TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00736-CV

Bradley Perrin, Appellant

v.

City of Temple and the Temple Police Department; Chief Floyd Mitchell, in his Official Capacity as Chief of Police; the Temple Fire Fighters' and Police Officers' Civil Service Commission Director, in her Official Capacity as Director; and James C. Powell, Appellees

FROM THE 169TH DISTRICT COURT OF BELL COUNTY
NO. 298,182-C, THE HONORABLE GORDON G. ADAMS, JUDGE PRESIDING

MEMORANDUM OPINION

Bradley Perrin appeals from the district court's final judgment denying his plea to the jurisdiction and motion for summary judgment; granting the motion for summary judgment filed by the City of Temple (the City), the Temple Police Department (the Department), Chief Floyd Mitchell, in his official capacity as chief of police (the Chief), and the Temple Fire Fighters' and Police Officers' Civil Service Commission Director, in her official capacity as director (the Director) (collectively, the City Defendants); and granting intervenor James Powell's motion for summary judgment. As to the City Defendants' counterclaim and Powell's cross claims, we conclude that the district court lacked jurisdiction, reverse the district court's denial of Perrin's plea, and dismiss those claims. As to Perrin's claims, we conclude that he—but not Powell or the City Defendants—met his summary judgment burden. We therefore

reverse and render judgment granting Perrin's motion and denying Powell's and the City Defendants' motions.

BACKGROUND

The underlying suit concerns Powell's reinstatement to the rank of corporal in the Department ahead of Perrin. The Fire Fighters' and Police Officers' Civil Service Act (the Act), *see generally* Tex. Loc. Gov't Code §§ 143.001–.403, if adopted by the municipality, *see id.* § 143.004(a) (providing that certain municipalities may hold election to adopt Act), governs promotions and reinstatements, *see Lee v. City of Houston*, 807 S.W.2d 290, 295 (Tex. 1991) (noting "all appointments" to positions "in the civil service hierarchy" "must be made in accordance with the Act"). A municipality's adoption of the Act establishes a fire fighters' and police officers' civil service commission, which may adopt an alternate promotional system. Tex. Loc. Gov't Code §§ 143.006(a) (establishing commission "[o]n adoption of this chapter"), .035(b) (providing that commission "may adopt an alternate promotional system"), (k) ("A person promoted under an alternate system has the same rights and the same status as a person promoted under this chapter[.]"). Here, it is undisputed that the City adopted the Act and established a fire fighters' and police officers' civil service commission (the Commission) and that the Commission adopted its own alternate promotional system (the APS).

The Act's enacted purpose is "to secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants." *Id.* § 143.001. Pursuant to the Act, a police officer must pass a written examination to be placed on a promotional eligibility list and to be eligible for promotion to a new classification—e.g., corporal, sergeant, or lieutenant. *See id.* §§ 143.031–

.033 (providing eligibility requirements and procedures for promotional examination); *see also id.* § 143.021(c) (explaining that certain positions "may be filled only from an eligibility list that results from an examination held in accordance with this chapter"). The "grade that must be placed on the eligibility list" consists of an examination score out of 100 points, plus "one point for each year of seniority as a classified police officer in that department, with a maximum of 10 points." *Id.* § 143.033(b)–(c). An alternate promotional system may provide a different procedure for promotional examination grading. *Id.* § 143.033(c). Here, the APS provides that "officers who pass the written exam will be eligible to participate in the assessment center" and that the candidate's performance at the assessment center will be scored, also on a 100-point scale. The promotional eligibility list is based on these two scores, and the APS provides the following procedures to arrive at a final score:

> 1. Forty (40) percent of the raw written exam score will be added to sixty (60) percent of the assessment center score.
> 2. One point for each year of seniority as a classified officer in the department, up to a maximum of ten (10) points, will be added to the established sum of the written exam and assessment center score.
> 3. Each participant will be ranked on the eligibility list on the basis of their final score[.]

The APS also provides procedures to break tied final scores. *See id.* ("If a tie score occurs, the commission shall determine a method to break the tie."). Finally, the APS provides that the promotional eligibility list is in effect "for one (1) year from the date the final eligibility list is certified by the Director." *See id.* §§ 143.035(k) ("An existing eligibility list, whether created under the system prescribed by this chapter or created under an alternate system adopted under this section, may not be terminated before or extended beyond its expiration date."), .036(h)

("Each promotional eligibility list remains in existence for one year after the date on which the written examination is given, unless exhausted. At the expiration of the one-year period, the eligibility list expires and a new examination may be held.").

In September 2016, Perrin and Powell were serving as police officers for the Department and took the written examination for promotional eligibility to the rank of corporal. Five officers passed, including Perrin and Powell. The results were publicly posted on a certified list, which included the following rows:

	Name	Raw Score	Seniority Points	Total Score
3	Powell, James	63	10	73
5	Perrin, Bradley	66	5	71

Perrin and Powell proceeded to the assessment center in October 2016, where Perrin scored 86.41 and Powell scored 84.13. When the Director publicly posted the certified corporal promotional eligibility list in October 2016, Perrin was ranked third and Powell was ranked fourth pursuant to the following posted calculations:

Name	Written Test Score	40%	Assessment Score	60%	Total Score
3. Perrin, Bradley	71	28.40	86.41	51.85	80.25
4. Powell, James	73	29.20	84.13	50.48	79.68

The City Defendants and Powell now contend that the Director erred by adding the seniority points to the written test score, not to "the established sum of the written exam and assessment center score" as required by the APS.[1] The City Defendants argue that if the Director had

[1] As explained in an affidavit by the Deputy City Attorney, seniority points are initially added to the raw score of the written exam in determining who passed the written exam to

properly applied the APS, the calculations would be as follows, with Powell ranked as third and Perrin as fifth:

Name	Written Test Score	40%	Assessment Score	60%	Seniority Points	Total Score
3. Powell, James	63	25.20	84.13	50.48	10	85.68
5. Perrin, Bradley	66	26.40	86.41	51.85	5	83.25

It is undisputed that no one questioned the Director's calculations before the promotional eligibility list expired and the underlying suit was filed. Thus, the certified corporal promotional eligibility list, which was publicly posted in October 2016, ranked Perrin above Powell.

In January 2018, the Chief sent a memorandum to all Department members, which had the subject line of "Corporal Promotional List of September 15, 2016." The memorandum was written in response to a grievance "regarding the abolishment of four corporal positions by Ordinance No. 2016-4814 on 12/15[/16]" and cited *City of Fort Worth v. Nyborg*, 999 S.W.2d 451 (Tex. App.—Fort Worth 1999, pet. denied). In his memorandum, the Chief explained that the City adopted a December 2016 ordinance that created two new lieutenant and two new sergeant classifications and "concurrent with the date of future promotions, would eliminate four (4) corporal classifications" and that the ensuing promotions in February 2017 to fill the new lieutenant and sergeant positions "result[ed] in four (4) vacancies in the rank of corporal." The Chief also explained that the "findings in [*Nyborg*] indicate that when a certified promotion[al eligibility] list exists, and positions in that rank are abolished, those members on the list should have been promoted into the number of vacancies that occurred at the time of the

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proceed to the assessment center, but "[t]he seniority points added at the Written Exam level are backed out of the Written Exam Score before the 40% is applied."

abolished rank." The Chief then stated that "this affects" the October 20, 2016 promotional eligibility list "as follows":

- The effect of [*Nyborg*] should have resulted in the promotion of Officers Mueller, Perrin, Powell and Hickman to corporal, and then the immediate demotion back to the rank of police officer, and placement on a Re-Instatement List for the period of one year, per Local Government Code Chapter 143.085(a) in the order of seniority [i]n the Department.

- The Re-Instatement List would be effective for one year from the date of 2/10/17 to 2/10/18, with the following order of promotion now based on Department seniority, and as vacancies in that classifications occur: . . . 2. Powell 3/31/06 . . . 4. Perrin 7/8/11

The Chief explained that "[t]he original Certified Corporal List dated October 20th, 2016, expire[d]" before a second corporal vacancy[2] became available on October 26, 2017, and that:

- Per Chapter 143.036(e), the department head is required to fill a vacant position from an existing eligibility list (Re-Instatement List in this case) within 60 days after the vacancy occurs; in this case that would have been no later than 12/25/17.

- Based on [*Nyborg*], Officer Powell is entitled to be promoted to this vacant position from the Re-Instatement List, and receive back pay from the date of 12/25/17.

Perrin testified in an affidavit that he learned from this January 2018 memorandum that "even though [he] was ranked higher than Officer James Powell . . . on the final promotion[al] eligibility list, [he] was ranked last on the reinstatement list because Chief Mitchell created the reinstatement list based on department seniority."

In February, Perrin sued the City Defendants. Under the Uniform Declaratory Judgments Act (UDJA), *see* Tex. Civ. Prac. & Rem. Code §§ 37.001–.011, Perrin sought both declaratory relief that he is entitled under section 143.085 of the Texas Local Government Code

[2] The person listed first on the "Re-Instatement List" filled the first vacancy in June.

"to be placed on a reinstatement list in order of seniority in their position and not in order of seniority in the Department" and injunctive relief. He later amended his petition to also seek mandamus relief requiring the City Defendants to comply with section 143.085 and to "create a reinstatement list based on seniority in the position of corporal and not seniority in the department." Perrin and the City Defendants then entered into a Rule 11 agreement that the corporal vacancy would remain open pending adjudication of Perrin's request for declaratory judgment and any appeal. Powell intervened, seeking a declaration that he had been properly promoted to the corporal rank.

The City Defendants counterclaimed, seeking declaratory relief that Powell was entitled to the promotion regardless of the interpretation of the term "seniority" because:

- [the City Defendants] cannot be required to promote a person to a position based on an erroneous promotion[al] eligibility ranking, or prevented from promoting the person who should have been promoted but for the error;
- [the City Defendants] cannot be required to reverse a promotional decision made in good faith to accommodate an erroneously-generated promotion[al] eligibility list;
- [t]he last *status quo* of the subject Corporal position was Officer Powell occupying the position, and there is no equitable or legal basis to disturb that *status quo*[; and]
- [the] Commission exceeded its jurisdiction when it generated the promotion[al] eligibility list by a process that skipped a major and paramount step in the [APS], and [Perrin] is not entitled to rely on that list for his "seniority" argument.

Powell also amended his petition in intervention to include an ultra vires cross claim to compel the Director to correctly apply the APS formula to Powell's and Perrin's respective scores on the corporal promotional eligibility list. In response, Perrin filed a plea to the jurisdiction, alleging that the City Defendants cannot establish the district court's jurisdiction over the counterclaim

because the Act only provides a right to appeal to officers, not municipalities. Perrin, the City Defendants, and Powell each filed competing motions for summary judgment.

After a hearing, the district court issued an order denying Perrin's plea to the jurisdiction and motion for summary judgment and granting the City Defendants' and Powell's motions for summary judgment. The order includes declarations that Powell was properly promoted to the rank of corporal; that the Chief properly established and applied the reinstatement list; that "if the mandates of the [APS] were followed[,] Officer Powell would have ranked higher than [Perrin]" in the promotional process; that "the application of the full value of seniority points is an important and intended step of the [APS] and is expressly mandated to be conducted thereby"; and that the Director failed to apply the APS formula. The district court then ordered the Director to comply with her non-discretionary duty to correctly apply the APS formula. Perrin appeals from this final order.

DISCUSSION

Perrin raises two issues on appeal. First, he asserts that the City Defendants violated their statutory duty under section 143.085(a) of the Texas Local Government Code by ranking the reinstatement list in order of department seniority rather than seniority in the corporal position, and therefore he is entitled to retroactive promotion to corporal with backpay and benefits. Second, he contends that the district court lacked subject matter jurisdiction to consider the claim that the Director erred in adding seniority points to the promotional exam grade because Powell waited until after the challenged promotional eligibility list had expired by operation of law and failed to timely pursue an administrative challenge to the Director's alleged error. We consider Perrin's jurisdictional issue first.

Jurisdiction Over the Counterclaim and Cross Claims

Powell's cross claims and the City Defendants' counterclaim raise concerns about the accuracy of the original promotional eligibility list based on the Director's alleged failure to properly add the seniority points. It is undisputed that the certified promotional eligibility list expired before the underlying suit was filed and went unchallenged until this suit. Powell and the City Defendants effectively seek relief to amend the expired list to accurately reflect Powell as ranking higher on the list than Perrin. Perrin argues that the district court lacked subject matter jurisdiction over Powell's cross claims and the City Defendants' counterclaim, and we agree. Our standard of review is de novo and well established. *See, e.g.*, *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (describing standard of review of trial court's ruling on plea to jurisdiction).

Powell's UDJA and Ultra Vires Cross Claims

Perrin frames his jurisdictional challenge to Powell's UDJA and ultra vires cross claims by asserting that Powell failed to exhaust administrative remedies. Related to the exhaustion of administrative remedies doctrine is the redundant remedies doctrine. *See Chisholm Trail SUD Stakeholders Grp. v. Chisholm Trail Special Util. Dist.*, No. 03-16-00214-CV, 2017 WL 2062258, at *8 (Tex. App.—Austin May 11, 2017, pet. denied) (mem. op.) (citing cases discussing both doctrines of exhaustion of administrative remedies and redundant remedies). "Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels." *Patel v. Texas Dep't of Licensing and Reg.*, 469 S.W.3d 69, 79 (Tex. 2015). "The focus of the doctrine is on the initiation of the case, that is, whether the Legislature created a statutory waiver

of sovereign immunity that permits the parties to raise their claims through some avenue other than the UDJA." *Id.* Here, the legislature has waived immunity for dissatisfaction with the grading in section 143.034(a), which permits an "eligible promotional candidate" who is "dissatisfied" with "the examination grading" to "appeal, within five business days, to the commission for review." Tex. Loc. Gov't Code § 143.034(a); *see id.* § 143.033(a)–(c) (describing grading procedure, including that "[e]ach police officer is entitled to receive one point for each year of seniority"). To the extent that Powell is relying on the UDJA to challenge "the examination grading" for the purpose of determining the order of the promotional eligibility list, we conclude that the UDJA does not grant the district court jurisdiction over such a claim, which seeks a redundant remedy that is available through section 143.034(a).[3] *See City of New Braunfels v. Carowest Land, Ltd.*, 549 S.W.3d 163, 173 (Tex. App.—Austin 2017, pet. pending) (noting that "under the redundant remedies doctrine, courts do not have jurisdiction over a claim brought under the UDJA against a governmental entity 'when the same claim could be pursued through different channels'" (quoting *Patel*, 469 S.W.3d at 79)).

Powell, however, also brought an ultra vires claim—"if necessary, in the alternative"—"seek[ing] to compel the [Director] to comply with her non-discretionary duty to correctly apply the formula required by the [APS] to the scores of [Powell] and [Perrin] on the

[3] Powell alleges in his briefing and averred in a summary judgment affidavit that he "had no reason to appeal the grading of the written exam" within five business days because he "did not learn that the [Director] failed to comply with her non-discretionary duty to correctly apply the formula required by the [APS] to the scores for him and Perrin on the Corporal Promotion[al Eligibility] List at issue until after he was promoted and this lawsuit was filed." But the record establishes that the September 2016 publicly posted list included both the initial written examination grade and the grade after adding the seniority points; that the October 2016 publicly posted list used the written examination grade that included the seniority points, not the raw score; and that the October 2016 list did not add the seniority points after summing the written examination grade and the assessment center grade. Thus, Powell's complaint that the Director improperly applied the APS formula was manifest from the two publicly posted lists in 2016.

Corporal Promotion List at issue herein." Under a "common-law 'ultra vires' cause of action," "a claimant can effectively sue the State by suing, in his or her official capacity, a state official who is the decisionmaker of the relevant agency (thereby binding the State through its agent) for prospective relief to compel compliance with statutory or constitutional provisions." *Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 748 (Tex. App.—Austin 2014, pet. dism'd). Some Texas courts have concluded that generally "[e]xhaustion of administrative remedies is not required for ultra vires claims." *See, e.g.*, *Lazarides v. Farris*, 367 S.W.3d 788, 798 (Tex. App.—Houston [14th Dist.] 2012, no pet.). And without invoking the redundant remedies doctrine as to the ultra vires claim at issue, we have expressly considered an ultra vires claim in a similar context of whether an eligible candidate was improperly "not credited with the ten seniority points that he would have been entitled to under Act section 143.033, subsection (b)." *City of New Braunfels v. Tovar*, 463 S.W.3d 913, 919 (Tex. App.—Austin 2015, no pet.). In *Tovar*, we noted, "Tovar's alternative theory for invoking the district court's jurisdiction despite appellants' governmental immunity relies on the 'ultra vires exception' to such immunity, whereby a claimant can seek prospective relief to compel a governmental body to comply with its statutory authority or perform a non-discretionary duty." *Id.* We also noted, however, that "we have sometimes declined to address the applicability of the ultra vires exception where, as here, a valid statutory waiver of immunity has been invoked." *Id.*

Nevertheless, we considered the "ultra vires exception" to governmental immunity in *Tovar* "in an abundance of caution," *id.*, and we likewise consider here whether Powell's ultra vires claim constitutes an exception to governmental immunity.[4] Generally,

[4] Although the Texas Supreme Court has indicated that we are not required to raise sua sponte questions of governmental immunity, it has not prohibited raising such an issue that

governmental immunity would bar a suit against the City, its agencies, or its agents—including the Director. *See id.* at 917–18 (citing *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 512–13 (Tex. App.—Austin 2014, no pet.)). But "while governmental immunity provides broad protection to the state and its officers, it does not bar a suit against a government officer for acting outside his authority—*i.e.*, an *ultra vires* suit." *Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016). To be valid, the remedy sought by an ultra vires claim "must be prospective in nature—i.e., compelling legal compliance going forward, as opposed to awarding retrospective relief to remedy past violations." *City of Austin v. Utility Assocs.*, 517 S.W.3d 300, 309 (Tex. App.—Austin 2017, pet. denied) (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373–74 (Tex. 2009)).

Powell relies on our *Tovar* opinion to assert that the district court had jurisdiction over his ultra vires claim. But in *Tovar*, initially "no list was created" because "[n]one of the candidates taking the exam [was] credited with a passing grade." 463 S.W.3d at 915. Tovar then sought the creation of a new list; i.e., to "compel appellants to add the ten seniority points to which he claims entitlement, credit him with a grade of 74 on the exam, and place his name on the promotion-eligibility list." *Id.* at 917. Thus, Tovar sought only prospective relief. Here, in contrast, the corporal promotional eligibility list already had been created and had expired as a

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implicates subject matter jurisdiction—especially where, as here, the relief sought may be improper. *See Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 751 (Tex. 2017) (noting "while a court is obliged to examine its subject-matter jurisdiction on its own in every case, we have never suggested that a court should raise immunity on its own whenever the government is sued" (quoting *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 102 (Tex. 2012) (Hecht, J., concurring))). Moreover, our precedent has interpreted *Rusk* as implying that sovereign immunity may be raised by an appellate court sua sponte. *See Texas Dep't of Ins. v. Texas Ass'n of Health Plans*, 598 S.W.3d 417, 424 n.2 (Tex. App.—Austin 2020, no pet.) (citing *Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 745 (Tex. App.—Austin 2014, pet. dism'd)).

matter of law. In seeking to compel the Director "to correctly apply the formula required by the [APS] to the scores of [Powell] and [Perrin] on the Corporal Promotion List at issue herein," Powell seeks retrospective relief to amend an already expired promotional eligibility list—a type of relief not available per his ultra vires claim. *See Heinrich*, 284 S.W.3d at 374 (noting that because ultra vires "suit is, for all practical purposes, against the state, its remedies must be limited" and holding that retrospective relief is generally barred); *Texas Educ. Agency v. American YouthWorks, Inc.*, 496 S.W.3d 244, 265–66 (Tex. App.—Austin 2016) (concluding that ultra vires claims challenging revocation of school charter were "barred by sovereign immunity because they seek or would require forms of relief that are retrospective in nature and, thus, impermissible" and noting that "actual relief they seek—ultimately that their charters not be revoked under this particular revocation decision, but also that they be allowed to challenge past accountability ratings on which that decision was based—necessarily requires somehow undoing or changing prior acts or events"), *aff'd sub nom. Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54 (Tex. 2018); *Southwest Pharmacy Sols., Inc. v. Texas Health & Human Servs. Comm'n*, No. 03-11-00802-CV, 2013 WL 3336868, at *7 (Tex. App.—Austin June 27, 2013, no pet.) (mem. op.) (concluding that claims exceeded proper scope of ultra vires exception because "these claims are in the nature of retroactive relief, seeking to 'undo' prior acts"); *cf. City of Waco v. Akard*, 252 S.W.2d 496, 499 (Tex. App.—Waco 1952, writ ref'd n.r.e.) ("Perforce of the statute, the Civil Service Commission was without any authority to make any correction of said eligibility list if it had been illegally created, because its life had been extinguished by operation of the statute. . . . Since the eligibility list expired by operation of law and the Civil Service Commission was without authority to make any changes therein, the district court likewise was without authority or jurisdiction to hear any complaint about an eligibility list that had expired by

operation of law.”). Because he seeks impermissible retrospective relief, Powell has not asserted an ultra vires claim that falls within the exception to governmental immunity and repleading would not cure this jurisdictional defect. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (holding that pleader should only be given opportunity to replead “if it is possible to cure the pleading defect”). Accordingly, the district court erred in granting summary judgment on Powell’s cross claims.

The City Defendants’ UDJA Counterclaim

We now turn to whether the district court had jurisdiction over the City Defendants’ UDJA counterclaim. The City Defendants asserted that they are entitled to declaratory relief because “[u]nder the [APS], Officer Powell should have been ranked higher on the promotion[al] eligibility list than Officer Perrin,” and “even accepting Officer Perrin’s argument that where an officer is ranked on the promotion[al] eligibility list controls ‘seniority,’ the corporal position still should have gone to Officer Powell, which in fact occurred.” The City Defendants explained in their response to Perrin’s plea that the “declaratory relief is in the nature of an alternate means of attempting to ensure that an equitable outcome results, that outcome being Officer Powell retaining the corporal promotion that he received,” and that “[t]he declaratory relief requested addresses the fact that, even if [Perrin]’s novel ‘seniority’ theory could be adopted, the right person received the promotion, and that the City [Defendants] cannot be forced to make inequitable changes.”

The UDJA is a remedial statute designed “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, or other legal relations.” Tex. Civ. Prac. & Rem. Code § 37.002(b). “[T]o invoke the subject-matter jurisdiction of the court, a

declaratory judgment action 'requires a justiciable controversy as to the rights and status of the parties actually before the court for adjudication, and the declaration sought must actually resolve the controversy.'" *Trinity Settlement Servs. v. Texas State Secs. Bd.*, 417 S.W.3d 494, 504 (Tex. App.—Austin 2013, pet. denied) (quoting *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004)). "A justiciable controversy is one in which a real and substantial controversy exists involving a genuine conflict of tangible interest and not merely a theoretical dispute," *id.*, and therefore jurisdiction under the UDJA "primarily depends on the nature of the controversy; whether the controversy is merely hypothetical or rises to the justiciable level," *id.* (quoting *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 154 (Tex. App.—Austin 1998, no pet.)).

We conclude that the City Defendants' counterclaim requesting declaratory relief did not rise to a justiciable level and therefore that the district court lacked subject matter jurisdiction over the counterclaim. It is the promotional eligibility list that provided the rights and status of the parties as to their initial promotion to corporal. *See* Tex. Loc. Gov't Code § 143.021(c) (explaining that certain positions, including corporal, "may be filled only from an eligibility list that results from an examination held in accordance with this chapter"). Whether Perrin was erroneously placed ahead of Powell on the promotional eligibility list does not affect the rights and status of the parties under that list because, on this record, there is no mechanism by which the expired list may be retroactively amended.

Acknowledging that section 143.034 of the Act provides a right to appeal from the promotional eligibility list only to "eligible promotional candidate[s]"—which undisputedly did not occur—the City Defendants nevertheless argue that because section 143.034 "only applies to officers adversely affected by grading or scoring, not to the City," the Act did not

prevent the City Defendants from "seeking declaratory relief from the district court." But in *City of Houston v. Clark*, the Texas Supreme Court explained why section 143.034 provided only the candidate officer, and not the municipality, with a right to appeal. 197 S.W.3d 314, 318–19 (Tex. 2006). The Texas Supreme Court first noted that some portions of the Act "explicitly afford appellate rights only to fire fighters and police officers," including section 143.034(a)'s allocation to a promotional candidate of the right to appeal for dissatisfaction with the examination grading. *Id.* at 318. The Court then explained that throughout the Act "officers are uniformly granted the right to appeal . . . when the decisionmaker is the Commission or a Commission appointee," "the decisionmakers [in those instances] are closely aligned with the municipalities," the "allocation of appellate rights only to aggrieved officers in such situations acknowledges this implicit alignment," and "affording police officers . . . a unilateral right of review makes sense when appeal is from the decisions of Commission appointees or the Commission itself." *Id.* at 319–20. Thus, by providing a unilateral right of review only to officers, the Act is not thereby permitting a declaratory judgment action through which the City Defendants may challenge the decision of the Director—the City's "closely aligned" decisionmaker—in ranking Perrin above Powell, particularly when that list has expired. *See id.*; *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (emphasizing with respect to justiciability requirements that UDJA is "merely a procedural device for deciding cases already within a court's jurisdiction"); *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 298 (Tex. App.—Austin 2018, pet. denied) (noting that "declaratory relief under the UDJA is more precisely a type of remedy that may be obtained with respect to a cause of action or other substantive right" and that "the UDJA does not expand the trial court's jurisdiction to grant the

declaratory remedy it provides"); *see also* Tex. Loc. Gov't Code § 143.012(a) (noting that commission appoints director).

The City Defendants point to *Smith v. City of Garland* to assert that declaratory relief is available to a municipality. 523 S.W.3d 234, 240–41 (Tex. App.—Dallas 2017, no pet.). But in *Smith*, the city sought declarations that it was *not* required to adjust the rank and seniority of those promoted from an already expired promotional eligibility list that was affected by a cheating scheme on the exam. *Id*. at 237 (noting that "eligibility lists based on the examinations in question had expired" and that city sought declaratory relief, including that "it is not required to adjust the rank or seniority of any fire fighters who were affected by the cheating scheme" and that "fire fighters taking future promotional examinations . . . are not entitled to further relief from the City"). The city in *Smith* was not challenging the decision of its "closely aligned" decisionmaker but seeking to affirm that decision. *Id.* Additionally, *Smith* does not discuss or cite *Clark*. *See generally id.* at 240–41. Accordingly, *Smith* does not provide authority that the City Defendants' UDJA counterclaim was justiciable. *Cf. Akard*, 252 S.W.2d at 499 ("Since the eligibility list expired by operation of law and the Civil Service Commission was without authority to make any changes therein, the district court likewise was without authority or jurisdiction to hear any complaint about an eligibility list that had expired by operation of law.").

For these reasons, we conclude that the UDJA does not provide the district court with jurisdiction over the City Defendants' counterclaim and that repleading could not cure the jurisdictional defect. *See Koseoglu*, 233 S.W.3d at 840. Accordingly, the district court erred in denying Perrin's plea to the jurisdiction and in granting summary judgment on the City Defendants' counterclaim.

Cross Motions for Summary Judgment

Having concluded that the district court lacks jurisdiction over the City Defendants' counterclaim and Powell's cross claims, we turn now to Perrin's first issue of whether he should have been ranked higher on the reinstatement list than Powell based on Perrin's "seniority" in the position and therefore should have been reinstated to corporal instead of Powell. This issue was addressed in Perrin's, the City Defendants', and Powell's cross motions for final summary judgment. "When we review cross-motions for summary judgment, we consider both motions and render the judgment that the trial court should have rendered." *Perryman v. Spartan Tex. Six Cap. Partners*, 546 S.W.3d 110, 116 (Tex. 2018) (quoting *Coastal Liquids Transp., L.P. v. Harris Cnty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001)). "Each party bears the burden of establishing that it is entitled to judgment as a matter of law." *Id.*

The cross motions for summary judgment primarily turn on the meaning of the word "seniority" in section 143.085(a) of the Texas Local Government Code, which reads in full as follows:

> If a municipality's governing body adopts an ordinance that vacates or abolishes a fire or police department position, the fire fighter or police officer who holds that position shall be demoted to the position immediately below the vacated or abolished position. If one or more positions of equal rank are vacated or abolished, the fire fighters or police officers who have *the least seniority in a position shall be demoted* to the position immediately below the vacated or abolished position. If a fire fighter or police officer is demoted under this subsection without charges being filed against the person for violation of civil service rules, the fire fighter or police officer *shall be placed on a position reinstatement list in order of seniority*. If the vacated or abolished position is filled or re-created within one year after the date it was vacated or abolished, the position must be filled from the reinstatement list. Appointments from the reinstatement list *shall be made in order of seniority*. A person who is not on the list may not be appointed to the position during the one-year period until the reinstatement list is exhausted.

Tex. Loc. Gov't Code § 143.085(a) (emphases added). Notwithstanding that the demotion should occur based on "the least seniority in a position," the City Defendants and Powell argue that the Chief correctly ordered the reinstatement list by seniority in department rather than in the corporal position because the second and third references to "seniority" in section 143.085(a) do not include the modifying prepositional phrase of "in a position." We disagree.

We review issues of statutory interpretation de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). It is a cardinal rule of statutory interpretation that we read statutory terms in context, not in isolation. *See, e.g.*, *In re Office of the Att'y Gen. of Tex.*, 456 S.W.3d 153, 155–56 (Tex. 2015) (orig. proceeding) (per curiam) ("When construing statutes . . . one cannot divorce text from context. . . . The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive."); *see also* Tex. Gov't Code § 311.011(a) ("Words and phrases shall be read in context."). Here, the context of the statute makes clear that the reinstatement list is created by the demotion of officers who have "least seniority in a position" and that the list "shall" be "in order of seniority." Tex. Loc. Gov't Code § 143.085(a). To read the latter uses of "seniority" in section 143.085(a) as referring to seniority in the department would be to read the term in isolation and to ignore the context of the statutory provision that focuses on seniority in a position with no reference to seniority in a department. *Compare id.*, *with, e.g.*, *id.* §§ 143.013(c) (referencing "rights of seniority in the department"), .014(g) (same), .033(b) (referencing "seniority as a classified police officer in that department").[5]

[5] As another example, the statute here initially refers to a "position reinstatement list" and then references only a "reinstatement list." Tex. Loc. Gov't Code § 143.085(a). In context, the latter reference to "reinstatement list" in the statute does not refer to a separate and distinct

On appeal, the City Defendants raise a new argument that even if "seniority" in section 143.085(a) refers to seniority in a position, they are entitled to summary judgment because "Perrin was not entitled to be promoted to the rank of corporal because no vacancy occurred in that position." The City Defendants base this argument on the applicable ordinance's language of "concurrent," in contrast to the *Nyborg* ordinance's language of "upon." *See* 999 S.W.2d at 456 (relying on "the plain language of the ordinance" that "upon the promotion of a Lieutenant into the newly created captain's position, said Lieutenant's position shall be considered to be contemporaneously abolished"; noting that "[t]he lieutenant's position therefore was not abolished until Kneblick was promoted to captain, at which point Nyborg was entitled to be promoted to Lieutenant"; and holding that "the lieutenant's position was not abolished *before* Nyborg was entitled to be promoted as the City and the Commission contend"). They argue that *Nyborg*'s use of the word "upon" means "thereafter" while here "concurrent" means "operating or occurring at the same time." Therefore, the City Defendants argue, "the four corporal positions were eliminated at the same time four corporals were promoted to the rank of sergeant," there were no vacancies in the corporal position, and Perrin could not complain of the reinstatement list because he was never entitled to be promoted to the rank of corporal.

We need not decide, however, if the language of the City's ordinance—in contrast to the language of the *Nyborg* ordinance—created any vacancies in the corporal position to be filled from the promotional eligibility list. First, Powell's and Perrin's promotion to the corporal position was not in dispute in the summary judgment proceeding, and the City Defendants may

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department reinstatement list because the phrase no longer includes the modifier "position." The same principle applies to the statute's use of the word "seniority."

not raise this issue for the first time on appeal. *Cf. Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 593 S.W.3d 324, 333 (Tex. 2020) ("Lack of mutuality presents a new defense to enforcement that simply has not been raised until now. We have no basis to consider it if it does not implicate this Court's jurisdiction to decide the case."); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006) ("Except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties."). Second, in their motion for summary judgment, the City Defendants judicially admitted to the contrary fact, i.e., that Perrin and Powell were promoted to corporal to fill the vacancies and then demoted after the abolishment of the positions:

> Unlike the City of Fort Worth, the Defendants did <u>in fact promote</u> four (4) officers from the corporal promotional list even though the City was abolishing the four corporal positions. It then demoted the four (4) officers to their prior positions and placed them on a corporal reinstatement list in order of seniority. Therefore the whole focus of *Nyborg* is not even applicable to this case.[6]

See Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 568 (Tex. 2001) (noting that "'[a]ssertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions'" and that "[a] judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact" (quoting *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983))). For these reasons, we cannot affirm the district court's summary judgment on the ground that the City ordinance did

[6] Powell never disputed that he and Perrin were promoted to and then demoted from the corporal position, and in his appellee's brief, he states that the "Chief promoted four persons on the promotion eligibility list to the corporal position, but then immediately demoted them back to police officer status because the positions were abolished and were not available" and that these "officers included Perrin and Powell."

not create any corporal vacancies entitling Perrin to be listed on the reinstatement list in order of seniority in the corporal position.

Turning to Perrin's motion for summary judgment, we conclude that he met his burden to establish as a matter of law his entitlement to be promoted before Powell. *See* Tex. R. Civ. P. 166a(c). To meet his burden, Perrin had to establish as a matter of law the following three propositions: (1) four vacancies were created in the corporal position through the promotion of four corporals to the new sergeant and lieutenant positions created by the City ordinance; (2) Perrin and Powell were simultaneously promoted to two of those corporal vacancies from the eligibility list and then immediately demoted with the abolishment of those four corporal positions by the City ordinance; and (3) Perrin and Powell should have been placed on the reinstatement list by seniority in the corporal position based on their ranking on the promotional eligibility list before their promotions. As noted above, the first two propositions were undisputed in the summary judgment proceedings and judicially admitted to by the City Defendants in their response. We also already have determined that "seniority" in section 143.085(a) refers to seniority in the corporal position, not seniority in the Department. Thus, the only remaining issue is: When multiple individuals are promoted to open vacancies from a promotional eligibility list at the same time and then demoted at the same time, should the statutory term "seniority"—construed as seniority in a position—be interpreted for purposes of the reinstatement list as being determined by the order of the promotional eligibility list? Applying proper principles of statutory construction, we conclude that it should.

"In construing a statute, our objective is to determine and give effect to the Legislature's intent" as "derive[d] from an act as a whole rather than from isolated portions of it." *Youngkin*, 546 S.W.3d at 680. The plain and common meaning of the enacted language—

"which necessarily includes any enacted statements of policy or purpose"—provides the surest guide to what the legislature intended, unless a contrary intention is apparent from the context or the construction leads to absurd results. *Id.* Here, the enacted purpose of the Act "is to secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants," and the Act "shall" be administered "in accordance with this purpose." Tex. Loc. Gov't Code § 143.001(a)–(b). Consistent with this purpose of securing efficient departments composed of capable personnel, we have held that "[a] fundamental principle of civil service is that appointments must be made according to merit and fitness, ascertained by competitive examinations." *Klinger v. City of San Angelo*, 902 S.W.2d 669, 671 (Tex. App.—Austin 1995, writ denied).

To effectuate this purpose, the legislature requires that "an existing position or classification or a position or classification created in the future either by name or by increase in salary may be filled only from an eligibility list that results from an examination held in accordance with this chapter." Tex. Loc. Gov't Code § 143.021(c). Section 143.021(c) expressly excepts certain appointments from this requirement. *See id.* (prefacing provision with "[e]xcept as provided by Sections 143.013, 143.014, 143.0251, 143.102, and 143.1251"); *see also id.* §§ 143.013 ("Appointment and Removal of Department Head"), .014 ("Appointment and Removal of Person Classified Immediately Below Department Head"), .0251 ("Reappointment After Resignation"), .102 ("Appointment of Assistant Chief"), .1251 ("Reappointment After Resignation"). But it does not exempt from this requirement an appointment by reinstatement per section 143.085. *See id.* § 143.085(a) ("Appointments from the reinstatement list shall be made in order of seniority.").

With the Act's "enacted statement[] of policy or purpose" in mind, *Youngkin*, 546 S.W.3d at 680, and "striv[ing] to harmonize the meaning and application of related statutes whenever possible," *Tarrant County v. Bonner*, 574 S.W.3d 893, 899 (Tex. 2019), we turn to the specific statutory provision at issue. Section 143.085(a) states: "If a . . . police officer is demoted under this subsection . . . [, the] police officer shall be placed on a position reinstatement list in order of seniority," and "[a]ppointments from the reinstatement list shall be made in order of seniority." Tex. Loc. Gov't Code § 143.085(a). Although we already have construed the term "seniority" to mean seniority in a position given the context of the uses of this term in section 143.085(a), we have not yet clarified the meaning of "seniority" in a position. The term "seniority" is not defined in the Act, but generally the term refers to the duration of service. *See, e.g.*, *Seniority*, *Black's Law Dictionary* (11th ed. 2019) (defining "seniority" as "[t]he preferential status, privileges, or rights given to an employee based on the employee's length of service with an employer"); *see also Taylor v. Firemen's & Policemen's Civil Serv. Comm'n of City of Lubbock*, 616 S.W.2d 187, 189–90 (Tex. 1981) (holding that "seniority" for purposes of calculating "seniority points" based on "seniority in his department" pursuant to precursor to section 143.033(b) "means years of service whether interrupted or uninterrupted, and not merely the last continuous period of service"). However, the plain and common meaning of the term "seniority" can also incorporate other factors when the duration of service is the same. *See, e.g.*, *Seniority*, *American Heritage Dictionary* (5th ed. 2011) (defining "seniority" to mean "[p]recedence of position, especially precedence over others of the same rank by reason of a longer span of service," but not excluding other reasons to establish precedence of position). If we were to construe section 143.085(a)'s use of the term "seniority" to provide the Chief with

discretion[7] to place Powell over Perrin on the reinstatement list even though they both had the same duration of service in the position and Perrin was ranked higher on the initial corporal promotional eligibility list based on examination scores, then promoting Powell over Perrin would be contrary to section 143.021(c)'s requirement that "an existing position . . . may be filled only from an eligibility list that *results from an examination* held in accordance with this chapter." Tex. Loc. Gov't Code § 143.021(c) (emphasis added). In other words, harmonizing sections 143.021(c) and 143.085(a), we conclude that if two individuals have the same duration of service in a position and both were promoted and demoted at the same time, the one who was initially entitled to the promotion based on the promotional eligibility list has greater seniority for the purpose of section 143.085(a)'s reinstatement list, unless the department head initially had a valid reason for not appointing that person from the promotional eligibility list and absent proof of an exception.[8] *See id.* § 143.036(f) ("Unless the department head has a valid reason for not appointing the person, the department head shall appoint the eligible promotional candidate having the highest grade on the eligibility list."); *Klinger*, 902 S.W.2d at 673 ("Absent proof of an exception, the person at the top of the list existing when a vacancy occurs has the primary

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[7] Although section 143.085(a) does not address who has greater seniority between individuals with the same length of service, the section also does not indicate any legislative intent to convey discretionary authority to determine the order the officers are listed on a reinstatement list. *See* Tex. Loc. Gov't Code § 143.085(a) (requiring that "officer *shall* be placed on a position reinstatement list in order of seniority" and that "[a]ppointments from the reinstatement list *shall* be made in order of seniority" (emphases added)); *see also* Tex. Gov't Code § 311.016(2) ("'Shall' imposes a duty."); *City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 582 (Tex. 2018) ("'Use of the word "shall"' in a statute 'evidences the mandatory nature of the duty imposed.'" (quoting *Southwestern Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 588 (Tex. 2015))).

[8] The parties do not argue, and the record does not indicate, that the department head provided a valid reason for not initially appointing Perrin to the position of corporal from the promotional eligibility list or that there is any proof of an exception.

right to be promoted to fill the vacancy and is entitled to that promotion[.]"). This statutory interpretation of "seniority" as used in section 143.085(a) is consistent with the Act's enacted statement of purpose to "secure efficient . . . police departments composed of capable personnel," Tex. Loc. Gov't Code § 143.001(a); is consistent with the plain language of the text, *see Youngkin*, 546 S.W.3d at 680; and harmonizes the meaning and application of relevant statutes, including section 143.021(c), *see Bonner*, 574 S.W.3d at 899. We therefore conclude that Perrin was entitled to summary judgment and that the trial court erred in granting the City Defendants' and Powell's motions for summary judgment and in denying Perrin's motion for summary judgment.[9]

CONCLUSION

For these reasons, we reverse the district court's denial of Perrin's plea to the jurisdiction and dismiss Powell's cross claims and the City Defendants' counterclaim, and we reverse the final summary judgment and render judgment on Perrin's claims by granting Perrin's motion for summary judgment and denying Powell's and the City Defendants' motions for summary judgment.

[9] The City Defendants and Powell both argue that even under this definition of seniority, Powell was entitled to be promoted first because the promotional eligibility list was based on the erroneous calculation of the examination scores and seniority points. But as we have already noted, we do not have jurisdiction over the City Defendants' and Powell's claims that attempt to address the alleged errors in the promotional eligibility list.

Melissa Goodwin, Justice

Before Justices Goodwin, Kelly, and Smith

Reversed and Dismissed in Part; Reversed and Rendered in Part

Filed: November 6, 2020