

2013 IL App (2d) 120518-U  
No. 2-12-0518  
Order filed February 20, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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LARRY THOMAS,	)	Appeal from the Circuit Court
	)	of Lake County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-CH-2614
	)	
POLICE CHIEF MICHAEL NEWSOME,	)	
CITY OF NORTH CHICAGO FIRE	)	
AND POLICE COMMISSION and	)	
its members, PETER BALMES, VELMA	)	
DICKER and NORMA HARRIS,	)	Honorable
	)	Luis A. Berrones,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Plaintiff challenged the trial court's interpretation of "vacancy" under section 10-2.1-15 of the Illinois Municipal Code, but the trial court was correct in looking to the municipality's local law to define the term. Local law required that the appropriate corporate authority provide notice to the Board of Fire and Police Commissioners of North Chicago for a vacancy to exist, and appellant presented no evidence of notice at the trial court level. Therefore, we affirmed the trial court's judgment in favor of defendants.

¶ 2 Plaintiff Larry Thomas appeals from the Lake County circuit court order in favor of defendants, Michael Newsome, the City of North Chicago Fire and Police Commission, Peter Balmes, Velma Dicker, and Norma Harris. Thomas was a sergeant for the North Chicago police department and was the lone remaining sergeant on the lieutenant promotional register when the Board of Fire and Police Commissioners of the City of North Chicago (Board) struck the register in November 2009. Thomas sought a declaration that defendants violated section 10-2.1-15 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/10-2.1-15 (West 2008)) when they struck his name from the register because a vacancy existed at the time he was struck. He also sought an injunction to enjoin promotional examinations and the posting of a new promotional register. The trial court denied both the declaratory relief and the injunction.

¶ 3 On appeal, Thomas contends that the trial court erred in its interpretation of “vacancy” under section 10-2.1-15 of the Municipal Code and that its decision was against the manifest weight of the evidence. For the reasons stated herein, we affirm the trial court’s judgment in favor of defendants.

¶ 4 I. BACKGROUND

¶ 5 The facts of this case are largely uncontested. Thomas is a police officer for the City of North Chicago. He was first hired as a patrolman on April 1, 1991, and was promoted twice, first to sergeant in January 2002 and then to master sergeant around June 2003. At the time of trial, Thomas still held the position of master sergeant.

¶ 6 On November 10, 2006, the Board posted a lieutenant promotional register for the North Chicago police department in accordance with Illinois law and the Board’s rules and regulations.<sup>1</sup>

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The Board is required by law to keep a register of eligible candidates for original appointment and for promotion to superior ranks of the police department. 65 ILCS 5/10-2.1-14 (West 2008).

The register contained three names: Crystal Phillips, George McLarey, and Thomas. The three candidates were ranked based on a promotional examination and other criteria, including seniority. Thomas ranked third on the November 2006 promotional register.

¶ 7 Some time after the November 2006 promotional register was posted, two lieutenant positions became available. The positions were filled by the respective promotions of Phillips and McLarey, leaving Thomas as the lone sergeant on the promotional register.

¶ 8 In September 2007, Lieutenant Pedrin retired from the North Chicago police department, leaving the city with four lieutenants. According to the City Code of North Chicago, the North Chicago police department “shall consist of the chief of the police department, two (2) deputy chiefs, five (5) lieutenants, seven (7) sergeants and forty six (46) patrol officers \* \* \*.” City Code of North Chicago § 3-1-1(B) (approved August 21, 2000). As the lone remaining sergeant on the active promotional register, Thomas would have been the only eligible candidate for promotion to fill the fifth lieutenant position with the city. Nonetheless, Thomas did not receive a promotion to lieutenant. Over a year and a half later in April 2009, Thomas wrote a letter to the mayor of North Chicago, inquiring as to the fifth lieutenant position. On May 4, 2009, the mayor wrote back to Thomas to inform him that the city had decided not to fill the lieutenant position created by the retirement of Lieutenant Pedrin. The mayor indicated the decision was made for budgetary reasons and was not a personal reflection on Thomas. The mayor said it was he who directed the police chief “not to promote anyone to the vacancies created by the retirement of Lieutenant Pedrin.”

¶ 9 Earlier that same year, on January 26, 2009, the North Chicago city council minutes showed that the council had removed a proposed amendment to the city ordinance reducing the number of

lieutenants by one and increasing the number of sergeants by one. The general corporate fund of North Chicago authorized five lieutenant positions for 2008 through 2010.

¶ 10 The names on the lieutenant promotional register were set to be struck on November 9, 2009, per Illinois statute. The applicable statute states: “The board shall strike off the names of candidates for promotional appointment after they have remained thereon for more than 3 years, *provided there is no vacancy existing* which can be filled from the promotional register.” (Emphasis added.) 65 ILCS 5/10-2.1-15 (West 2008). Indeed, on November 9, 2009, the Board struck Thomas from the promotional register. This information was communicated to Thomas via letter from an attorney representing the Board on February 9, 2010. The letter further communicated that the City of North Chicago governing body had determined not to fill the lieutenant position created by Lieutenant Pedrin’s retirement due to budgetary issues. Therefore, the lieutenant position did not currently exist, and because there was no vacancy on November 9, 2009, the Board properly struck Thomas from the promotional register in accordance with Illinois law. The Board planned to proceed with testing in order to create a new promotional register for the lieutenant position in the North Chicago police department.

¶ 11 Thomas filed this two-count action on May 11, 2010, seeking a declaratory judgment and an injunction against defendants. Thomas specifically sought a declaratory judgment that defendants failed to comply with section 10-2.1-15 of the Municipal Code when they struck his name from the promotional register in November 2009, an order to reinstate the promotional register, and a permanent injunction against the city to enjoin the process of testing and posting a new promotional register. The trial court entered a memorandum order on April 13, 2012, dismissing both counts with prejudice and denying orders declaring defendants violated Illinois law, reinstating the November

2006 promotional register, and enjoining the City of North Chicago from administering new promotional exams and posting a new promotional register. The trial court disagreed with Thomas that a vacancy existed for a North Chicago lieutenant's position when there were less than five active North Chicago lieutenants. Rather, the trial court looked to the Board's rules and regulations to determine whether a vacancy existed under section 10-2.1-15 of the Municipal Code. The trial court reasoned that the Board's rules and regulations required the appropriate corporate authority—whether that be the mayor, the police chief, or the North Chicago city council—to notify the Board of a vacancy, and Thomas presented no such evidence of notification to the Board. The trial court did not find the Board's rules to conflict with the city ordinance that established five lieutenant positions but rather found the ordinance merely established the maximum number of lieutenant positions the city may fill. The May 2009 letter from the mayor to Thomas made it clear to the trial court that “due to departmental needs and budgetary constraints the Lieutenant's position formerly held by Lieutenant Pedrin was not going to be filled so no notification of a vacancy was communicated to the Board, thus no vacancy existed.” Therefore, the trial court held that because there was no vacancy, the promotional register was properly struck pursuant to section 10-2.1-15 of the Municipal Code.

¶ 12 Thomas timely appealed.

¶ 13 II. ANALYSIS

¶ 14 A. Standard of Review

¶ 15 Before addressing the trial court's decision, it is necessary to establish the proper standard of review. In Illinois, the appropriate standard of review depends on (1) whether the case is civil or criminal and (2) whether the issue for review is an issue of law, fact, or a mixed issue of both. *Joel*

*R. by Salazar v. Board of Education of Mannheim School District 83*, 292 Ill. App. 3d 607, 612 (1997).

¶ 16 Appellant argues that we are faced with a mixed question of fact and law and should therefore apply a clearly erroneous standard of review, which is the standard of review appropriate for a mixed question of fact and law in a civil case. See *City of Belvedere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998) (applying a clearly erroneous standard to mixed questions of fact and law in the context of administrative review). He argues the clearly erroneous standard, which is between *de novo* review and an against the manifest weight of the evidence standard (*id.* at 205), applies because we must examine the legal effect of the given set of facts on the outcome of the case. However, we disagree that this case presents a mixed question of fact and law. A mixed question of fact and law arises when the “historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or whether the rule of law as applied to the established facts is or is not violated.” *Collins v. Retirement Board of Policemen’s Annuity & Benefit Fund of the City of Chicago*, 407 Ill. App. 3d 979, 983 (2011). On the other hand, if the issue is only a question of law, we apply a *de novo* standard, in which our review of the issue is fully independent of the trial court’s. *U.S. Steel Corp. v. Illinois Pollution Control Board, Illinois Environmental Protection Agency*, 384 Ill. App. 3d 457, 461 (2008).

¶ 17 Here we are faced squarely with a question of law. The facts are not disputed, but the interpretation of the law is. This case begins and ends with the trial court’s interpretation of the word “vacancy.” If we find that a vacancy under section 10-2.1-15 of the Municipal Code occurred when the number of active lieutenants fell below the number of lieutenants specified by North Chicago

ordinance, then the trial court clearly erred in finding for defendants. On the other hand, if a lieutenant vacancy exists only after the appropriate North Chicago corporate authority acts to notify the Board of a lieutenant vacancy—for which no evidence was supplied in the trial court—the trial court should be affirmed. The question is not how the established facts apply to established law; the question is how to establish the definition of “vacancy” as used in section 10-2.1-15 of the Municipal Code. As “[t]he construction of a statute is a question of law that [a] court reviews *de novo*” (*Mashal v. City of Chicago*, 2012 IL 112341, ¶ 21 (2012)), we apply a *de novo* standard of review.

¶ 18 B. Interpretation of Law—The Meaning of “Vacancy”

¶ 19 Thomas argues as follows. The controlling law to interpret when a “vacancy” occurs is the North Chicago ordinance stating the “police department shall consist of \*\*\* five (5) lieutenants \*\*\*.” City Code of North Chicago § 3-1-1(B) (approved August 21, 2000). Lieutenant Pedrin’s retirement left the city with only four lieutenants, and a lieutenant vacancy automatically resulted because the city was required by ordinance to have five lieutenants. This conclusion is evidenced and supported by the minutes from the January 26, 2009, North Chicago city council meeting, where a proposed amendment to the ordinance reducing the number of lieutenants was removed from consideration. Defendants therefore violated section 10-2.1-15 of the Municipal Code when they struck Thomas from the register because a vacancy existed at the time the Board struck the promotional register, and the Board shall only strike the register “provided there is no vacancy existing which can be filled from the promotional register.” 65 ILCS 5/10-2.1-15 (West 2008). Thomas was the only remaining officer on the promotional register because the two officers ahead of him on the register had already been promoted to a lieutenant position. Additionally, the

promotional register freezes when a vacancy occurs. Therefore, as Thomas was the lone remaining officer on the lieutenant promotional register and because the register “froze” upon the vacancy created by Lieutenant Pedrin’s retirement, the city is required by Illinois law to fill the vacant lieutenant position with Thomas when it fills the position. Finally, the mayor had no authority to declare whether a vacancy existed or not; the question of whether a vacancy exists or not is controlled solely by the North Chicago ordinance.

¶ 20 Thomas relies on *James Stover v. Board of Fire & Police Commissioners of the City of O’Fallon*, 291 Ill. App. 3d 784 (1997), for the proposition that a promotional register freezes once a vacancy occurs. In *Stover*, the defendant board administered new promotional examinations to the plaintiff-lieutenant and another lieutenant to create a new promotional register for the rank of captain, even though the captain vacancy that the plaintiff sought as a promotion occurred while the plaintiff was on the original register but the other lieutenant was not. *Id.* at 786-88. In support of there being an antecedent vacancy, the plaintiff presented a letter from the board acknowledging its authority to fill the vacant position. *Id.* at 787. The trial court ordered the defendant board to promote plaintiff because the new tests had occurred after the captain vacancy was created, and the date the vacancy occurred was the “logical point in which a promotional list is frozen.” *Id.* at 788. The appellate court affirmed the trial court, holding that once a vacancy occurs, new names may not be added to the promotional register. *Id.* at 792. The appellate court reasoned that section 10-2.1-15 of the Municipal Code, which instructs the striking of names from the promotional register after three years unless a vacancy is available at that time, indicates that a municipality should not conduct promotional tests and add names to the promotional register when there is an eligible officer already on the register at the time the vacancy occurs. *Id.*



¶ 21 Thomas also cites *Hammer v. City of Peoria Board of Fire & Police Commissioners*, 196 Ill. App. 3d 306 (1990), to bolster his interpretation of section 10-2.1-15 of the Municipal Code. Thomas argues that *Hammer* is consistent with *Stover* in that, per section 10-2.1-15, the Board must promote the eligible officer currently on the promotional register when a vacancy occurs before the time the register is to otherwise expire under Illinois law.

¶ 22 Although Thomas is correct that *Hammer* and *Stover* generally agree on an interpretation of section 10-2.1-15, he fails to recognize a salient difference between the two cases: in *Stover* the court found a vacancy to exist and in *Hammer* the court did not. See *Stover*, 291 Ill. App. 3d at 793 (explicitly recognizing the difference in *Hammer*). The *Hammer* court dealt with a similar situation to this case. The plaintiffs in *Hammer* were the top two candidates on the 1982 lieutenant promotional register for the Peoria police department. *Hammer*, 196 Ill. App. 3d at 307. The plaintiffs contended that there was a vacancy at the time their names were struck from the register; the defendant denied any vacancy existed, arguing that the city had the authority to establish a vacancy but had not done so. *Id.* at 308-09. Addressing the application of section 10-2.1-15 to its case, the appellate court framed the dispositive question as “when does a vacancy exist which can be filled from the promotional register.” (Internal quotation marks omitted.) *Id.* at 309.

¶ 23 To answer this question, the court looked to the Peoria City Code to define “vacancy.” *Id.* Section 28-4 of the Peoria City Code provided that the City of Peoria Board of Fire and Police Commissioners shall not fill vacancies or make promotions within the police department until a request by the police superintendent is approved by the city manager. *Id.* Not only had the city manager in *Hammer* declined to authorize a promotion of an officer to the rank of lieutenant, but he also had expressed an intention to reduce the number of lieutenants in the police department. *Id.*

Under local law, therefore, no vacancy existed. Without any vacancy, the defendant board did not violate section 10-2.1-15 of the Municipal Code when it struck the plaintiffs' names from the Peoria promotional register, and the trial court's judgment for the defendants was affirmed. *Id.*

¶ 24 In this case, defendants are correct that *Hammer*, not *Stover*, is dispositive. As in *Hammer*, we must first decide whether a vacancy existed at the time the Board struck Thomas's name from the promotional register. To rely on *Stover* puts the cart before the horse, skipping the critical issue of whether there was a lieutenant vacancy at all. As in *Hammer*, we look to local law to see whether a vacancy is defined, and if so, how.

¶ 25 The rules and regulations of the Board provide the basic procedure for a promotional vacancy. Rules and Regulations of the Board of Fire and Police Commissioners of the City of North Chicago § 4-1 *et seq.* (adopted November 1, 1995). Section five states: "Upon notice from the appropriate corporate authority that a promotional vacancy exists, the Board shall select the individual to be promoted in the manner specified in Section 1 of this Chapter IV." *Id.* § 4-5. Section one of Chapter IV restates much of section 10-2.1-15 of the Municipal Code, including, "[t]he Board shall strike off the names of candidates for promotional appointment after they have remained thereon for more than three (3) years, provided there is no vacancy existing which can be filled from the promotional register." *Id.* § 4-1. However, section one also adds that "[f]or the purpose of determining that a vacancy exists, the Board must have received notice from the appropriate corporate authorities to fill an existing vacancy prior to the date the name(s) are to be stricken from the promotional eligibility register." *Id.*

¶ 26 Here, as in *Hammer*, a separate corporate authority is required to notify the Board of a vacancy before a vacancy exists. Thomas, however, presented no evidence of any such notice to the

Board. Thomas argues that the mayor did not have the authority to declare whether a vacancy exists—authority that he argues the mayor claimed in his May 2009 letter to Thomas. This argument again misses the mark. We need not decide who the correct corporate authority to provide notice is. As the trial court correctly stated in its memorandum order, “[t]here was no evidence presented that the ‘appropriate corporate authority’ whether it be the Mayor, the Police Chief, or the North Chicago City Council ever communicated to the Board that a Lieutenant’s vacancy existed.”

¶ 27 Thomas ignores the Board’s rules and regulations and instead argues that the North Chicago ordinance stating that the police department shall consist of five lieutenants automatically creates a vacancy when there are less than five active lieutenants. This is incorrect. It is a general rule of statutory construction that when there are two statutory provisions, one of general applicability and one particular to the subject, the particular statute trumps the general. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 233 (2007). Furthermore, it is not even clear the statutes conflict. It is a reasonable interpretation of the ordinance that it merely authorizes the maximum amount of North Chicago lieutenants, whereas the Board’s rules and regulations explicitly and unambiguously speak to when a vacancy occurs.

¶ 28 Without evidence of corporate notice to the Board, Thomas cannot show a lieutenant vacancy existed. Without a vacancy, he cannot show the Board struck his name from the promotional register in violation of section 10-2.1-15 of the Municipal Code. Without a violation of section 10-2.1-15, there is no basis for a declaration that defendants failed to comply with the Municipal Code or to enjoin defendants testing of new officers and posting of a new promotional register.

¶ 29 As the facts are not in dispute and we resolve the sole issue of law—the interpretation of “vacancy”—against Thomas, their argument that the trial court’s decision was against the manifest

weight of the evidence is without merit. The problem for Thomas was not a balance of the evidence; it was a lack thereof. Accordingly, the trial court's order in favor of defendants is affirmed.

¶ 30

### III. CONCLUSION

¶ 31 Thomas claims that defendants acted in violation of section 10-2.1-15 of the Municipal Code because defendants struck his name off the promotional register while a vacancy existed. However, local law defines when a "vacancy" occurs, requiring notice from North Chicago corporate authorities to the Board that a vacancy exists. Thomas presented no evidence to the trial court of corporate notice to the Board that a lieutenant vacancy existed. This lack of evidence of notice is fatal to Thomas's case because without a vacancy, defendants could not have violated section 10-2.1-15 of the Municipal Code given the facts on the record. Accordingly, we affirm the judgment of the Lake County circuit court in favor of defendants.

¶ 32 Affirmed.