

B-37



STATE OF NEW JERSEY

In the Matter of Thomas Carney,
Police Captain (PM0886S), Township
of Parsippany-Troy Hills

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2017-2001 and
2017-2153

Request for a Stay and
Request for Administrative Relief

ISSUED: MAR 24 2017 (JET)

The Township of Parsippany-Troy Hills (Parsippany-Troy Hills), represented by Stephen E. Trimboli, Esq., requests a waiver of promotional examination procedures and the retroactive permanent appointment of Thomas Carney as Police Captain.¹ Parsippany Troy-Hills also requests a stay of the priority provisional certification for Police Captain (PM0886S), Parsippany Troy-Hills. Since these matters concern similar issues, they have been consolidated.

A review of the record indicates a promotional examination for Police Captain (PM0886S), Parsippany-Troy Hills, was announced with a closing date of September 30, 2014. The resulting list of three eligibles promulgated on March 26, 2015 and will expire on March 25, 2018. Carney did not apply for this examination and his name is not on the eligible list. John Wieners was the first ranked eligible, Keith Lefferts was the second ranked eligible, and Brian Dowd was the third ranked eligible. Wieners was appointed from the October 30, 2015 (PL151193) certification.

The County and Municipal Personnel System (CAMPS) indicates that on January 25, 2016, Carney's provisional appointment to Police Captain, effective April 11, 2014, was submitted to this agency. As a result, a certification was issued to the appointing authority on February 5, 2016 (PL160174). The appointing authority retuned this certification indicating that the two eligibles were to be listed

¹ It is noted that Carney was permanently appointed as a Police Lieutenant from the promotional list for Police Lieutenant (PM2546K) effective September 9, 2010. The appointing authority also indicates that Carney served as "acting" Police Captain at some point in 2013 prior to his provisional appointment.

as "I-9 – Retained, certification incomplete." Thereafter, Lefferts contacted this agency and requested a priority provisional certification be issued against Carney's provisional appointment. This resulted in the issuance of certification PL161126 on September 20, 2016 which had a disposition due date of December 20, 2016 and is the subject of the appointing authority's stay request.

It is noted that the prior promotional list for Police Captain (PM3547J) promulgated on March 7, 2008 and expired on February 22, 2012 upon the promulgation of the Police Captain (PM7551N) promotional list on February 23, 2012. Thereafter, the PM3547J list was revived and consolidated by the Civil Service Commission (Commission) with the PM7551N eligible list. *See In the Matter of Jeffrey Storms and Richard Patina, Police Captain (PM3547J), Parsippany-Troy Hills* (CSC, decided June 20, 2013). The PM7551N eligible list expired on March 25, 2015. Carney did not apply for the PM3547J or PM7551N examinations for Police Captain. However, a new examination for Police Captain (PM1352U), Parsippany-Troy Hills, was announced with a closing date of September 30, 2016. Carney applied for and took the PM1352U examination, and the results are still pending.

REQUEST FOR EXAMINATION WAIVER AND RETROACTIVE APPOINTMENT FOR CARNEY

In its petition to the Commission, the appointing authority explains that Carney was appointed as a provisional Police Captain on April 11, 2014 after the prior lists (PM3457J) and (PM7551N) for Police Captain had been exhausted. It adds that, prior to his provisional appointment, he served as "acting" Police Captain due to a retirement. As of April 11, 2014, it asserts that only two other Police Lieutenants had sufficient experience to apply for Police Captain. The appointing authority states that it advised Carney that his promotion was permanent in April 2014 and he was provided with a swearing in ceremony. In this regard, it explains that swearing in ceremonies are only performed when an Officer becomes permanent. Further, the appointing authority asserts that neither the Commission nor the appointing authority advised Carney of his obligation to apply for and take the PM0886S examination. As such, Carney did not take the examination.

Although a permanent appointment was made from the PM0886S list on October 30, 2015, the appointing authority states that Carney was not informed at that time that he would be removed as a provisional Police Captain due to that appointment. Moreover, it notes that although he could have taken the PM0886S examination, Carney did not do so because he was erroneously informed that he was permanently appointed as a Police Captain. The appointing authority claims that this matter is similar to *In the Matter of William Makowitz* (MSB, decided August 11, 2004), where the former Merit System Board ordered a waiver of the promotional examination and retroactive permanent appointment of a Deputy

Police Chief whose provisional appointment was not reported to this agency to trigger a promotional examination announcement. In this regard, the appointing authority contends that, since it erroneously led Carney to believe that his position was permanent, and failed to advise him to apply for the PS0886S examination, the same remedy as fashioned in *Makowitz, supra*, should apply in this matter. Additionally, the appointing authority argues that in *Melani v. County of Passaic*, 345 N.J. Super. 579 (App. Div. 2001) and *Kyer v. City of East Orange*, 315 N.J. Super. 524 (App. Div. 1998), are applicable to this matter since those matters also involved long-term provisional employees who were provided with the opportunity to achieve permanent status despite errors committed by the appointing authority. Specifically, the appointing authority did not notify this agency of Carney's provisional appointment as Police Captain in a timely manner and it led him to believe that he had received a permanent appointment. Therefore, since Carney was erroneously permitted to serve as a provisional Police Captain after the PM0886S list was issued, successfully passed the basic skills required for the title, and there was only one vacancy for Police Captain available on April 11, 2014, the examination should be waived and Carney should receive a retroactive appointment.

REQUEST FOR STAY OF PRIORITY PROVISIONAL APPOINTMENT

The appointing authority asserts that since there is a clear likelihood of success on the merits based on the aforementioned reasons provided above, a stay of the appointment process should be granted. It adds that there is a danger of irreparable harm in this matter if Carney's provisional appointment is discontinued as it would cause disruption and create uncertainty within the chain of command. The appointing authority adds that *N.J.A.C. 4A:4-1.5(b)* provides that when a provisional appointee fails to file for and take an examination announced for his or her title, the Commission is required to notify the appointing authority of the provisional appointee's failure to file for and take the examination, and to direct it to remove the provisional appointee. However, the appointing authority maintains that the Commission took no action against Carney despite his failure to apply for the PM0886S examination. Moreover, it states that the principles of merit and fitness are not being violated as no other officer raised an objection or expressed interest in the position until the notice for the priority provisional appointment was issued. Further, it contends that, although *N.J.A.C. 4A:4-2.1(b)* requires employees to be notified by electronic or other means of promotional opportunities, no such notification was provided to Carney. As such, it contends that Carney would have filed for the Police Captain examination had this agency provided the proper notification. Moreover, the appointing authority argues that an assessment of costs and penalties should not be imposed in this matter as it is in compliance with the rules and it does not want to be compelled to make the priority provisional appointment. Additionally, the appointing authority asserts that a certification for a priority provisional appointment is not defined by Civil Service rules and that the

September 20, 2016 certification is not a complete list as it does not consist of at least three names.

In support, the appointing authority provides certifications dated December 13, 2016 from Stephen Trimboli, Esq., and Paul Phillips, Chief of Police, who reiterate many of the aforementioned arguments, an oath of allegiance form signed by Carney on April 11, 2014, a request for personnel action form dated January 8, 2014 indicating that Carney was appointed as "acting" Captain effective December 3, 2013, a request personnel action form dated April 11, 2014, indicating that Carney was permanently appointed as Police Captain, and a certification dated December 13, 2016 by Carney confirming that it was his understanding that, since he was already appointed to the position, and there were only two other Police Lieutenants at the time of his appointment with one year of seniority the examination process could be waived, and he did not have to take the Police Captain examination.

CONCLUSION

N.J.A.C. 4A:4-1.5(a) provides that a provisional appointment may be made in the competitive division of the career service when there is no complete list of eligibles, and no one remaining on an incomplete list will accept provisional appointments. *N.J.A.C. 4A:4-1.5(b)* provides that the Commission must notify the appointing authority when a provisional employee has failed to take an examination within the allotted time and must direct the appointing authority to separate the employee from service.

N.J.A.C. 4A:4-2.7(a) provides 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 above does not exceed the number of promotional appointments by more than two; and 4) Veterans preference rights are not a factor.

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:4-4.2(c)2i states that when fewer than three interested eligibles are certified and no provisional currently serving in the title is listed on the

certification, the appointing authority may either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title.

In the present matter, there is no basis on which to grant the request for a waiver of promotional examination procedures or to grant Carney a retroactive date of appointment. The appointing authority argues that Carney was not notified to take the promotional examination at the time he was serving provisionally as a Police Captain because it advised him that he was permanently appointed, and as such, he was unaware that he was required to file for and take the promotional examination. It also states that he served provisionally for more than a year and the list was incomplete at the time the priority provisional certification was issued on September 20, 2016. However, while Carney may have served as provisional Police Captain since April 11, 2014, the appointing authority did not record his provisional appointment with this agency until January 25, 2016. Thus, since the appointing authority failed to properly report Carney's provisional appointment until well after the September 30, 2014 closing date for the PM0886S examination, it would be impossible for this agency to notify it to separate him because he failed to file for and take the examination. See *N.J.A.C.* 4A:4-1.5(b). Rather, Carney's January 2016 retroactive provisional appointment was permitted to be recorded since Wieners was appointed from the PM0886S list of three eligibles on October 30, 2015, thus leaving the eligible list incomplete and allowing the provisional appointment of Carney. As this agency was unaware of Carney's provisional appointment, it did not fail in its duty to advise the appointing authority to remove Carney as a provisional appointee because he failed to file for and take the PM0886S examination.

Because Carney's retroactive provisional appointment was reported on January 25, 2016, and an eligible list existed, certification PL160174 was promptly issued on February 5, 2016 against the provisional appointment. As an appointing authority is entitled to a complete certification containing the names of three eligibles for the first permanent appointment, and only two names remained on the PM0886S list that could be certified, the appointing authority, as is permitted by *N.J.A.C.* 4A:4-4.2(c)2(i), returned certification PL160174 retaining Carney as a provisional appointee indicating that the certification was incomplete. The individuals whose names were certified are then notified that the certification was returned as incomplete by the appointing authority and that a provisional appointee has been retained in the title. Lefferts then indicated to this agency that he was interested in the provisional appointment held by Carney. Therefore, in accordance with *N.J.A.C.* 4A:4-2(c)2(i), a certification for a priority provisional appointment (PL161126) was issued against the name of a provisional appointee whose name is not on the list. As such, a priority provisional certifications are provided for by Civil Service rules.

With respect to its assertion that Carney satisfies the criteria to waive a promotional examination, one of the criteria under *N.J.A.C. 4A:4-2.7* is that the employee has not failed, within one year prior to the *announced closing date*, a promotional examination for that title. In other words, a promotional examination must first be announced and the employee for whom the waiver is sought must apply for and be deemed eligible the announced examination. However, Carney's situation is not similar to those of *Makowitz, supra, i.e.*, that he would likely have been appointed via a waiver of competitive examination in 2014 had his provisional appointment been properly recorded, because three individuals were deemed eligible to compete in the PM0886S examination that was announced with a closing date of September 30, 2014. In this regard, in 2004, as a result of a continuing need to fill vacancies, certain public safety promotional announcements, including the Police Captain examination, are tested on a cyclical basis to ensure that promotional lists for public safety titles are available at all times. *See In the Matter of Promotional Lists for Public Safety Titles* (MSB, decided April 7, 2004). As such, even assuming Carney's provisional appointment had been properly recorded in April 2014, the conditions for a waiver would not exist since the number of interested eligibles for the promotional examination would have exceeded the number of promotional appointments by more than two. In this regard, it cannot be ignored that the first appointment made to fill an additional vacancy from the PM0886S was made effective October 30, 2015.

Additionally, there is no evidence in the record to show that Carney was not properly notified of his obligation to take the PM0886S examination. This announcement was issued and was posted on this agency's website. Since the announcement was posted, it was the appointing authority's responsibility and *not* this agency's responsibility to notify any qualified candidates, including Carney, by posting the announcement in a conspicuous place and individuals serving in the titles to which the examination was open. Moreover, three candidates applied for the PM0886S examination, were found eligible, and appeared on the list. Since those candidates were aware of the announcement, and Carney competed in prior promotional examinations for Police Sergeant and Police Lieutenant, it is reasonable to conclude that he should have been aware of the need to apply for and compete in the examination for Police Captain. Further, the appointing authority acknowledges that it was in receipt of the notice dated January 2014 for the Police Promotional Schedule (2014), which includes the Police Captain title. The notice clearly indicated that it is intended to notify *appointing authorities and police promotional candidates* of the time frames that will apply to [this agency's] 2014 announcements and testing schedules for in-line, police promotional titles (emphasis added). As such, the Commission is satisfied that the appointing authority and Carney were provided with sufficient notice regarding the PM0886S examination. Even if Carney was erroneously informed by the appointing authority that his position was permanent, which it clearly acknowledges in this matter, that

information does not overcome the fact that he was required to take and pass an examination for Police Captain.

Additionally, unlike in the *Kyer* and *Melani* cases, Carney's qualifications to establish eligibility for Police Captain is not at issue in this matter. Rather, the primary issue of concern in this matter involves Carney's inappropriate status and continued appointment as a provisional Police Captain in the face of an outstanding priority provisional appointment list. Although the appointing authority argues that it conducted a swearing in ceremony, and had Carney sign an oath which signals permanent status in that jurisdiction, none of that conveys permanent status under Civil Service rules. In other words, Carney's provisional status did not automatically entitle him to a permanent position. As such, since an eligible on the PM0886S list expressed an interest in the position, Carney's situation cannot now be remedied. In this regard, in the New Jersey Supreme Court found that "the legislative goal of appointments based on merit and fitness is the paramount consideration. With respect to provisional employees, that goal is met by competitive examinations, not by holding a position beyond the time prescribed by the Legislature." See *O'Malley v. Department of Energy*, 109 N.J. 309 (1987).

With respect to the argument that the appellant applied for and took the examination for Police Captain (PM1352U), the fact that his name may appear on a separate eligible list does not establish his contentions in this matter. Regardless, once that eligible list is issued, should Carney be reachable, the appointing authority can consider him for a permanent appointment. Regardless, it must be underscored that a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. In other words, a provisional employee has no automatic right or expectation of achieving permanent appointment to the position to which he or she is occupying. See *O'Malley, supra*. (Appointing authority was not equitably estopped from removing a provisional employee even when the provisional employee occupied the position longer than the statutory one-year limit). Therefore, since there is no basis on which to grant a waiver of the examination and to provide Carney with a retroactive appointment, the appointing authority's request for a stay is denied.

As a final matter, the Commission has serious concerns with the appointing authority's actions in this matter. In this regard, the appointing authority should not have advised Carney that he had achieved permanent status when he was never subjected to an examination, his name was never certified, and never completed a working test period. As evidenced by its reliance on *Makowitz, supra*, the appointing authority should take steps to ensure that situations like this do not happen in the future.

Accordingly, the appointing authority is ordered to properly dispose of certification PL161126 within 15 days of the issuance date on this order. If the

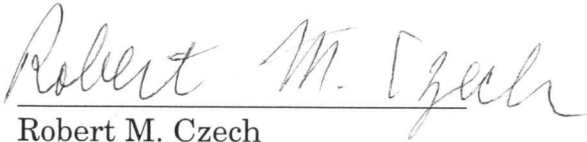
appointing authority fails to dispose of the certification within this time frame, it may be subject to fines or other penalties, up to and including \$10,000, pursuant to N.J.S.A. 11A:10-3 and N.J.A.C. 4A:10-2.1(a)2.

ORDER

Therefore, it is ordered that these requests for relief 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 22nd DAY OF MARCH, 2017



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