

B-33



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Thomas Massimino,  
Police Captain (PM1544R), Irvington  
Township

CSC Docket No. 2015-747

Request for Reconsideration

ISSUED: APR 16 2015 (CSM)

Thomas Massimino, represented by David A. Krenkel, Esq., requests reconsideration of the attached decision rendered on July 30, 2014, which found that he was ineligible for the promotional examination for Police Captain (PM1544R), Irvington Township on the basis that he did not have one year of continuous permanent service in a title to which the examination was open.

By way of background, the subject examination was open to employees in the competitive division in the Irvington Police Department who had an aggregate of one year of continuous permanent service as of the closing date of August 31, 2013 and were serving in the title of Police Lieutenant. As a result of a settlement agreement dated August 8, 2013, the appellant received a retroactive appointment to Police Lieutenant effective December 22, 2011. *See In the Matter of Thomas Massimo, Irvington Township Police Department* (CSC, decided October 16, 2013). In the prior decision, the Civil Service Commission (Commission) determined that even though the appellant was awarded a retroactive appointment date as a result of a settlement, since he had actually not served in and performed the duties of a Police Lieutenant during the requisite one-year period prior to the August 31, 2013 closing date, he was not eligible for the subject examination.

On reconsideration, the appellant maintains that the settlement agreement was intended to make him whole, which included his eligibility to take the promotional examination for Police Captain. The appellant emphasizes that the Police Director provided clarification of the settlement agreement to the Commission in the initial proceeding which specifically indicated that he performed the duties and functions of a Police Lieutenant up to his actual promotion to that

title on May 15, 2013. Thus, he maintains that the parties intended that he would be eligible to sit for the subject promotional examination. Additionally, the appellant asserts that the Commission has previously deviated from its policy of requiring one year of time in grade in a title when it permitted a retroactively-appointed employee to be conditionally admitted to an expired examination despite failing to meet the one-year time in grade requirement. *See In the Matter of Christopher Szczygiel, Fire Captain (PM3524) and Deputy Fire Chief (PM3518G), City of Passaic* (MSB, decided January 31, 2007).

### CONCLUSION

*N.J.A.C. 4A:2-1.6(b)* sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the instant matter, the appellant has not met the standard for reconsideration. Essentially, the appellant maintains that *Szczygiel, supra*, stands for the proposition that an award of a retroactive appointment date as a result of a settlement agreement is a basis on which to waive the requirement that an individual must have actually served in and performed the duties of the title to which the examination is open. However, it cannot be ignored that the circumstances in *Szczygiel* were unique and substantially different from this case and the remedy was limited to that matter. Moreover, the former Merit System Board's determination is *Szczygiel* was subsequently overturned as relaxation of the time-in-grade requirements was not agreed to by the United States Department of Justice. *See In the Matter of Kenneth R. Martinez* (CSC, decided December 3, 2008) (Removing *Szczygiel*'s name from the Deputy Fire Chief eligible list and ordering his return to his permanent title of Fire Captain). Additionally, as stated in the prior decision, there is no such designation as an "acting" appointment under Civil Service law and rules. *N.J.S.A. 11A:4-13* and *N.J.A.C. 4A:4-1 et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. *See In the Matter of Russell Davis* (MSB, decided August 10, 2005); *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). Regardless, the appellant was the first ranked individual on the existing eligible list for Police Lieutenant (PM5024M)<sup>1</sup> and was reachable for appointment. Therefore, there would have been no need for the appellant to serve in an acting capacity as a Police Lieutenant since the appointing authority could have requested a certification at that time and permanently appointed him from the list.

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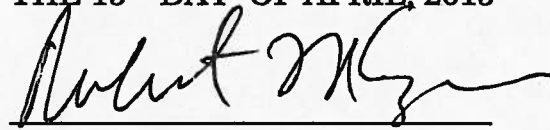
<sup>1</sup> It is noted that the PM5024M list promulgated on February 3, 2011 and expired on February 2, 2014. Thus, Massimino could have been permanently appointed during the time of his "acting" service.

**ORDER**

Therefore, it is ordered that this request for reconsideration be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 15<sup>TH</sup> DAY OF APRIL, 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
Division of Appeals  
and Regulatory Affairs  
Civil Service Commission  
Written Record Appeals Unit  
P.O. Box 312  
Trenton, New Jersey 08625-0312

Attachment

c: Thomas Massimino  
David A. Krenkel, Esq.  
Kelly Glenn  
Joseph Gambino



STATE OF NEW JERSEY

In the Matter of Thomas Massimino,  
Police Captain (PM1544R), Irvington  
Township

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

CSC Docket No. 2014-434

Examination Appeal

ISSUED: **AUG 01 2014** (JH)

Thomas Massimino appeals the determination of the Division of Selection Services, which found that he was ineligible for the promotional examination for Police Captain (PM1544R), Irvington Township.

The subject examination was open to employees in the competitive division in the Irvington Police Department who had an aggregate of one year of continuous permanent service as of the closing date of August 31, 2013 and were serving in the title of Police Lieutenant.

By way of background, as indicated in *In the Matter of Thomas Massimino, Police Lieutenant (PM5024M), Irvington Township* (CSC, decided April 3, 2013), a certification (Certification No. PL110162) was issued on February 10, 2011 from the Police Lieutenant (PM5024M) eligible list containing the names of the eligibles who appeared at ranks 1 through 11. In disposing of Certification No. PL110162, the appointing authority bypassed the appellant's name as the first ranked non-veteran eligible and appointed Monique Smith, the second ranked veteran eligible, effective May 20, 2011. The Commission noted that despite that appellant's very specific allegations of wrongdoing and improper motivation for his bypass, the appointing authority did not submit a response. As such, the Commission determined that a material dispute of fact existed which could not be resolved through a written record appeal and ordered that the matter be referred to the Office of Administrative Law for a hearing. During the pendency of the hearing, Irvington Township, represented by Evans C. Anyanwu, Esq., and the appellant entered into a settlement agreement dated August 8, 2013 which provided, in pertinent part,

that the appellant be appointed to the Police Lieutenant title effective December 22, 2011. See *In the Matter of Thomas Massimino, Irvington Township Police Department* (CSC, decided October 16, 2013).

On appeal, Mr. Massimino argues that since he received a retroactive date of appointment of December 22, 2011, pursuant to the above noted settlement agreement, he should be admitted to the subject exam.

In a letter dated February 10, 2014, Joseph J. Santiago, Police Director, indicates that Mr. Massimino "has in excess of one year of continuous permanent service for an aggregate of greater than one year immediately preceding the closing date for the referenced position during which time, he performed the duties and functions of a Police Lieutenant up to his actual promotion to Police Lieutenant on May 15, 2013." He presents that the settlement agreement was intended to make the appellant whole by "including the eligibility to take the promotional examination for Police Captain in 2013 to which he would have been eligible had he not been bypassed."

## CONCLUSION

*N.J.A.C.* 4A:4-2.6(a)1 provides that applicants for promotional examinations must have one year of continuous permanent service for an aggregate of one year preceding the closing date in a title or titles to which the examination is open.

With respect to the eligibility of Mr. Massimino for the promotional examination for Police Captain (PM1544R), Irvington Township, the appellant must have actually served in and performed the duties of the Police Lieutenant title during the requisite one-year period in order to be eligible. See *In the Matter of Daniel O. Errickson* (MSB, decided January 11, 2006) (The appellant, who received a retroactive appointment date to the Correction Sergeant title on the basis of administrative delay, was not eligible to sit for a Correction Lieutenant examination as there was no evidence that he performed the duties of a Correction Sergeant during the requisite year-in-grade); *In the Matter of Albert Giordano* (MSB, decided January 26, 2005) (Employee must actually serve in and perform the duties of the title to which the examination is open during the requisite year-in-grade in order to establish eligibility); *In the Matters of David J. Barrett, et al.* (MSB, decided November 19, 2003) (Individuals who received retroactive appointment dates to the Fire Lieutenant and Fire Captain titles solely on equitable considerations but who did not meet the time-in-grade service requirements as of the closing date of the announcement were not entitled to sit for the examinations for Fire Captain and Deputy Fire Chief). Thus, Mr. Massimino cannot use his retroactive date of appointment to the Police Lieutenant title for examination eligibility. Moreover, the opportunity to apply for and take a promotional examination was neither explicitly stated nor inferred in the settlement agreement.

As such, Mr. Massimino has not demonstrated that eligibility for the PM1544R test was an intended consequence of the agreement.

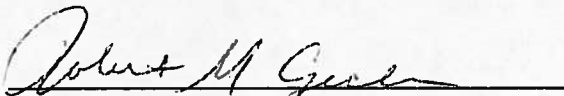
With respect to the claim that Mr. Massimino served as an Acting Police Lieutenant a year prior to his actual appointment date of May 15, 2013, there is no such designation as an "acting" appointment under Civil Service rules. *N.J.S.A. 11A:4-13* and *N.J.A.C. 4A:4-1 et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. *See In the Matter of Russell Davis* (MSB, decided August 10, 2005); *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). In this regard, for promotional examination purposes, experience is considered only if it is gained in a recognized type of appointment. Typically, experience acquired in an "acting" capacity is not recognizable. *See e.g., In the Matter of Walter Furtney* (MSB, decided April 18, 2000), *aff'd on reconsideration* (MSB, decided September 26, 2000). Furthermore, it is noted that an eligible list existed for the Police Lieutenant title (PM5024M) on which Mr. Massimino, as the first ranked individual, was reachable for appointment.<sup>1</sup> Thus, the Township could have requested a certification at the time it assigned Mr. Massimino "the duties and functions of a Police Lieutenant." Moreover, no documentation has been provided to support the claim that the appellant served as a Police Lieutenant in an acting capacity.

#### ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 30TH DAY OF JULY, 2014

  
Robert M. Czech  
Chairperson  
Civil Service Commission

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<sup>1</sup> It is noted that the PM5024M list promulgated on February 3, 2011 and was set to expire on February 2, 2014.

**Inquiries  
and  
Correspondence**

**Henry Maurer  
Director  
Division of Appeals and Regulatory Affairs  
Written Record Appeals Unit  
P.O. Box 312  
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**c: Thomas Massimino  
Dan Hill  
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