



B-151

STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Robert Gillen,
Harrison

CSC Docket Nos. 2015-1823
2015-1833

Reconsideration and Request for Stay

ISSUED: FEB - 9 2015

(RE)

Robert Gillen petitions the Civil Service Commission (Commission) for a reconsideration, and stay, of *In the Matter of Joseph Lang, et al., Harrison* (CSC, decided December 3, 2014). A copy of that decision is attached hereto and incorporated herein.

By way of background, in July 2011, the Harrison Fire Department (Department) underwent layoff proceedings and established the rank of Fire Lieutenant, which had not been previously used. As a result, the Fire Lieutenant title became the first level supervisor, the Fire Captain title became the second level supervisor, and the title of Battalion Fire Chief was eliminated. Thereafter, in December 2011, the Division of State and Local Operations¹ (SLO) acknowledged the Department's restructuring, including an ordinance establishing the title of Fire Lieutenant and their discontinuance of the use of Battalion Fire Chief. SLO described the new structure of the Fire Department, including one Fire Director, five Fire Captains, four Fire Lieutenants, and twenty Fire Fighters. SLO indicated that the five Fire Captains would be Henry Richard, Joseph Nichirco, John Mulrenan, John Dwyer and Robert Gillen. Nevertheless, an examination for the second-level supervisor, Battalion Fire Chief (PM3517L), Harrison, had been announced in February 2009, five candidates passed, and the list had an effective date of September 2, 2010 and expiration date of September 1, 2013. As such, it was still effective for the appointments of individuals to second-level supervisory

¹ Now the Division of Agency Services (DAS).

positions, which were the Fire Captains after the restructuring. Mr. Gillen failed that examination.

The Department left individuals in the title Fire Captain after the restructure, although they were appointed as first-level Fire Captains, not second-level Fire Captains. It did not single out Mr. Gillen, but did not take action to correct the records for multiple employees after the restructure and layoff occurred. In *In the Matter of Joseph Lang, et al., supra.*, the Commission corrected these inactions, and ordered the revival of the list for Battalion Fire Chief (PM3517L), Harrison in order to appoint two individuals from that list. It also found that the petitioner had been working out-of-title as a Fire Captain without actual possession of the title, but as he was not on the Battalion Fire Chief (PM3517L) eligible list, he was not entitled to a retroactive appointment. It indicated that the Department should immediately assign him duties commensurate with his permanent title or provide him with a provisional appointment pending promotional examination to Fire Captain. The petitioner has indicated in his petition that Harrison has chosen to assign him duties commensurate with his permanent title, first-level supervisor, which is Fire Lieutenant.

In his petition for a stay of the Commission's December 3, 2014 decision, Mr. Gillen states that the Department has told him they have no provisional positions available, and he believes that the Department is not acting in good faith. He states that Mr. Lang was reassigned to "acting" Fire Captain, and another individual, Mr. Underhill, was reassigned to "acting" Fire Lieutenant.² He does not provide any arguments regarding the factors for a petition for interim relief.

In support of his request for reconsideration, Mr. Gillen argues that there are "multiply [sic] questionable practices and circumstances regarding my denial for retroactive appointment."³ He states that he previously had been listed as one of the five Fire Captains in SLO's letter of December 8, 2011. He argues that on three occasions Fire Lieutenants were promoted; he points out the restructuring ordinance of July 8, 2011 was amended to increase salaries for members of the Fire Department; and he states that the Commission announced an examination for Fire Captain (PM0174R) in 2013, which was cancelled. He maintains that these actions denied him a promotion, and he should receive a retroactive appointment. He states that he meets the requirements under *N.J.A.C. 4A:4-2.7* and has worked in the title over two years.

² On December 1, 2014, Mr. Lang was provisionally appointed to Fire Captain. Mr. Underhill is still recognized in the official record as Fire Fighter.

³ It is noted that Mr. Gillen did not submit a request for retroactive appointment. Instead, Harrison requested revival of the expired eligible list (PM3517L) to appoint others, and it requested permission to appoint Mr. Gillen from a list for Deputy Fire Chief (PM3540A), which had an effective date of July 13, 2000.

The following factors are provided by *N.J.A.C. 4A:2-1.2(c)* in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

CONCLUSION

Regarding Mr. Gillen's request for interim relief, since the Commission is deciding the matter herein, this request is moot. Next, *N.J.A.C. 4A:2-1.6(b)* provides that a petition for reconsideration must show the following:

1. New evidence or additional information not presented at the original proceeding which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or
2. That a clear material error has occurred.

Applying this standard to the instant matter, the petitioner has not demonstrated that reconsideration should be granted. In the present matter, the Commission's decision is amply supported by substantial evidence. There is nothing in the record to demonstrate that the Commission's decision was arbitrary, capricious or unreasonable or against the weight of the credible evidence. Although Mr. Gillen was included by SLO in its December 8, 2011 letter as one of those who would become a Fire Captain, he had failed the examination for Battalion Fire Chief (PM3517L), Harrison, and no further examination for Fire Captain was given. The Commission's announcement for an examination for Fire Captain (PM0174R), Harrison in 2013, was cancelled, but it had only one applicant, Joseph Cavanaugh. Although he states that this cancellation denied him a promotion, Mr. Gillen had not applied for that examination. The appointing authority's request to revive a 14 year old eligible list for Deputy Fire Chief containing multiple names in order to provide the tenth and last ranking candidate, Mr. Gillen, with an appointment to Fire Captain is entirely arbitrary and contrary to Civil Service regulations.

Promotions for Fire Lieutenants and providing an increase in salaries for members of the Fire Department are fiscal issues, but they have no bearing on the petitioner's non-appointment to Fire Captain. In that regard, the definition of "appointing authority" is a person or group of persons having power of appointment or removal. See *N.J.A.C. 4A:1-1.3*. In addition to appointments, the appointing authority's responsibilities include assignments, disciplinary actions, changes to work status, layoffs, demotions, promotions, approval of leaves, removals, salary decisions, terminations, transfers, and other personnel actions. The appointing authority has the right to determine the organizational structure of its operation. Normally, as long as there are no improper reporting relationships or

misclassifications, how the local unit is organized or how often the local unit is reorganized is not under the jurisdiction of the Commission. The appointing authority decides when to make promotions and to what titles, and in this case, must do so in accordance with any fiscal restrictions placed on it by the Department of Community Affairs. Employees and candidates for examinations cannot make or demand promotions, or force the appointing authority to promote them.

The petitioner states that he meets the requirements for an examination waiver under *N.J.A.C. 4A:4-2.7* and has worked in the title over two years. *N.J.A.C. 4A:4-2.7(a)*, Promotion upon waiver of competitive examination, states that, following the announcement of a promotional examination, the Commissioner 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.

In this regard, the number of interested eligible candidates for the promotional examination would include all Fire Lieutenants, and the petitioner is himself a veteran. Clearly, the requirements for promotion upon waiver of competitive examination would not be met.

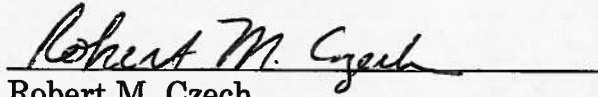
The petitioner has failed to present a basis for reconsideration of this matter since he failed to establish that a clear material error occurred in the original determination or that new evidence presented would change the outcome of the appeal.

ORDER

Therefore, it is ordered that this request 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 4th DAY OF FEBRUARY, 2015



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Attachment

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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Joseph Lang, et al.,
Harrison

CSC Docket Nos. 2015-342
2015-1335
2015-1336
2015-1337
2015-1338

Administrative Appeal

ISSUED: DEC - 5 2014 (RE)

Joseph Lang, a Fire Lieutenant with Harrison, represented by Brian Kincaid, Esq., appeals the appointing authority's failure to regularly appoint him from the (then) second-level supervisor Battalion Fire Chief (PM3517L) eligible list in 2011. Additionally, Harrison requests revival of the expired¹ eligible list for Battalion Fire Chief (PM3517L), so that it can be certified and promotional appointments can be made for the second-level supervisory title of Fire Captain.

By way of background, an examination for the second-level supervisor, Battalion Fire Chief (PM3517L), Harrison, was announced in February 2009, and five candidates passed the examination. This list had an effective date of September 2, 2010 and expiration date of September 1, 2013. This eligible list had been certified one time with three names, and the first ranking candidate, Henry Richard, was appointed on February 1, 2011, although he was subsequently demoted back to first-level supervisor in lieu of layoff on July 1, 2011. Joseph Nichirco ranked second on this list and the appellant ranked third. In July 2011, the Fire Department underwent layoff proceedings and established the rank of Fire Lieutenant, which had not been previously used. As a result, the Fire Lieutenant title became the first level supervisor, the Fire Captain title became the second level supervisor, and the title of Battalion Fire Chief was eliminated. It is noted that in

¹ This list expired September 1, 2013. As noted above, Henry Richard ranked first, Joseph Nichirco ranked second, and the appellant ranked third. Two more individuals who were on the eligible list, although not on the first certification, were John Dwyer, ranking fourth, and John Crilley, ranking fifth.

August 2013, there was a Special Reemployment List in place for the second-level supervisor.

On December 8, 2011, the Division of State and Local Operations² (SLO) acknowledged Harrison's Fire Department restructuring, including an ordinance establishing the title of Fire Lieutenant and their discontinuance of the use of Battalion Fire Chief. SLO described the new structure of the Fire Department, including one Fire Director, five Fire Captains, four Fire Lieutenants, and twenty Fire Fighters. SLO indicated that the five Fire Captains would be Henry Richard, Joseph Nichirco, John Mulrenan, John Dwyer and Robert Gillen. SLO also indicated that the appellant and another individual must be appointed to the title Fire Lieutenant, and said it would allow two more appointments to the first-level supervisor title. SLO indicated that on July 1, 2011 the appellant and another individual were demoted in lieu of layoff from Fire Captain (a first level supervisor) to Firefighter, and further indicated that the Special Reemployment List for Fire Captain (first-level supervisor) must be certified before any other promotional appointments are made to any title higher than Fire Fighter.

In February 2013, the Civil Service Commission issued the decision regarding the classification of two individuals, Henry Richard and Joseph Nichirco, who appealed their positions as Fire Captains, and four individuals who appealed their positions as Fire Fighters. *See In the Matter of Henry Richard, et al., Harrison* (CSC, decided February 20, 2013). That decision provided background regarding the Harrison Fire Department, including the organization of the department and the reasoning for the restructuring. Specifically, it indicated that the Organizational Chart of February 2012 showed that the Harrison Fire Department consisted of one Fire Director, four tour Fire Captains, one administrative Fire Captain, four Fire Lieutenants, and twenty Firefighters. This equates to seven men on duty for each of four tours, two supervisors and five Firefighters. The Department was described as having one fire station with two engines and one ladder, an EMS vehicle and an extra engine. In 2010, Harrison, which is located in Hudson County, had a population of 13,000 people in approximately 5,000 households, and is 1.2 square miles in area. In agreements with the Firemen's Mutual Benevolent Association (FMBA), the appointing authority established four Fire Lieutenant positions and agreed to appoint five Fire Captains. A Fire Captain is on duty for each of the four tours, and a fifth Fire Captain acts in an administrative capacity. The appellant had filed a classification appeal as well, in March 2012, and in a determination dated November 9, 2012, SLO indicated that the appellant's duties were commensurate with the title Fire Lieutenant. The appellant did not appeal that determination to the Commission.

² Now the Division of Agency Services (DAS).

In the present matter, the appellant states that he has been told he needs to apply for the examination for Fire Captain (PM1121S), Harrison. He argues that he was "skipped as a second-level supervisor and two provisional Captain/second level supervisors were put in place that did not have the proper credentials and are not qualified for said position." The appellant inquires why he was "skipped" while other personnel, who the appellant does not identify, and himself, have to take a test. In support of this appeal, the appellant sends a *draft* copy of an unsigned letter addressed to the Division of Appeals and Regulatory Affairs from David Fox, Esq., who was representing FMBA Local No. 22, which represents Harrison's rank and file Fire Department personnel. In this letter, dated March 27, 2012, prior to the Commission's classification decisions, he makes reference to an agreement which was not attached and which refers to the appellant as a second-level supervisor using the Battalion Fire Chief list. He also states that Robert Gillen and Jack Mulrenan failed the Battalion Fire Chief examination but were serving as second-level supervisors, or Fire Captains. There is no indication that this letter was sent to the Commission. In support of this appeal, Assemblyman Anthony Bucco states that the appellant qualified for this position and did not receive a reason for his non-appointment. The Assemblyman also mentions that there are currently eight Fire Lieutenants.

Concurrently, the appointing authority requests revival of the expired eligible list for Battalion Fire Chief (PM3517L), so that it can be certified and promotional appointments can be made for the second-level supervisory title of Fire Captain. In support, the appointing authority explains that it left Henry Richard, Joseph Nichirco, John Mulrenan, John Dwyer and Robert Gillen in the title Fire Captain with no further action. In contrast, it requested a certification (PL120744) of four names for Lieutenant from the existing Captain list and it appointed the appellant and Ronald Greenemeier to Fire Lieutenant on July 16, 2012. In August 2014, an examination for second-level Fire Captain (PM1121S), Harrison, was announced. The appointing authority has indicated that Mr. Mulrenan applied for retirement effective October 1, 2014, and he did not file an application to take the examination for (PM1121S). The appointing authority states that Mr. Gillen passed an examination for Deputy Fire Chief (PM3540A), with an eligible list effective date of July 13, 2000. It believes that due to the fact that Mr. Gillen has been performing the duties of a second-level supervisor for over two years, and has passed a second-level promotional exam, a "waiver" is in order to allow Gillen to remain a second-level Captain without the need for further testing. The appointing authority states that this resolves the issue for Mr. Gillen. The appointing authority also indicates that it was never its intention to make Messrs. Dwyer and Nichirco take the upcoming Captain test, as they had been performing as second-level Fire Captains for over two years, and they were on a Battalion Fire Chief promotional list (PM3517L), which expired September 1, 2013. It states that, had it known in 2011 or 2012 of the "current position of the CSC," it would have requested

a certification of the eligible list for Battalion Fire Chief (PM3517L), and would have made promotional appointments of Messrs. Nichirco, Dwyer, and Lang.

The Division of Agency Services (DAS) indicates that, since Harrison has certified that Joseph Nichirco and John Dwyer have been functioning as second-level supervisors since June 6, 2012, it supports the requested action to revive the Battalion Fire Chief (PM3517L) list and grant retroactive appointments for Messrs. Nichirco and Dwyer to Fire Captain. DAS adds that Harrison's request to include a retroactive appointment for Joseph Lang, who is on this list, cannot be supported since the town has not certified that he has been performing second-level supervisory duties. It also does not support a retroactive appointment for Robert Gillen, as his name does not appear on the list.

N.J.A.C. 4A:4-3.4(a) provides that the [Civil Service Commission] may revive an expired eligible list under the following circumstances:

1. to implement a court order, in a suit filed prior to the expiration of the list;
2. to implement an order of the [Civil Service Commission] in an appeal or proceeding instituted during the life of the list;
3. to correct an administrative error;
4. to effect the appointment of an eligible whose working test period was terminated by a layoff; or
5. for other good cause.

See also, N.J.S.A. 11A:4-6.

CONCLUSION

As to the second level of supervision, Henry Richard was appointed on February 1, 2011 from the eligible list for Battalion Fire Chief (PM3517L), and was demoted in lieu of layoff in July 2011. Clearly, the financial situation in Harrison precluded additional appointments prior to July 2011 to the second-level supervisor title. Upon restructuring of the Fire Department on September 6, 2011, the appointing authority failed to follow certification procedures for the second-level supervisors. Instead of asking for certifications from eligible or special reemployment lists, it simply left Messrs. Richard, Nichirco, Mulrenan, Dwyer and Gillen unchanged in the position of Fire Captain. This inaction was not discovered until this appeal was filed and, upon discovery, Commission staff updated the official records of these individuals. Mr. Richard's demotion in the layoff to Fire Lieutenant was recorded, and he was also recorded as receiving a promotion to Fire Captain from the special reemployment list for the second level supervisor (Battalion Fire Chief) on September 7, 2011. Based on these circumstances, DAS should remove Mr. Richard's name from the special reemployment list for Battalion Fire Chief. The official records of Messrs. Nichirco, Mulrenan, Dwyer and Gillen

were changed to reflect lateral title changes from first-level Fire Captain to Fire Lieutenant on September 6, 2011, the date of the reorganization. These four individuals have never been certified from an eligible list for a second-level supervisor examination.

For the first level supervisors, Messrs. Lang and Greenemeier were demoted in lieu of layoff in July 2011 from Fire Captain to Fire Fighter. On June 6, 2012, Mr. Lang was provisionally appointed to Fire Lieutenant, and on July 16, 2012, both individuals were regularly appointed to Fire Lieutenant from the special reemployment list for the first level supervisor (Fire Captain). Due to the restructuring of the Fire Department, DAS should remove their names from the special reemployment list for Fire Captain, as they were appointed from this list to the first-level supervisory title of Fire Lieutenant, and Fire Captain is now the second-level supervisory title.

As to the appointing authority's request for revival of the expired Battalion Fire Chief list (PM3517L), first, it is noted that the appointing authority failed to follow certification procedures and timely appoint second-level supervisors from this list. It also did not make provisional appointments pending promotional examination for Messrs. Gillen and Mulrenan. Further, it did not make changes to the official records after the layoff and departmental reorganization. It is well established that the steps necessary to perfect a regular appointment, which include Civil Service Commission review and approval of a certification disposition proposed by an appointing authority, are required and necessary. The fact that the appointing authority did not take these steps to effectuate appointments from the Battalion Fire Chief (PM3517L) eligible list is a clear administrative error on its part.

Mr. Richard is unaffected by the appointing authority's error, as his regular appointment could be made from the special reemployment list on the date of the reorganization. Messrs. Nichirco, Mulrenan, Dwyer and Gillen remained in the job, performing the duties of a second-level supervisor without proper regular or provisional appointments. Given that Messrs. Nichirco and Dwyer were reachable for appointment after the removal of Mr. Richard based on his appointment from a special reemployment list, based on equitable considerations, it is appropriate to revive the Battalion Fire Chief (PM3517L) eligible list, and certify Messrs. Nichirco's and Dwyer's names to allow for their appointment as Fire Captain retroactive to September 6, 2011, the date of the reorganization.

Mr. Gillen has been working out-of-title as a Fire Captain without actual possession of the title. Mr. Gillen was not on the Battalion Fire Chief (PM3517L) eligible list, and, thus, he is not entitled to a retroactive appointment. Accordingly, Harrison should immediately assign him duties commensurate with his permanent title or provide him with a provisional appointment pending promotional

examination to Fire Captain. Messrs. Mulrenan and Crilley have retired and their appointments are no longer at issue.

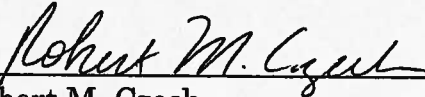
As for Mr. Lang, he requests a retroactive permanent appointment from the Battalion Fire Chief (PM3517L) eligible list since Messrs. Gillen and Mulrenan remained in the second-level supervisory positions. Also, the appointing authority requests an appointment for Mr. Lang from this list. In this regard, it must be emphasized that the appellant does not possess a vested property interest in a position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). Further, although the appointing authority made an administrative error by failing to certify the list, the appellant cannot benefit from such an error. See *Cipriano v. Department of Civil Service*, 151 N.J. Super. 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 N.J. 309 (1987); *HIP of New Jersey, Inc. v. New Jersey Department of Banking and Insurance*, 309 N.J. Super. 538 (App. Div. 1998). In addition, the record does not establish that the error was due to bad faith or some invidious reason. Correction of this error does not require that Mr. Lang receive a retroactive permanent appointment to the Fire Captain title. According to N.J.A.C. 4A:4-5.1, the working test period is part of the examination process designed to permit an appointing authority to determine whether an employee can satisfactorily perform the duties of the title and, all regular appointments to a title in the career service shall be subject to a working test period, except appointments from special, police and fire and regular reemployment lists. Mr. Lang did not commence or complete a working test period, hold a provisional position, or otherwise perform the duties of a second-level supervisor. Indeed, a classification determination on his position, issued November 9, 2012, confirmed that he was performing the first-level supervisory duties of a Fire Lieutenant. The fact that Messrs. Gillen and Mulrenan were performing the duties of a second-level supervisor does not establish that Mr. Lang is entitled to a retroactive permanent appointment from the list. Had the appointing authority properly requested certification of this list and the special reemployment list, Messrs. Richard, Nichirco and Dwyer would have been removed due to appointments to the title, and the eligible list would have been incomplete, with two names remaining. As Mr. Lang was not given second-level supervisory duties at the time, or since, it cannot be assumed that the appointing authority would have regularly appointed him from that list. The appointing authority knew that they could only have five Fire Captains at that time, five persons were performing those duties, and Mr. Lang was not one of them. As such, Mr. Lang is not entitled to a retroactive permanent appointment from the Battalion Fire Chief (PM3517L) eligible list.

ORDER

Therefore, it is ordered that the request be granted in part and the Battalion Fire Chief (PM3517L), Harrison, eligible list be revived in order for Messrs. Nichirco and Dwyer to be appointed retroactive to September 6, 2011. The remainder of the request, and the appeal, is 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 3rd DAY OF DECEMBER, 2014**



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