



STATE OF NEW JERSEY

In the Matter of Jeffrey Pascual,  
Police Lieutenant (PM4143C),  
Moorestown

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

CSC Docket No. 2022-760

Examination Appeal

**ISSUED: JULY 5, 2022 (JH)**

Jeffrey Pascual, represented by Michael C. Mormando, Esq., appeals his appointment date to the Police Sergeant title and requests to be permitted to submit an application for the promotional examination for Police Lieutenant (PM4143C), Moorestown, after the application filing deadline.

By way of background, the eligible list for Police Sergeant (PM0838V), Moorestown promulgated on May 24, 2018 with the names of 14 eligibles and expired on May 23, 2022. The appellant ranked fifth on the subject list. On May 31, 2018, a certification was issued from the PM0838V list (Certification No. PL180758) which contained the names of the first three ranked eligibles. In disposing of PL180758, Moorestown appointed the eligibles appearing at rank 1 and 2 effective July 13 and July 20, 2018, respectively. On June 10, 2019, a certification was issued (Certification No. PL190783) which contained the names of the eligibles appearing at ranks 3 through 5. In disposing of PL190783, Moorestown appointed the eligible appearing at rank 3 effective July 1, 2019. On January 28, 2021, a certification was issued (Certification No. PL210070) which contained the names of the eligibles appearing at ranks 4 through 6. In disposing of PL210070, Moorestown appointed the eligible appearing at rank 4 effective February 12, 2021 and the appellant effective January 28, 2021.<sup>1</sup>

<sup>1</sup> For reasons that are unclear in the record, available employment records indicate that Pascual was recorded as receiving a provisional appointment to the Police Sergeant title effective January 22, 2021, which was disapproved as there was a complete list of eligibles in existence at the time. See *N.J.A.C. 4A:4-1.5*. When PL210070 was initially returned on April 29, 2021, Moorestown indicated the appointment of the eligible appearing at rank 4 effective February 12, 2021 and recorded the

The announcement for the subject examination was issued on July 1, 2021 with an application filing deadline of July 21, 2021 and all on-line applications had to have been received by that date. The subject examination was open to employees in the competitive division who had an aggregate of one year of continuous permanent service and were serving in the Police Sergeant title as of the September 30, 2021 closing date. A review of the record finds that three applications were filed for PM4143C. It is noted that the examination for Police Lieutenant was administered on October 23, 2021.

In an appeal filed September 28, 2021, Pascual presents that “in 2016, he was promoted to the supervisory position of ‘Corporal’ and has been performing his supervisory role since that time” and he “was doing supervisory work akin to Sergeant, and was being paid the top Sergeant salary.” He notes that he took an examination for Police Sergeant and “awaited an opening in Sergeant position. On September 1, 2020, a Police Sergeant retired, which created an opening for the position of Sergeant.” He claims that “past practices of the department reveal that previous individuals were promoted to open slots for Sergeant without delay.”<sup>2</sup> However, he contends that “the Township intentionally delayed the promotion of Pascual until nearly five months later when he was finally promoted to Sergeant on January 22, 2021. This delay has led to Pascual not being officially considered eligible to take the Lieutenant’s exam. The delay was a clear and intentional act by the Township to deprive Sergeant Pascual of a fair and competitive process.” Pascual presents that “he was being paid the top rate for a Sergeant during the time period from September 1, 2020 (when the opening for Sergeant occurred) and January 22, 2021 (when he was eventually promoted). During that time, he was a ‘Corporal’ and was doing supervisory work akin to a Sergeant, and was being paid the top Sergeant salary, and yet the Township relentlessly delayed promoting Pascual (even when promoting him would have meant paying him less than the top Sergeant salary).” He argues that the Township “intentionally waited so that Pascual would not have official time-in-grade to take the Lieutenant’s exam this year, which in turn would assure the person they want to promote will get the position without a competitive process.” In this regard, he claims that Sergeant

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appellant as I2 (Retain – Interested Others Appointed). Subsequently, in an email sent June 16, 2021, Moorestown indicated that it had erroneously recorded the appellant as I2 and subsequently amended PL210070 to indicate the appellant’s regular appointment effective January 28, 2021. In this regard, it is noted that an eligible cannot receive a regular appointment date prior to the issue date of the certification. It is further noted that it is not clear from the record as to why the appellant, who appears at rank 5, received an earlier appointment date than the eligible who appears at rank 4.

<sup>2</sup> Pascual refers to “the Collective Bargaining Agreement, Article XI of section B, Corporal Section #4 which states: ‘The Township shall not use the Corporal position to delay filling an open Sergeant position. Open positions shall be promptly filled by a promotion; either permanent or provisional as the circumstance may dictate.’”

Walt Walczak, who “had not even taken a Civil Service Exam for the rank of Lieutenant,” was promoted to Lieutenant “on February 12, 2021, after Lieutenant Mike Maas retired on or about February 1, 2021.” He avers that that upon discussing this matter with Police Chief Lee Lieber, he was advised that Walczak would be permanently appointed to the Police Lieutenant title without an examination and “the Chief claimed the ‘rule of 3’ allowed him to do so[, *i.e.*] . . . because there were only three people eligible for Lieutenant . . . he could just ‘make’ Walczak Lieutenant without a Civil Service test.”<sup>3</sup> He asserts that Chief Lieber also informed him that “the decision to delay Pascual’s promotion was Tom Merchel’s (the former Township Manager) decision, not his own.” He indicates that “on or about June 8, 2021, Pascual contacted Civil Service and inquired about being allowed to take the Lieutenant’s exam,” and he was informed that there was no record of his promotion to the Police Sergeant title. Pascual “had his union representative contact the Town Manager to fix the problem; the Town Manager assured the union representative that the situation was corrected, and that Civil Service was notified of Pascual’s promotion to Sergeant.”<sup>4</sup> Subsequently, in July, he “submitted a letter to his Chief requesting to be granted waiver eligibility so that he may take the upcoming Civil Service Lieutenant’s exam” but his “request was denied based upon the reasoning that he lacked the time-in-grade prerequisite.”<sup>5</sup> He argues that if he is “denied the ability to even take the upcoming Lieutenant’s exam, he will be deprived the ability to promote to Lieutenant in the future, prior to his eventual retirement (. . . his own projected retirement date is approximately September 2024).” He refers to *N.J.A.C. 4A:4-2.6(c)(1)* and *N.J.A.C. 4A:4-2.6(g)(3)*<sup>6</sup> and argues:

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<sup>3</sup> It is noted that for Civil Service purposes, the “Rule of Three” allows an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. *See N.J.S.A. 11A:4-8, N.J.S.A. 11A:5-7* and *N.J.A.C. 4A:4-4.8(a)3*. However, it appears that the appellant may be referring to *N.J.A.C. 4A:4-2.7* (Promotion upon waiver of competitive examination) which provides, in part, that following the announcement of a promotional examination, 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 may be made 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; 3. The number of interested eligibles for the promotional examination does not exceed the number of promotional appointments by more than two; and 4. Veterans’ preference rights are not a factor.

<sup>4</sup> As noted previously, Pascual’s employment record currently indicates a regular appointment to the Police Sergeant title effective January 28, 2021.

<sup>5</sup> It is noted that the appellant did not provide a copy of this letter on appeal.

<sup>6</sup> *N.J.A.C. 4A:4-2.6* (Eligibility for promotional examination) provides, in part:

(c) Except when permitted by the Chairperson or designee for good cause, applicants for promotional examinations with open competitive requirements may not use experience gained as a result of out-of-title work to satisfy the requirements for

The facts as presented in this matter provide good cause for the Civil Service Commission to consider out-of-title work to be applied to the time-in grade prerequisite which would thus allow Pascual to take the upcoming Lieutenant's exam. Further, independently, Pascual has the experience in-grade and should have his promotion retroactively applied to September 1, 2020. Finally, although the Chief and the Township have denied Pascual's request to be waived-in to take the Lieutenant's exam, the Civil Service Chair should find the presentation of these facts warrant a finding of valid reason to reduce the time-in-grade requirements to allow for Pascual to take the exam.

Finally, Pascual argues that the Township "is not abiding by the fair and competitive process and are systematically circumventing the process. It also appears that the appropriate authority and Police Chief have intentionally delayed promotion of Pascual to 1) allow for their hand-picked candidate to be promoted without proper testing or competitive process and 2) are intentionally damaging Pascual not only concerning the instant promotion but are intentionally preventing him from promotions to Lieutenant in the future prior to his retirement." In support of his appeal, Pascual submits additional documentation including his affidavit dated September 24, 2021 and a copy of a portion of Article XI of the Collective Bargaining Agreement regarding Salaries and Other Compensation, Corporals.

In its submission filed on October 5, 2021, Moorestown Township, represented by Carmen Saginario, Jr., Esq., indicates that the Police Sergeant vacancy in September 2020 "occurred during the height of the COVID 19 Pandemic.

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admittance to the examination or for credit in the examination process. Good cause may include, but not be limited to, the following:

1. Where the number of employees eligible for examination will result in an incomplete list, or where the number of applications does not exceed the number of provisional incumbents by more than one, the applicant may submit a detailed statement from his or her supervisor describing the out-of-title duties performed and the reasons why it was necessary to perform such duties. A statement shall also be submitted from the appointing authority verifying the supervisor's statement and indicating interest in making an appointment from the resultant eligible list . . .
- (g) An appointing authority may request that the time requirements specified in (a) and (b) above be reduced to completion of the working test period if:
1. There is currently an incomplete promotional list and/or the number of employees eligible for examination will result in an incomplete list;
  2. It appears that vacancies to be filled within the duration of the promotional list will exceed the maximum number of eligibles that could result from examination; or
  3. Other valid reasons as determined by the Chairperson or designee.

The fact is that the COVID 19 Pandemic had a dramatic impact on Moorestown’s budget and operations.” In this regard, the Township indicates that in order to avoid “draconian options” such as furloughs or layoffs, Township Manager and Chief Financial Officer, Thomas Merchel, “with the approval of Moorestown Township Council, made a determination to . . . implement a temporary policy of not filling all open positions and not making any promotions in any department, including the police department, during the budget year 2020.” The Township further indicates that “Merchel made this decision known to all Department heads, including Chief Lieber . . . [and] was presented to and understood by Pascual’s union representatives during labor negotiations (who did not challenge the decision). The union’s only request was that Merchel authorize promotions and fill positions as soon as possible in the 2021 budget year. In response, Merchel agreed that he would consider doing so depending on the possible impact of the Pandemic on the 2021 budget.” The Township presents that “at the beginning of the 2021 budget year, Merchel assessed the situation and based upon an optimistic future with respect to newly available vaccines and therapeutics, informed department heads that they were able to begin filling open positions and making promotions. Consistent with Merchel’s representations, Pascual was promoted to Sergeant on January 22, 2021 (shortly after the first of the year).” The Township argues that Pascual “ignores two significant facts”:

First, Pascual ignores that the Township retains, under the clear and unequivocal terms of the applicable Collective Negotiations Agreement, the management prerogative to ‘hire all employees and subject to the provisions of law, to determine their qualification and conditions for continued employment, or assignment, and to promote and transfer employees and to make and modify work rules in connections therewith.’

Second, Pascual ignores that the Collective Negotiations Agreement agreed upon between his union and the Township specifically contemplated that Corporals (like him) may be required to ‘fill a Sergeant’s position’ for a lengthy period of time. In this regard, . . . the Collective Negotiations Agreement specifically addresses that issue . . .<sup>7</sup> Thus, while the Township exercised its management prerogative to have Pascual remain in the Corporal position in 2020, he was in fact paid the top Sergeant’s rate of pay.

The Township emphasizes that “neither the FOP nor Pascual challenged the Township’s emergent decision not to effectuate promotions in 2020, notwithstanding

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<sup>7</sup> The Township refers to the Collective Negotiations Agreement which provides, “A Corporal shall not be used to fill a Sergeant’s position for more than fourteen (14) shifts. In the event that the Sergeant is off for more than fourteen (14) shifts, the Township will either appoint a provisional Sergeant or begin to pay the Corporal at top Sergeant’s rate of pay . . .”

the fact that they had every right to do under the terms of the above-cited provision of the Collective Negotiations Agreement.” With respect to Walczak, the Township indicates that “Walczak (as the most senior Sergeant with an accomplished history of administrative competence and leadership) was being mentored by a retiring Lieutenant to serve as a Provisional Lieutenant pending another CSC examination.” The Township “determined internally” that “since there were only three interested eligible Sergeants for the Lieutenant’s position, that the Township would request a waiver of the competitive examination and appoint one of the three interested and eligible Sergeants to the position.” The Township indicates that “Lieber advised Pascual of that fact” and “at no time did Lieber or anyone else intend to permanently appoint Walczak or anyone else to the Lieutenant’s position using the ‘Rule of Three’ as argued by Pascual or to deprive Pascual of the position in favor of Walczak.” The Township notes that the Civil Service Commission denied the request and “the eligible and interested candidates must participate in the competitive examination process.”<sup>8</sup> The Township presents that “the public is entitled to expect that those appointed to critical leadership positions have the requisite experience to serve in that capacity. With respect to Pascual’s request that the Commission allow him to participate in the Lieutenant’s examination, the Township opposes that request for several reasons.” The Township explains that historically, employees in Moorestown have had at least 2 years’ experience in the rank of Sergeant before being promoted to Lieutenant. This level of experience is consistent with the [open competitive requirements for] Lieutenant which requires ‘two years of supervisory police experience involving the providing of protection of persons, the safeguarding of property, the observance of the law, and the apprehension of lawbreakers.’”<sup>9</sup> The Township adds that although Pascual acted as a Corporal, “he ‘filled in’ only occasionally when the Sergeant was unavailable and, as such, has not been deemed by the Chief of Police to have fulfilled the two-year requirement to be eligible to become a Lieutenant; nor is a waiver of eligibility appropriate.” In support of its response, the Township provides a certification dated October 5, 2021 from Thomas Merchel and a certification dated October 4, 2021 from Lee R. Lieber.

In a subsequent submission, filed on October 25, 2021, Pascual argues that Moorestown’s claim that his promotion to Sergeant was delayed due to the pandemic is pretextual as the Township “did not save money by not promoting Pascual until January 2021; rather, it cost them more money because they were

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<sup>8</sup>N.J.A.C. 4A:4-2.6(g) permits the time-in-grade requirement to be reduced to completion of the working test period. Such requests are at the discretion of the appointing authority, but may be denied by the Commission if the established regulatory provisions are not satisfied.

<sup>9</sup> It is emphasized that the subject announcement was open to title, *i.e.*, to those individuals who had an aggregate of one year of continuous permanent service in the Police Sergeant title as of the September 30, 2021 closing date. Thus, while two years of supervisory police experience is consistent with the open competitive requirements for the Police Lieutenant title, it was not a requirement in order to apply for the subject examination.

required by the Collective Bargaining Agreement to pay Pascual the top Sergeant's salary (because even they admit they were utilizing him as a supervisor from September 2020 until his promotion to Sergeant in January 2021 even though he was only ranked as a Corporal during that time) . . . [and] that there was no legitimate reason to deny waiver and allow Pascual to take the Lieutenant's exam." Pascual asserts that "the Chief, who wanted Wal[c]zak to become the next Lieutenant, took specific steps to delay Pascual's promotion, so that Wal[c]zak would be a shoe-in [*sic*]. And now in defense, Moorestown claims pretextually that there was an altruistic intent to save money due to the pandemic . . ." Pascual inquires, even assuming the Township's claims are accurate, "why then, did the Chief not waive Pascual to take the Lt. exam? If Pascual would have been eligible to take the Lieutenant's exam had he been officially promoted in September 2020, but was performing as a supervisor at a top Sergeant salary anyway from September to January[,] why then not allow him to take the Lieutenant exam? . . . The work he performed was the same as if he had been promoted in September." Pascual further argues that the Township's assertion that those individuals promoted to Police Lieutenant had at least two years of experience as a Police Sergeant "isn't the point, really, is it? Lieber ignores the fact that if Pascual had officially been promoted in September 2021, then he would quite simply have been eligible to take the Lieutenant's exam. After all, Pascual isn't now saying that he should and must get the promotion; rather he is saying based on the reality of facts, he should have been afforded the right to at least take the Lieutenant's exam." In support of his appeal, he provides affidavits from three retired Police Sergeants, Eric Rogers, James J. Dever and Richard L. Gunning, dated October 15, 14 and 21, 2021, respectively, who he notes "are retired supervisors of Pascual who attested to his experience, not only as an officer or a corporal, but as a supervisor who performed supervisory roles for years."

## CONCLUSION

At the outset, it is noted that *N.J.A.C.* 4A:2-1.1(b) provides that, unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. In the present matter, the appellant claims that he anticipated being promoted to Police Sergeant in September 2020 but was not appointed until January 2021. However, the appellant did not file an appeal regarding this issue until September 28, 2021, a year after his anticipated promotion date and eight months after his regular appointment date. It is further noted that *N.J.A.C.* 4A:3-3.4 specifies that no person shall be appointed or employed under a title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the assigned title which the employee holds. Although Pascual, as noted above, presents that "in 2016, he was promoted to the supervisory position . . . and has been performing his supervisory role since that time" and "doing supervisory work akin to a Sergeant," there is no evidence in

the record that the appellant requested an audit of his position following the provisions outlined in *N.J.A.C.* 4A:3-3.9.

It is further noted that although the appellant and the appointing authority refer to provisions pursuant to the collective bargaining agreement, it is noted that the Commission does not have jurisdiction to enforce or interpret procedures or other items which are contained in a collective bargaining agreement negotiated between the employer and the majority representative. *See In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div., May 8, 2001).

With regard to the appellant's contention that in the past, "individuals were promoted to open slots for Sergeant without delay," it is noted that there is no statutory or regulatory provision that requires an appointing authority to fill a vacancy or that an appointing authority cannot leave a position vacant. *See In the Matter of Gertrude Remsen, Department of Human Services*, A-1126-96T3 (App. Div., January 17, 1997). In this regard, the determination as to whether a vacancy exists and/or will be filled is generally left to the discretion of the appointing authority. *See In the Matter of Institutional Fire Chief* (MSB, decided January 12, 2005) (County that did not intend to fill the recently vacated position of Institutional Fire Chief not compelled by law to fill position and this agency recognizes discretion granted to local Civil Service jurisdictions to abolish positions for reasons of economy and efficiency); and *In the Matter of Todd Sparks* (MSB, decided April 6, 2005) (Even if a vacancy existed, there is no provision in Civil Service law or regulation that requires an appointing authority to fill a vacancy immediately upon its creation). *See also, In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). Furthermore, individuals whose names merely appear on a list do not have a vested right to appointment. *See In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984), *Schroder v. Kiss*, 74 *N.J. Super.* 229 (App. Div. 1962). 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). In the present matter, Moorestown explains that due to the impact of the pandemic on the Township's budget and operations, it determined to temporarily suspend filling all open positions and making promotions during the 2020 budget year. It is noted that the appellant does not claim or present evidence that any regular appointments to police promotional titles were made during this time. Moorestown further explains, as noted previously, that at the beginning of the 2021 budget year, the Township Manager and Chief Financial Officer determined to end the temporary suspension on filling vacancies and promotions and as a result, the appellant was appointed to the Police Sergeant title in January 2021.



Regarding the appellant's request that "out-of-title work to be applied to the time-in grade prerequisite," as indicated above, the subject examination was not announced with open competitive requirements but rather to title. As such, the appellant's reliance on *N.J.A.C. 4A:4-2.6(c)* is misplaced. In addition, for a promotional examination open to title, experience is considered only if it is gained in the requisite title. In this regard, it is noted that "Corporal" is not a Civil Service title. See *In the Matter of Robert Ponzetti* (MSB, decided November 24, 1998) (Officer in Charge is not an approved title in the Merit System and did not establish eligibility for Police Captain). See also, *In the Matter of William Rudderow* (MSB, decided February 8, 2006); *In the Matter of Brian L. Smith* (MSB, decided January 15, 2003); *Michael P. Redfield v. City of Jersey City*, Docket No. 86-3869 (D.N.J., January 23, 1989). Furthermore, even assuming arguendo that the appellant was, in essence, an "acting" Sergeant,<sup>10</sup> for promotional examination purposes, experience is considered only if it is gained in a recognized type of appointment. Experience acquired in an "acting" capacity is not recognizable, as this work is intermittent in nature and the duties performed are not the primary focus of the employee's permanent title. Moreover, individuals performing in an acting capacity do not perform all the duties of that position when their acting term is limited, such as when serving during a term of vacation or sick leave. See e.g., *In the Matter of Walter Furtney* (MSB, decided April 18, 2000), *aff'd on reconsideration* (MSB, decided September 26, 2000). In this regard, Moorestown explains that the appellant "filled in only occasionally when the Sergeant was unavailable."

With regard to the appellant's request to reduce the year in grade requirement to completion of the working test period pursuant to *N.J.A.C. 4A:4-2.6(g)*, as indicated previously, the subject announcement was issued, with the above noted year in grade requirement, on July 1, 2021. In *In the Matter of County Correction Captain (PC1189P) and County Lieutenant (PC1202P), Hudson County*, Docket No. A-2162-14T3 (App. Div. March 9, 2017), the court found that retroactively amending an announcement to the completion of the working test period was contrary to Commission regulations and was not a reasonable application of legislative policies. Given this, the Commission cannot consider such a request.

## ORDER

Therefore, it is ordered that the appeal and request be denied.

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

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<sup>10</sup> In this regard, as noted above, the appellant contends that he "was doing supervisory work akin to Sergeant" and Moorestown indicates that Corporals "may be required to 'fill a Sergeant's position' for a lengthy period of time."

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 29<sup>TH</sup> DAY OF JUNE 2022

*Deirdre L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

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