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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Robert Magella,
et al., Borough of Carteret

CSC Docket Nos. 2015-1343, 2015-
1344, 2015-1345, 2015-1346, and
2015-1347

Administrative Appeals

ISSUED: **DEC 19 2014** (DASV)

The Borough of Carteret, represented by Leslie G. London, Esq., on behalf of Robert Magella, Samuel Goddess, Richard Bonner, Peter Ziemba, and Mark Hruska requests a waiver of the promotional examination for Fire Captain. Additionally, the appointing authority requests that the petitioners receive retroactive permanent dates of appointment to Fire Captain effective July 9, 2012.

By way of background, in a letter dated April 23, 2013, the appointing authority advised the former Division of Classification and Personnel Management (CPM)¹ that it had restructured its Fire Department and added a first-level supervisory title of Fire Lieutenant. Prior to that time, it utilized the Fire Captain title as the first-level supervisory position. The appointing authority proposed that the chain of command would be from Fire Fighter to Fire Lieutenant, Fire Captain, Battalion Fire Chief, and Fire Chief. It also submitted an ordinance, which amended its then current salary ordinance to reflect the establishment of the Fire Lieutenant title and corresponding salary. This ordinance was approved on December 20, 2012 and effective January 1, 2013. Additionally, the appointing authority stated that it would utilize the Fire Captain (PM5056M), Borough of Carteret, eligible list² as appropriate for Fire Lieutenant and "would be leaving our current certified Fire Captains in place as our 2nd level supervisors." In that regard, Magella, Goddess, Bonner, Ziemba, and Hruska had been appointed as Fire Captains, effective September 30, 1998, January 7, 2011, May 4, 2001, May 2, 1999,

¹ CPM is now known as the Division of Agency Services.

² The (PM5056M) eligible list promulgated on April 14, 2011 and expired on April 13, 2014.

and October 21, 2010, respectively.³ Hruska later received a provisional appointment pending promotional examination procedures as a Battalion Fire Chief effective January 4, 2013. He is still serving in that position. Moreover, the following four individuals were subsequently appointed as Fire Lieutenants, effective July 19, 2013, from the Fire Captain (PM5056M), Borough of Carteret, eligible list: Brendan Rhodes, Daniel Biel, Nathaniel Reynolds, and James McFadden. It is noted that, due to the restructuring, CPM amended the petitioners' records to reflect a change in their title from Fire Captain to Fire Lieutenant effective December 20, 2012. Hruska's later appointment to Battalion Fire Chief remains unchanged. Thus, personnel records reflect that there are currently eight Fire Lieutenants and one Battalion Fire Chief in the Borough of Carteret. It is further noted that, on August 1, 2014, a (second-level) Fire Captain (PM1159S), Borough of Carteret, examination was announced open to Fire Lieutenants who possessed one year of continuous permanent service as of the September 30, 2014 closing date. The petitioners, Rhodes, Biel, Reynolds, and McFadden, who are all nonveterans, filed for and were admitted to the examination, which was scheduled for November 6, 2014. However, none of them appeared at the examination.

In the instant matter, the appointing authority submits that prior to the restructuring, a Fire Captain served as the primary supervisor of the Fire Fighters. On July 9, 2012, it states that the Fire Department began operating with an additional level of supervision, which resulted in the petitioners performing the duties of a second-level supervisor since that date. It is noted that the appointing authority does not identify who served as the first-level supervisors at that time. However, it later indicates that the four Fire Lieutenants, namely Rhodes, Biel, Reynolds, and McFadden, have been serving as Fire Lieutenants for approximately one year (as of its August 18, 2014 letter to CPM). Furthermore, the appointing authority states that it wrote to this agency on April 23, 2013, requesting to "formally implement this additional first level, [Fire] Lieutenant supervisory position." However, it did not receive a response until the issue surfaced as a result of the examination announcement for Fire Captain (PM1159S), Borough of Carteret. In a letter dated August 18, 2014, the appointing authority had requested that the examination be delayed pending resolution of the matter. It noted that a desk audit of the petitioners' positions would confirm that the positions were presently performing the duties of a second-level supervisory Fire Captain.

Moreover, the appointing authority presents that there is no immediate need to hire additional Fire Captains, as those positions are all filled, and the positions have long been filled by the petitioners who have many years of experience. Thus, it requests a waiver of competitive examination for the petitioners and that Hruska's service as a provisional Battalion Fire Chief be considered towards the

³ The petitioners' appointments as Fire Captains were through competitive testing, *i.e.*, by examination and appointment from eligible lists. As of the establishment of the Fire Lieutenant title on January 1, 2013, the petitioners were the first-level supervisors in the jurisdiction.

completion of his working test period as a Fire Captain. Furthermore, the appointing authority maintains that the factors set forth in *N.J.A.C. 4A:4-2.7(a)*, promotion upon waiver of competitive examination, have been met in that the petitioners have successfully been tested in the basic skills for Fire Captain; have not failed a promotional examination for the title within a one-year period; the number of interested eligibles for the examination does not exceed the number of promotional appointments by more than two; and veterans preference rights are not a factor. In addition, it submits letters from the Firefighters Mutual Benevolent Association (FMBA) Local 67, supporting petitioners' request to be "grandfathered in their current [Fire] Captain positions."

The Division of Agency Services supports the appointing authority's request and acknowledges that an administrative error occurred. It states that it inadvertently did not process the request to waive the petitioners into the second-level supervisory position of Fire Captain at the time of the Fire Department's restructuring. It further indicates that the criteria set forth in *N.J.A.C. 4A:4-2.7(a)* appear to have been met. Moreover, CPM contends that Hruska's provisional service as a Battalion Fire Chief should be counted towards his working test period for Fire Captain.

CONCLUSION

N.J.A.C. 4A:4-2.7(a) provides that:

Following the announcement of a promotional examination, the [Civil Service Commission] may authorize the promotion of a qualified permanent employee in the career service by regular appointment without competitive examination and without the establishment of an eligible list if:

1. The employee has been successfully tested in the basic skills required for the promotional title;
2. The employee has not failed, within one year prior to the announced closing date, a promotional examination for that title. However, an employee who subsequently passed an examination for that title shall be eligible for promotion;
3. The number of interested eligibles for the promotional examination referred to in (a) above does not exceed the number of promotional appointments by more than two; and
4. Veterans preference rights are not a factor.

Additionally, *N.J.A.C.* 4A:4-1.10(c) states that an individual may receive a retroactive date of appointment to correct an administrative error, for an administrative delay or for other good cause. *N.J.A.C.* 4A:1-1.2(c) provides that a rule may be relaxed for good cause in a particular circumstance in order to effectuate the purposes of Title 11A, New Jersey Statutes.

In the instant matter, the appointing authority requests a waiver of promotional examination for the second-level Fire Captain title in order for the petitioners to remain as Fire Captains, since they have been performing commensurate duties since July 9, 2012 and the factors set forth in *N.J.A.C.* 4A:4-2.7(a) have been met. Initially, it would be inappropriate to provide the petitioners with retroactive dates of appointment to July 9, 2012. Although the appointing authority submits that the petitioners were operating as second-level supervisors since that time, it does not identify who served as first-level supervisors, *i.e.*, Fire Lieutenants, whom the petitioners would have been required to supervise. In this regard, the job specification for Fire Lieutenant states that the incumbent “[u]nder direction of a **Fire Captain**, has charge of a fire department company or a platoon intended to assist in the extinguishing of fires; does other related duties” [emphasis added]. In this case, the appointing authority only provides, and agency records confirm, that Rhodes, Biel, Reynolds, and McFadden did not become Fire Lieutenants until July 19, 2013. Moreover, the Borough of Carteret ordinance, which established the Fire Lieutenant title and its corresponding salary, was not effective until January 1, 2013. It is noted that the petitioners’ records currently reflect a title change to Fire Lieutenant effective December 20, 2012. However, although the subject ordinance was approved on that date, the title was not effective until January 1, 2013. Thus, their records shall be amended to reflect a title change to Fire Lieutenant effective January 1, 2013. Accordingly, any retroactive date of appointment to a second-level supervisory position of Fire Captain could only be set as early as July 19, 2013 for Magella, Goddess, Bonner, and Ziemba, since that is the first date they would have supervised Fire Lieutenants. There is not a sufficient basis for an earlier date of appointment under these circumstances. As for Hruska, he had already been appointed pending promotional examination procedures as a Battalion Fire Chief effective January 4, 2013. Thus, as further explained below, he cannot be provided with a retroactive date of appointment to a second-level supervisory Fire Captain position.

Regarding whether the petitioners may be appointed without a competitive examination, *N.J.A.C.* 4A:4-2.7(a) initially directs that such an appointment may be authorized “[f]ollowing the announcement of a promotional examination.” Although the petitioners applied for the Fire Captain (PM1159S), Borough of Carteret, examination which had a closing date of September 30, 2014, the request for a waiver must be viewed in the context of the 2013 examination cycle. By way of background, agency records indicate that the announcements for the second-level supervisory Fire Captain examinations for various jurisdictions were issued on

February 1, 2013 with an amended closing date of April 30, 2013. The examinations were held on May 23, 2013 and the resulting eligible lists promulgated on January 30, 2014 and do not expire until January 29, 2017. Prior to the closing date, the Fire Lieutenant position in the Borough of Carteret was established effective January 1, 2013. Therefore, the appointing authority could have been included among the jurisdictions to be tested for the second-level supervisory Fire Captain title and could have requested a waiver of the examination at that time. Nonetheless, it did in fact advise CPM of its intention of "leaving our current certified Fire Captains in place as our 2nd level supervisors" in April 2013 prior to the administration of the May 23, 2013 Fire Captain examinations. However, the request was not acted upon due to an apparent administrative oversight. At that time, the petitioners would have been the only employees eligible for a second-level Fire Captain examination, since the examination would have been open to permanent Fire Lieutenants.

Regarding the factors set forth in *N.J.A.C. 4A:4-2.7(a)*, it is noted that all four conditions must be met before the Civil Service Commission can consider a promotional examination waiver. The New Jersey Supreme Court has upheld the processing of an examination through the provisions of *N.J.A.C. 4A:4-2.7* as being within the lawful discretion of this agency. See *Pringle v. Department of Civil Service*, 45 *N.J.* 329 (1965) and *Falcey v. Civil Service Commission*, 16 *N.J.* 117 (1954). In *Pringle*, the Court, in a footnote, suggested that the subject rule should indicate that the way to determine whether a candidate had been tested successfully in the basic skills for the title was if the candidate had previously taken and passed an examination for the basic skills required in the position to which he was being promoted. A test administered by the Civil Service Commission ensures that a consistent standard is applied as there is no way to ensure consistency in the evaluation.

Moreover, this agency advised all appointing authorities by way of memorandum, dated December 29, 2005, that the "basic skills of every job title are identified in a job analysis process and the extent to which they are measured is a function of the design and validity of the examination or selection instrument." Based on this assessment, it was determined that a test for Fire Lieutenant (first-level supervisor) may be accepted as a "basic skills" test for Fire Captain (second-level supervisor). In the present case, the petitioners have all been successfully tested in the basic skills required for the second-level supervisory title of Fire Captain, in that they were appointed via the competitive process by taking the first-level supervisory Fire Captain examination and being appointed from eligible lists. Thus, *N.J.A.C. 4A:4-2.7(a)1* has been satisfied. Moreover, in accordance with *N.J.A.C. 4A:4-2.7(a)2*, none of the petitioners have failed an examination for Fire Captain within the one-year period prior to the announced closing date, which would have been April 30, 2013. Moreover, as noted above, the petitioners would have been the only employees eligible for the Fire Captain examination and four of

the five petitioners, Magella, Goddess, Bonner, and Ziemba, could have clearly been appointed by the appointing authority on July 19, 2013 when the four Fire Lieutenants had been appointed. Therefore, as required by *N.J.A.C. 4A:4-2.7(a)3*, the number of interested eligibles for the promotional examination would not have exceeded the number of promotional appointments by more than two. Furthermore, the last condition, *N.J.A.C. 4A:4-2.7(a)4*, has been satisfied since none of the petitioners are veterans. Therefore, pursuant to *N.J.A.C. 4A:1-1.2(c)* and *N.J.A.C. 4A:4-1.10(c)*, good cause has been shown to grant the appointing authority's request for a retroactive waiver of the second-level supervisory Fire Captain examination in accordance with *N.J.A.C. 4A:4-2.7(a)* and appoint Magella, Goddess, Bonner, and Ziemba effective July 19, 2013. It is emphasized that, for the reasons set forth above, there is not a sufficient basis to grant an earlier date of appointment. Further, since Magella, Goddess, Bonner, and Ziemba have continuously performed the duties of the subject title since July 19, 2013, they should be considered as having successfully completed their working test period. *See e.g., In the Matter of Winfred L. Christy, Police Officer (M1847M), Borough of Lindenwold (MSB, decided January 15, 2003)*. Accordingly, their appointments are to be considered permanent.

As for Hruska, based on the foregoing it would be inappropriate to record an appointment for him to a second-level supervisory Fire Captain position, retroactively to July 19, 2013, because he was already serving provisionally as a Battalion Fire Chief by January 4, 2013. Thus, it appears that he never actually served as a second-level Fire Captain. Further, there was apparently no need for a fifth Fire Captain position since there were only four Fire Lieutenant positions which required supervision and the appointing authority presents that all Fire Captain positions have been filled. Accordingly, Hruska's records shall only be amended to the extent of the title change to Fire Lieutenant, effective January 1, 2013, consistent with the records of the other petitioners.⁴

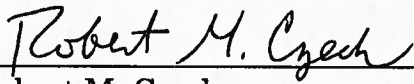
⁴ It is noted that this determination would not affect Hruska's eligibility for a prospective Battalion Fire Chief examination if the examination is appropriately announced. In this regard, *N.J.A.C. 4A:4-2.4(a)* states that if a title which is the subject of a promotional examination is part of a title series, the examination, with or without all or part of the open competitive requirements, as appropriate, shall be open to one of the following: 1. The next lower in-series title **used in the local jurisdiction**; 2. The next two lower in-series titles **used in the local jurisdiction**; or 3. All applicants in the unit scope who meet the open competitive requirements and all applicants in the next lower or next two lower in-series titles **used in the local jurisdiction** (emphasis added).

ORDER

Therefore, it is ordered that the request be granted in part and the personnel records of Robert Magella, Samuel Goddess, Richard Bonner, and Peter Ziemba be amended to reflect a title change from Fire Captain (first-level) to Fire Lieutenant, effective January 1, 2013, and their permanent appointments to Fire Captain (second-level) effective July 19, 2013. It is further ordered that the personnel records of Mark Hruska be amended to reflect a title change from Fire Captain (first-level) to Fire Lieutenant, effective January 1, 2013.

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 17TH DAY OF DECEMBER, 2014



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