR.? NO

Are sexual abuse claims alleged by: DOUGLAS WHITTEN? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE
CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Employer/Employee

Does the statute governing this case provide for payment of fees by the losing party? YES

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO

If yes, please identify the requested accommodation:

Will an interpreter be needed? NO

If yes, for what language:

Please check off each applicable category: Putative Class Action? NO Title 59? NO Consumer Fraud? NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

11/04/2020

Dated

/s/ PHILIP SMITH BURNHAM II

Signed

BURNHAM DOUGLASS

Philip S. Burnham II, Esq. Attorney Id. No. 030951990

Michelle J. Douglass, Esq. Attorney Id. No. 025091988

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Attorneys for Plaintiffs, Robert Hartman, Jr. and Douglas Whitten

ROBERT HARTMAN, JR. and DOUGLAS WHITTEN,

Plaintiffs,

v.

THE TOWNSHIP OF LOWER, MAYOR FRANK SIPPEL, DEPUTY MAYOR DAVID PERRY, and TOWNSHIP MANAGER JAMES RIDGWAY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

CAPE MAY COUNTY

Docket No. CPM-L-000385-20

Civil Action

CERTIFICATE OF SERVICE

I, Maria Andreina Fernandez, Paralegal of Burnham Douglass, representing the Plaintiffs, Robert Hartman, Jr. and Douglas Whitten, in the above-entitled action hereby certify the following:

On December 14, 2020, I caused a true and accurate original of the following: Plaintiffs' Opposition to Defendants Township of Lower, Mayor Frank Sippel, Deputy Mayor David Perry and Township Manager James Ridgway's Motion to Dismiss Plaintiffs' Complaint, Exhibits, and this Proof of Service to the following person at the following address via (eCourts / e-filing):

Honorable James H. Pickering Jr.
Superior Court of Cape May County
9 North Main Street
Cape May Court House, NJ 08210-3096

and,

John C. Grady, Esquire
Craig, Annin & Baxter, LLP
58 Euclid Street
Woodbury NJ 08096
Email: jgrady@kwclawyers.com

On December 14, 2020, I caused a true and accurate copy of the following: Plaintiffs' Opposition to Defendants Township of Lower, Mayor Frank Sippel, Deputy Mayor David Perry and Township Manager James Ridgway's Motion to Dismiss Plaintiffs' Complaint, Exhibits, and this Proof of Service to the following person at the following address via USPS Priority Mail:

Honorable James H. Pickering Jr.
Superior Court of Cape May County
9 North Main Street
Cape May Court House, NJ 08210-3096

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,

Maria Andreina Fernandez

Maria Andreina Fernandez
Paralegal
BURNHAM DOUGLASS

Dated: December 14, 2020