



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 39 OF 2021

IN THE MATTER of an application for Judicial Review

BETWEEN:

- 1) SERGEANT SHARON LEWIS
- 2) SERGEANT ANTONIO HANNA
- 3) THE ROYAL CAYMAN ISLANDS POLICE ASSOCIATION

APPLICANTS

AND:

- 1) THE COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE SERVICE
- 2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

RESPONDENTS

OPEN COURT

Appearances: Mr. Guy Dilliway-Parry of Priestleys for the Applicants
Dr Jevon Alcock, Deputy Solicitor General and Ms. Marilyn Brandt,
Crown Counsel, Attorney General's Chambers for the Respondents

Before: Hon. Justice Marlene Carter (Actg.)

Heard: 01 September 2021

**Draft Judgment
circulated:** 25 November 2022

Judgment Delivered: 02 December 2022

HEADNOTE

Judicial Review – Powers of Commissioner of Police under the Police Act, Section 6 - breach of statutory duty - failure to convene promotional board – Breach of Sections 19 and 24 of the Bill of Rights

JUDGMENT

1. The Applicants were granted leave to seek judicial review on 12 March 2021. A Notice of Originating Motion was filed on 19 March 2021 wherein the Applicants sought the following relief:



“(a) A Declaration that:

- i. the decisions and actions of the First Respondent in failing to implement and/or comply with the provisions of the Promotional Selection Procedure for Police Officers dated 17 March 2015 (Promotion Policy) were/are unlawful;*
 - ii. the decisions and actions of the First Respondent in appointing officers to act in roles of higher rank without actually being of higher rank (Acting Up Positions) for periods in excess of 12 months were/are unlawful;*
 - iii. the continuing failure to convene promotional boards is unlawful;*
 - iv. the continued failure to implement Article 58(A) and 58(B) of the Cayman Islands Constitution is unlawful.*
- (b) An order of Mandamus that the First and Second Respondents immediately comply with Article 58(A) and 58(B) of the Cayman Islands Constitution;*
- (c) An order of Mandamus that the First Respondent immediately convenes a Promotion Board to consider the promotion of, inter alia, the First and Second Applicants;*
- (d) Damages sustained due to the unlawful administration of promotions and failure of the First Respondent to implement and/or comply with the provisions of the Promotion Policy;*
- (e) Such further, consequential or other relief that this Honourable Court deems is just; and*
- (f) Costs”*

THE PARTIES

2. The first and Second Applicants are police officers in the employ of the Royal Cayman Islands Police Service (“RCIPS”). The First Applicant passed the Promotional Examination for promotion to the rank of Inspector in 2007 but has not yet been promoted.
3. The Second Applicant passed the Promotional Examination in 2007 but has not yet been promoted.
4. The Third Applicant, the Royal Cayman Islands Police Association (“RCIPA”), is an incorporated association representing police officers who serve with the RCIPS. The Third Applicant appears in a nominal capacity only in these proceedings.



5. The First Respondent is the Commissioner of Police (“COP”) whose responsibilities include the appointment of all police officers, except the Deputy Commissioner and the Assistant Commissioner, and promotions in respect of police officers as he may see fit.
6. The First and Second Applicants each filed affidavits dated 30 July 2021 in support of the Originating Motion. The affidavit of the Rudolph Gordon, the President of the Third Applicant, filed on the 5 March 2021 in support of the application for leave to apply for judicial review, was also before the court.
7. On the 22 July 2021 the First Respondent filed an affidavit in opposition to the application.
8. At the hearing of this matter the Applicants indicated to the court that they no longer require the relief sought at a) iv, b) and c). Counsel for the Applicants noted that the COP had, since the filing of the application for judicial review, circulated two directives providing notice of his intention to convene a Promotional Board, a measure which the Applicants contend “*amounts to a total concession by the COP of non-compliance with the (previous) Promotion Policy.*”

Mootness
9. The Respondent had submitted as a preliminary point that this court should not embark on what counsel termed “*a forensic exercise*” for the purpose of rendering a decision which would have no practical effect on the parties, that this was not a case of exceptional public importance. This argument stems from the fact that a new promotion policy is now in place as of May 2021. I do not find that, as counsel submitted, the application has “*been overtaken by events, and as such, they have been rendered moot*”. The Applicants’ challenge is that the COP failed to act in accordance with the Promotion Policy. I agree with counsel for the Applicants that the implementation of a replacement policy does not have a material impact on their case as filed. On the Applicants’ case, the “*actions and inactions complained of by the Applicants have already taken place, the damage has already been incurred and the COP remains in breach of his obligation to convene a promotional board.*”
10. It was agreed that the Second Respondent, the Attorney General, ought to be removed as a party to these proceedings, which do not fall to be constructed as ‘civil proceedings’. This court is clear that the Third Applicant appears as a nominal party only. As counsel for the Applicants state in his written submissions: “*... the involvement of the Third Applicant, as nominal applicant, is of little consequence.*”



THE LAW

11. Section 6(1) of the Police Act (2021 Revision) (“Police Act”) provides:
- “The Commissioner shall have the command, superintendence and direction of the Service and may:*
- (a) subject to section 8, make such appointments and promotions in respect of police officers as he may see fit;*
 - (b) make standing orders for the general government of police officers in relation to their enlistment, discharge ,... and other appointments, and particular services as well as their distribution and inspection, and such other orders as he may deem expedient for preventing neglect and for promoting efficiency and discipline; and*
 - (c) make such rules of practice and procedure for the efficient operation of [the Police Act] as he may see fit”*
12. Section 8 of the Police Act provides:
- “(2) Police officers –*
- (b) other than those specified in paragraph (a), shall be appointed by the Commissioner to hold office at his pleasure and be disciplined, discharged, retired early or otherwise dealt with subject to such other terms and conditions as are provided by this Act, the regulations and standing orders”.*
13. The Police Act further defines “standing orders” as “standing orders made by the Commissioner under section 6(1)(b)”.
14. Pursuant to Section 6 of the Police Act, a policy entitled ‘*The Promotion Selection Procedure for Police Officers*’ was issued on the on 17 March 2015.
15. This policy stated as its objective:
- i *“the promotional selection process is transparent and clear to potential candidates”;*
 - ii *“all promotional candidates are treated fairly and consistently”;*
 - iii *“all promotional selection decisions are based on ability, the experience and skills required for the rank”;*
 - iv *“the promotion selection process complies with the Police Law 2014 and Police Regulations (2006 Revision)”.*



16. Section 1 of The Promotion Policy states that it applies to all police officers within the RCIPS and further that it is intended to:

“..maintain a standard procedure regarding promotions that is fair and equitable, and will result in the appointment of individuals who best demonstrate the skills, knowledge and abilities necessary for the Royal Cayman Islands Police Service to achieve its goals and objectives.”

17. Section 1 also states its intention to: *“outline in clear and concise terms the procedures established by the Royal Cayman Islands Police Service that facilitate the promotion of the most suitable police officers to the ranks of Sergeant, Inspector, Chief Inspector, Superintendent and Chief Superintendent.”*

18. Section 5.1 of the Promotion Policy provides that:

- i. *“Sergeants and Inspectors examinations will normally be held annually...”* (“Promotional Examination”); and
- ii. *“... promotion boards for all ranks will be held as and when required to meet organizational resourcing needs”* (“Promotional Board”).

19. Section 6.1 of the Promotion Policy lists the criteria to be satisfied for promotion. It is required that an officer must *“... have passed the appropriate promotion boards”*. The policy further states that to be eligible to apply for the Promotional Board, officers must, inter alia: *“Have obtained a pass in the police promotion examination for promotion to the rank of [sergeant][or][Inspector]”*.

20. Section 17.4 of the Promotion Policy further states: *“All candidates who are successful will be considered as suitable for promotion and placed in a pool for promotion, which will be subject to organizational needs.”*

21. Section 31 of the Personnel Regulations provides:

“An appointing officer who is appointing a staff member to act in a position under section 41 (12) of the [Public Service Management Law (2018 Revision) (“PSML”)] may, under section 41(13) of the PSML, do so without following the notification, short-listing, interviewing or other processes required by section 41(2) to (9) of the PSML, provided that the period the staff member is to act in the position is no more than twelve months”.



Grounds of Review

22. The Applicants seek to challenge the First Respondent's decisions on the following grounds:

Ground 1 – Breach of Statutory Duty

23. It was submitted that the First Respondent has a statutory obligation under Section 6 (1) of the Police Act. This obligation must be read in conjunction with section 8 to which section 6 refers. The Promotion Policy was issued pursuant to Sections 6 and 8 (2) (b) of the Police Act. The contention of the Applicants is that the Promotion Policy is either “*a standing order*” or part of the “*terms and conditions*” within the meaning of this section. The COP is in breach of his obligation by failing to comply with the Promotion Policy by not convening any Promotional Boards.

Ground 2 - Unlawful Administrative Action.

24. Further or in the alternative, that in failing to implement the Promotion Policy and in excessively using acting-up positions the COP has acted unlawfully

Ground 3 - Breach of Article 19 and Article 24 of the Bill of Rights

25. That the policies of the COP must be exercised in accordance with Section 19 of the Bill of Rights. In failing to implement the Promotion Policy and in excessive use of the acting-up positions the COP has acted irrationally, unlawfully and in a manner that is not procedurally fair.

The Decisions of the First Respondent which have given rise to the instant Application for Review.

(1) The failure of the Commissioner of Police to comply with the Promotion Policy.

26. The Applicants argue that the COP has failed to comply with the Promotion Policy in that Promotional Boards were last convened in October 2015. The failure of the COP to convene such boards since that date has resulted in the Applicants being denied any opportunity to be interviewed for promotion and has thereby deprived the Applicants of any opportunity to progress in their chosen careers in the RCIPS.

27. The Applicants point to the purpose of the Promotion Policy outlined at paragraphs 11 and 12 above and stated that if there was any relevance to these, the stated purpose and intention of the Promotion Policy, it was as a strong indicator of there being an obligation and duty on the part of the COP to ensure their fulfilment.



28. In furtherance of this argument the Applicants point to the fact that there are currently at least 92 officers who have passed the Promotional Examination but not yet been appointed to a permanent position. The Applicants point to the appointment of officers to acting-up positions by the COP as bolstering their submission that there are organisational resourcing needs which need to be met via the Promotion Policy.
29. The Applicants also submit that the duty of the COP to comply with the Promotion Policy has led to a position whereby the officers of the RCIPS (and in particular these Applicants) have a legitimate expectation that he will act in accordance with same.
30. On this ground of breach of statutory duty, the Respondent takes the position that the COP is not under a statutory duty to establish or to administer any promotional competitions or promotional boards within any given time scale. In any event one of the points raised by Counsel for the 1st Respondent is that the 1st Respondent has now (at the time of hearing of the application) established a promotion competition and a promotion interview panel which was set to convene shortly, that the Respondent had already taken actions in the sphere of the reliefs sought.

(2) The appointment by the Commissioner of Police of persons to act in roles of higher rank without being of such higher rank.

31. The Applicants submit that the COP can only have exercised a discretion to make Acting up appointments if such was derived from the Personnel Regulations (2019 Revision), specifically Section 31 of the Regulations. The Applicants argue that this is the only legislation that imbues the COP with power to act in that regard and that this is so especially because there is no provision in the Police Act or the Police Regulations (Revised) that provide for appointment of officers to Acting Up Positions.
32. In support of this submission the Applicants state that apart from the fact that the power to appoint individuals to Acting Up Positions appears in no legislation other than the Personnel Regulations, the RCIPS's standard form contracts of employment for police officers, adopts the terms and conditions detailed in Schedule 1 of the Personnel Regulations and, officers are contractually obliged to adhere to the PSML, the Personnel Regulations, the Police Act and the Police Regulations (Revised).
33. The Applicants argue further that the COP's excessive use of Acting Up Positions in place of following the Promotion Policy has meant that certain officers, who have failed to pass the Promotional Examination have been cherry picked for promotion rather than following the



process detailed in the Promotion Policy. Persons appointed to Acting up Positions have continued beyond the 12 months specified by Section 31 of the Regulations and that the COP has, by so doing, effectively side-lined the provisions of the Promotion Policy.

34. On behalf of the Respondent, regarding the Applicants' submission that the COP had acted unlawfully in permitting officers to remain in acting positions for in excess of a twelve month period in contravention of the provisions of section 51 of the Public Service Management Act (2018 Revision) ("PSMA") and section 31 of the Personnel Regulations (2019 Revision), these being the applicable provisions regarding the appointment of police officers within the RCIPS, the Respondent submitted that the position of the Applicants on the applicability of these sections was erroneous. Counsel submitted that it was the Police Act (2021 Revision) which empowered the COP to make decisions relating to appointment, assignment, promotion, discipline and dismissal of officers below the rank of Assistant Commissioner.
35. Counsel referred to Sections 6(1)(a) of the Police Act which states as follows:

"(1) The Commissioner shall have the command, superintendence and direction of the Service and may-
(a) Subject to section 8, make such appointments and promotions in respect of police officers as the Commissioner may see fit."

36. Counsel referred to section 8(3) of the Act and submitted that its provisions show that the PSMA is only applicable to appointments of staff who are to work with the RCIPS but who are not to be police officers. The section states:

*"For the avoidance of doubt, it is declared that staff who are to work with the Service but who are **not to be police officers** shall be appointed by the relevant chief officer in accordance with the Public Service Management Act (2018 Revision)"*

37. Regarding Regulation 31 of the Personnel Regulations, counsel argued that this Regulation did not apply to police officers as it was concerned with staff of a civil service entity. He went on to point to the definition of civil service entity urging the court to find that the RCIPS does not fall within this definition.
38. Section 2 of the Regulations define "civil service entity" as "a portfolio, ministry, the Audit Office, Cabinet Office, Office of Public Prosecutions, Judicial Administration or the office of the Complaints Commissioner".



39. In his written submissions counsel contended: *“the allegation that the Commissioner’s actions are unlawful because he did not act in accordance with regulation 31 of the Personnel Regulations is without merit.”* On the issue of the acting up appointments and the applicants’ complaint of the excessive use of such policy, counsel argued that *“the decisions made by the COP with regard to ‘Acting Up’ are lawful, rational, proportionate and procedurally fair and in compliance with the Bill of Rights”*. He further contended that there was a justification for each appointment and that the decisions to do so was based on organisational and strategic operational needs and were in fact made in a reasonable manner.
40. Counsel sought to emphasize that the Commissioner did not fail to act in accordance with the 2015 Promotion Policy. He argued that the Commissioner had instead recognized that the Policy was outdated and it was because he was awaiting the development of a new competency-based framework that he made no substantive appointments. Counsel argued that the Commissioner’s position in appointing only acting up positions was therefore based on sound organisational and strategic operational needs.

The Applicants’ position as set forth on affidavit:

41. The 1st Applicant related as follows:

“6 I have been an officer with the Royal Cayman Islands Police Service (“RCIPS”) for over 25 years, having joined in February 1996. I served as a constable for 10 years and was later promoted to the rank of Sergeant on 1 April 2006.

7. In July 2007, I passed the promotion examination for promotion to the rank of Inspector. Since that time while I accept that I have been before an interview board (unsuccessful) many years ago, there have been no further interview boards convened which have sat since the appointment of the present Commissioner of Police (“COP”).

8. There have not been any promotional boards convened or interviews conducted since the First Respondent’s appointment as Commissioner of Police in November 2016, with the last board being convened in October 2015. The First Respondent’s failure to hold promotional boards is in contravention of the Promotion Policy and it has denied me an opportunity to be promoted to a permanent position at the rank of Inspector, despite the fact that there is a clear requirement for the same, as evidenced by the numerous appointments of other officers to Acting Up Positions (as defined at paragraph 18 of the Application).



IN my view, given the considerable experience I have gained since the last time I appeared before the board, I would have had very good prospects of promotion had I not been deprived of this opportunity.

.....

10. *There are currently 6 officers from the rank of Sergeant in Acting Up Positions as Inspector. This clearly illustrates that there is an organizational requirement for Inspector positions to be filled. The First Respondent has failed to advertise these positions and although I passed the Inspector examination in 2007, I have been denied any opportunity to apply for any of these 6 positions. The Promotion Policy provides at section 5.1 "Sergeants and Inspectors examinations will normally be held annually, promotion boards for all ranks will be held as and when required to meet organisational resourcing needs." It is apparent that the First Respondent has adopted a policy of appointing officers to Acting Up Positions in place of following the Promotion Policy.*

11. *The First Respondent's actions have deprived me of the opportunity to progress in my career. It is extremely frustrating to me that I have remained in the current rank for the last 15 years through no fault of my own and prevented by the First Respondent from an opportunity to earn a high salary attached to the rank of Inspector.*

12. *When I joined the RCIPS, and throughout my years of employment, my expectation was that the Commissioner of Police would act in compliance with his own policies which included the Promotion Policy. I am firmly of the belief that the First Respondent's failure to comply with the Promotion Policy is unlawful and it has caused loss and damage to myself and other officers."*

42. Exhibited to this affidavit was a letter dated 8 July 2021 which was in response to queries raised by the 1st Applicant about the issue of Acting Up appointments. At paragraph 3 it stated:

"Furthermore you seek "details of the number of officers currently occupying acting positions including their date of appointments in acting positions". We are instructed that that are currently six "RCIPS Acting-Up Appointments as of 30 June 2021" from the rank of Sergeant to Inspector. The dates of those 'Acting-Up' appointments are 1st May 2018, 1st July 2018, 1st October 2018, 10th December 2018, 7th January 2020. There is also one 'Acting--Up' as Sergeant. The dates of those 'Acting-Up' appointments in chronological order are 1st June



2017 (x3), 1st February 2018; 1st May 2018 (x4); 1st October 2018; 8th February 2019; 1st July 2019; 8th July 2019; 1st October 2019; and 1st March 2020 (x2). There are currently 24 officers in 'Acting-Up' positions (in all ranks) for the period from 2017 to date."

43. The 2nd Applicant related as follows:

"6. Between 2009 and 2010 I acted up in the role of inspector for short periods of time to cover absence of the Inspector when on leave. Since that time, I have acted up on occasions and performed duties of Inspector but was not paid any extra remuneration for doing so and my Acting Up Position was not official.

7. Following the transfer of my Inspector in March 2019 I was informed that I would be the sole supervisor, as the First Respondent did not replace the Inspector. In practical terms I had taken on the role of Inspector, albeit not in an official Acting Up Position. Despite the need for the appointment of an Inspector, no promotional board was convened. I wrote to the First Respondent requesting to be promoted to an official Acting UP Position (as defined at paragraph 18 of the Application) of acting inspector however, I did not receive any response. After a period of 6 months in which I did not receive any response, I again wrote to the First Respondent requesting payment for the period of time in which I was working in the role of sole supervisor and Inspector. I further wrote to the First Respondent asking for feedback as to why I was not considered for an Acting Up Position.

.....

10. The First Respondent's actions have deprived me of the opportunity to progress in my career and to earn the higher salary attached to a higher rank. As a direct result of the First Respondent's unlawful failure to comply with the Promotion Policy, I have suffered loss and damage.

11. Whilst the First Respondent has very recently emailed an invitation to apply for a promotion board, this does not remedy the fact that as a direct result of the First Respondent's failure to comply with the Promotion Policy, my career in the RCIPS has been adversely affected for years.



12. *It has taken a long time to bring this matter before the Court and whilst the First Respondent's very recent invitation to apply for a promotion board is welcome, it does not change the fact that the COP was for a very long time in breach of the Promotion Policy (or provide any guarantee he will comply with any new policy.) I believe that declaration and other relief from the Court is required. I hereby humbly request that the Court considers our application for Judicial Review and grants the relief sought therein."*

44. The COP in his affidavit confirmed that there was now a promotional process that was in train and to which the Applicants could be eligible to apply for interview for promotion.

45. The COP's position is that he was not under any express statutory duty to conduct promotional competitions nor to convene a Promotional Board.

46. He went further to outline that acting up appoints were made *"to various ranks, for operational reasons, all of which were based on my assessment of their skills, including their leadership and management, and observed competency skills. In some instances, acting up appointments were made on the recommendation of members of the senior leadership team thought based on my agreement."*

47. At paragraph 16 of the affidavit of the COP he states:

"Since my appointment, in November 2016, I have conscientiously endeavoured to develop a modern, progressive, 21st century police service. This includes strengthening the supervision and leadership team in the RCIPS, which underpins the success of the service. I undertook a review of RCIPS strategies, structures, policies, processes and procedures, across a spectrum of operational areas, including the examination of the Promotional Policy, which had become outdated. I made no substantive appointments during my tenure because I was awaiting the development of a new competency-based framework."

48. Further at paragraph 24:

"I verily say that the "Promotion Policy 2015" has been superseded by the Promotion Policy 2021, which provides for an all-encompassing fit for purpose



competency-based promotion policy, and no substantive positions will be filled outside of this policy.”

Did the COP breach his statutory duty to convene a Promotion Board?

49. There is no issue between the parties that the last promotional boards were convened in October 2015. Since the present COP’s appointment in November 2016, no Promotion Board has been convened and this remained the position up to the time of filing of the instant proceedings. The issue is whether this court should find that there was a statutory duty on the part of the COP to convene such a board and whether the fact of his not having convened the Promotion Board during the relevant period breached that duty. The applicants contend that the provisions of the Promotion Policy did place a statutory duty on the COP to ensure that these boards were convened, his failure to do is in breach of that statutory duty.
50. There is no issue that the power to convene a Promotion Board resides in the COP as per the Police Act at Section 6. This section states that the COP “*may make such appointments and promotions in respect of police officers as he may see fit*”. Each of the Applicants is subject to such appointment and promotion.
51. As set out above the promotion policy stated that: “*... promotion boards for all ranks will be held as and when required to meet organizational resourcing needs*”
52. The Applicants argue that the aims of the policy, amongst which were to “*maintain a standard procedure regarding promotions that is fair and equitable*”, and to “*outline in clear and concise terms the procedures established by the Royal Cayman Islands Police Service that facilitate the promotion of the most suitable police officers to the ranks of Sergeant, Inspector, Chief Inspector, Superintendent and Chief Superintendent.*” were such as to require the COP to have annual examinations and, more pertinent to the instant application, to convene the promotions boards “*as and when required to meet organizational resourcing needs.*”
53. In essence the Applicants argue that the language of the policy that the promotion boards “*will be held as and when required to meet organizational resourcing needs*” indicates that if a need was made out that the COP was obliged to them “*comply with his own standing order.*” Further, that the fact that there were appointments of multiple officers to temporary acting up positions was evidence of such a need, requiring the COP to fulfil his obligation to under 5.1 of the Promotion Policy.



54. I am not in agreement with the Applicants' arguments on this point. Paragraph 5.1 of the Promotion Policy does not state that when a need is identified that a Promotion Board shall be convened. It states that such will be held as and when required. This is not mandatory language. This language contemplates that in order to meet organizational resourcing needs, it is within the discretion of the COP whether such a need, if it were present, required that a Promotion Board be convened.
55. The Promotion Policy, although it was clearly contemplated that it should seek to ensure that *"the promotion selection process complies with the Police Law 2014 and Police Regulations (2006 Revision)"* does not fetter the discretion of the COP in this regard i.e. a determination of whether there is a need for a Promotion Board to be convened to meet organizational resourcing needs.
56. At paragraph 13 of the affidavit of the COP he states:

"I verily confirm that I made "Acting Up" appointments in respect of police officers, which, were made up in order to meet the operational exigencies of the RCIPS. Those 'Acting-Up' appointments, were made to various ranks, for operational reasons, all of which were based on my assessment of their skills, including their leadership and management, and observed competency skills. In some instances, 'Acting-Up' appointments were made on the recommendations from members of the Senior Leadership Team, though based on my agreement. The decisions with regard to 'Acting-Up' are lawful, rational, proportionate and procedurally fair and in compliance with the Bill of Rights."

.....

"I verily state that there is a justification for each/every appointment which was predicated on sound reasoning. The decision to appoint Sergeants to 'Act-Up' positions has been based on sound organizational and strategic operational needs. The appointments were made in a principled and reasonable manner to meet the operational needs of the RCIPS which arise from time to time. The appointments were not based on any extraneous factors (benevolence nor capriciousness). The decision to appoint officers to 'Act Up' positions from time to time were lawful, proportionate, fair and met the needs of the service."

57. The COP determined that the appointment of police officers to act up was the manner in which the operational resource needs of the RCIPS was to be met during this period. He was entitled to do so. He did not act in breach of a statutory duty in doing so, the Promotional Policy having



not established a duty on his part to act as the applicants have claimed on this application. There is no duty to convene a promotional board once the need arose without more. It remained within the discretion of the COP to determine if it was needed. In this case the COP determined that there was no need to convene the promotional board. The Promotion Policy was one of the ways in which the COP could have met these needs. There is nothing in the legislation, or the promotion policy which precluded him from meeting those needs through other means. This ground of review fail.

The excessive and unlawful use of acting up positions.

58. The Applicants contend that in his excessive use of appointments of officers to act in roles of higher rank, without the officers being of such rank for periods in excess of 12 months the COP has acted unlawfully.
59. The Applicants assert that the COP must have taken his power to appoint officers to acting up positions from section 31 of the Personnel Regulations, there being no other legislation which permits such appointments, that officers of the RCIPS are contractually obliged to adhere to the PSML, the Personnel Regulations, the Police Act and the Police Regulations and also because the RCIPS standard form contracts of employment of police officers adopts the terms and conditions detailed in Schedule 1 of the Personnel Regulations.
60. In pursuance of the appointment to Acting Up positions there were, at the time of the hearing, 24 officers in acting up positions, most of whom have remained in such roles in excess of the 12 months as per Section 31 of the Personnel Regulations.
61. The Police Act at Section 6 is clear as to the powers of the COP, to make appointments and promotions as the Commissioner may see fit. It is fettered only by Section 8 of the Police Act. Section 8 states that persons employed in the police service, not police officers are appointed by the relevant chief officer in accordance with the Public Service Management Act, thereby implying that persons who are police officers within the service are not appointed in accordance with the PSML, confirming that police officers are employed in accordance with the other provisions of Section 8.

Section 8 of the Police Act states:

(1) The Commissioner shall be appointed by the Governor, to hold office at his pleasure and be disciplined, discharged, retired early or otherwise



dealt with subject to such other terms and conditions as are provided by this Law, the regulations and standing orders.

(2) Police officers -

1. (a) of the rank of Deputy Commissioner and Assistant Commissioner shall be appointed by the Governor, after consultation with the Commissioner, to hold office at his pleasure and be disciplined, discharged, retired early or otherwise dealt with subject to such other terms and conditions as are provided by this Law, the regulations and standing orders;

2. (b) other than those specified in paragraph (a), shall be appointed by the Commissioner to hold office at his pleasure and be disciplined, discharged, retired early or otherwise dealt with subject to such other terms and conditions as are provided by this Law, the regulations and standing orders.

(3) For the avoidance of doubt, it is declared that staff who are to work with the Service but who are not to be police officers shall be appointed by the relevant chief officer in accordance with the Public Service Management Law (2017 Revision).

62. I agree with the Respondent that Regulation 31 applies to acting appointments of staff in a civil servant entity of which the police are specifically not mentioned and therefore to which they could not be subject. These are the express provisions of the PSML which define civil service entity as “*a portfolio, ministry, the Audit Office, Cabinet Office, Office of the Director of Public Prosecutions, Judicial Administration or the office of the Complaints Commissioner.*”

63. I am unable to agree with the Applicant’s submission that the COP acted unlawfully in making the Acting Up Appointments. The COP’s powers under Section 6 are wide in their application. The appointment of acting up positions is not precluded by the provisions of that Section especially the clear powers under section 6 (1) (a) to make *such appointments and promotions in respect of police officers as the Commissioner may see fit.*

64. The COP has deposed that in the exercise of those powers he made the acting up appointments as set out at paragraph 56 above.



65. Apart from stating that the acting up appointments were made in excess of the period of 12 months, the Applicants have not argued before me that there was no operational need to make those appointments. I note that the ground of appeal was very clear and precise. It was not that he did not have the power to do so but that he did not have the power to do so in excess of 12 months. I find that this second ground of review fails.

Breach of Article 19 and Article 24 of the Bill of Rights

66. The Applicants submit that in failing to implement the Promotion Policy and in excessive use of Acting up Positions the COP acted irrationally, unlawfully and in a manner which was not procedurally fair.

67. The court has a duty to investigate and scrutinize the circumstances under which an impugned administrative decision was taken. The court is conscious of the provisions of sections 19 and 24 of the Bill of Rights. This court has concluded that the COP has not acted unlawfully. He has not acted in breach of a statutory duty. The COP has given reasons for his actions stating that they were in any event rational, proportionate and procedurally fair.

68. At paragraph 16 of his affidavit the COP stated as follows:

“Since my appointment in November 2016, I have conscientiously endeavored to develop a modern, progressive 21st century police service. This includes strengthening the supervision and leadership team in the RCIPS, which underpins the success of the service. I undertook a review of the RCIPS strategies, structures, policies, processes, and procedures across a spectrum of operational areas, including the examination of the “promotional Policy”, which had become outdated. I made no substantive appointments during my tenure because I was awaiting the development of a new competency-based framework.”

69. The Applicants argue that the Bill of Rights provisions demand a high degree of scrutiny of the decision of the Commissioner not to convene promotional boards and of the decision to use the appointment of Acting Up officers to fill the organizational resourcing needs. The Applicants state that these must be scrutinized in all the circumstances to ensure that it complies with Section 24, that it is also procedurally fair. In this regard, the Applicants question whether the entire abandonment of the Promotion Policy during the period from 2016 up to the time of filing can be seen as being fair in its application.

70. While the Applicants have not gone so far as to argue that they had legitimate expectation to the promotional boards being convened in their affidavits in support of the judicial review each



has stated that the COP's inactivity has denied them the opportunity to progress in their profession as police officers.

71. Counsel for the Respondent has urged the court to consider that the 1st Applicant had had the opportunity to be interviewed before a promotional board however she was unsuccessful in her endeavour to move to the rank of Inspector. For that reason, Counsel urged that the court must be careful to examine her position that implied that it was only because of the non-convening of the promotion board since 2015 that she had remained in her current rank for the last 15 years through no fault of my own." Counsel urged a similar examination of the entreaty by the 2nd Applicant. The court notes that the COP had stated in his affidavit at paragraph 20 the 2nd applicant had never applied for an Acting Up position during the relevant period, so it was not that they had been denied the opportunity to perform at that higher level in the service.
72. I have considered the Applicants submissions and the cases cited on this issue including *In the matter of an application for Permanent Residence by Hutchinson-Green 2015 (2) CILR 73* in which Smellie CJ noted: *There can, moreover, be no doubt, as set out in s. 19(1) of the Cayman Islands Constitution Order 2009, that the right to lawful administrative action is a fundamental right which demands, at the very least, a high level of protective oversight by the court.*"
73. In this case, there is nothing that has been presented to this court to conclude that the COP has acted out with the bounds of lawful administrative action. This ground of review also fails.

Costs

74. I note that the Respondents have sought costs if the Applicants were not successful on this application, on the basis that the COP had given an indication upon being questioned about the timing for convening a Promotion Board, that he was giving "*earnest consideration to holding promotion interviews in the first half of 2021.*" However, it is the case that no such promotion board was constituted before the institution of these proceedings.
75. There is no order as to costs.

Hon Mrs. Justice Marlene Carter
Acting Judge of the Grand Court