No. 09-2707

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF NEW JERSEY, *et al*.,

Defendants-Appellees

CHRISTOPHER SZCZYGIEL,

Appellant/Proposed Intervenor

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 42 U.S.C. 2000e-6(b) and 28 U.S.C. 1345. On June 8, 2009, proposed intervenor Christopher Szczygiel filed a notice of appeal of the district court's May 8, 2009, order denying intervention based on Szczygiel's lack of standing.

This Court has jurisdiction under 28 U.S.C. 1291 because this Court has

held that the denial of a motion to intervene is a final, appealable order. *McKay* v. *Heyison*, 614 F.2d 899, 903 (3d Cir. 1980); *United States* v. *Alcan Aluminum, Inc.*, 25 F.3d 1174, 1179 (3d Cir. 1994).

STATEMENT OF THE ISSUE

Whether the district court erred in denying appellant's motion to intervene.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This Court heard a prior appeal in this case in *United States* v. *State of New Jersey*, 832 F.2d 811 (3d Cir. 1987), which did not involve proposed intervenor/appellant Szczygiel. There are state proceedings that are related to this case. See *In the Matter of Kenneth C. Martinez*, Docket No. A-0090-07T2 and A-18760-08T2, Superior Court of New Jersey, Appellate Division.

STATEMENT OF THE CASE

1. Facts And Proceedings Below

a. 1980 Consent Decree

On October 4, 1977, the United States filed a complaint against the New Jersey Department of Civil Service and 12 municipalities alleging a pattern or practice of discrimination in the testing for, and appointments to, entry-level firefighter and promotional fire department positions in violation of Title VII, 42 U.S.C. 2000e, *et seq.*, and the State and Local Fiscal Assistance Act of 1972, 31

U.S.C. 1221-1264 (1976). *United States* v. *State of New Jersey*, Nos. 77-2054 & 79-184 (D.N.J.). The parties entered into a Consent Decree on May 30, 1980.

Under the Consent Decree, the City agreed to refrain from "discriminat[ing] against any [black or Hispanic] individual in hiring, assignment, training, discipline, promotion or discharge because of race, color, or national origin." A. 7.[1] The Consent Decree required, *inter alia*, that the "time-in-grade requirement for applicants for each fire department's first level supervisory rank, *i.e.*, Lieutenant or Captain, shall be no more than three years; the time-in-grade requirement for applicants for each higher rank shall be one year." A. 13. The Decree ended the United States' lawsuit challenging as discriminatory the State of New Jersey's selection process for firefighters. The district court "retain[ed] jurisdiction of the matters covered under [the] Consent Decree for * * * further relief or action * * * necessary or appropriate to effectuate the purposes of [the] decree." A. 15-16.

A supplemental Consent Order was agreed to by the parties, and entered by the Court, on November 7, 1990. The supplemental Consent Order resolved issues between the parties concerning the physical performance test for

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[1] "A. _" refers to pages in Appellant/Proposed Intervenor Szczygiel's Appendix filed with his opening brief on October 2, 2009. "S.A. _" refers to pages in the United States' Supplemental Appendix.

firefighters.

b. Szczygiel's Lawsuit Against The City And Passaic Fire Department

(i) Proceedings Related To Szczygiel's Unlawful By-Pass Lawsuit Against The City

Proposed intervenor Christopher Szczygiel (Szczygiel) began working for the Passaic Fire Department and the City of Passaic in December 1994. A. 19. In 2004, Szczygiel held the rank of Fire Lieutenant, and later was second on a promotion list for Captain. A. 19, 47. When vacancies in the Captain's rank were filled from the list in 2004, Szczygiel was by-passed and, he asserted, lower-ranked individuals were appointed instead. A. 47. Szczygiel challenged the City's decision to by-pass him by filing an appeal with the State Merit Systems Board (MSB) and a state lawsuit against the City (the "by-pass lawsuit"). A. 47. The administrative appeal to the MSB was held in abeyance pending the civil litigation in state court. A. 47.

In his state court complaint, Szczygiel alleged that he suffered retaliation and a hostile work environment from 2003 to 2004 following his decision not to file a false report and for testifying in a sexual harassment proceeding involving members of the fire department. A. 31-33. While the lawsuit was pending, Szczygiel was promoted to Fire Captain on April 11, 2005. A. 47.

(ii) Szczygiel Applies For Deputy Fire Chief Position

In December 2005, the City announced that a civil service examination would be administered for the position of Deputy Fire Chief. A. 47. The closing date for the Deputy Fire Chief examination was February 28, 2006. A. 47. The state's civil service laws require that applicants for Deputy Fire Chief must have served at least one year in permanent status as a Fire Captain as of the closing date in order to be eligible to sit for the Deputy Fire Chief examination. See N.J.A.C. 4A:4-2.6(a)(1) ("Applicants for promotional examination shall * * * [h]ave one year of continuous permanent service for an aggregate of one year immediately preceding the closing date in a title or titles to which the examination is open.").

Szczygiel applied to take the Deputy Fire Chief examination even though as of the examination's February 28, 2006, closing date, he had not served as a Fire Captain for a year. A. 47-48. The State Department of Personnel found that Szczygiel was ineligible because he did not meet the one-year time-in-grade requirement of N.J.A.C. 4A:4-2.6(a)(1). A. 47-48. He appealed his ineligibility determination to the MSB and, at his request, was conditionally admitted to take the examination. A. 47.

Szczygiel took the examination with others in March 2006, but his examination was not immediately scored. His name was not included on the

eligible list pending the outcome of his MSB appeal and the outcome of a lawsuit he had filed against the City challenging the delay in his appointment as a Fire Captain. A. 48. When the other examinations were scored, applicant Kenneth Martinez was ranked first among the eligible non-veterans who took the examination. See *In re Martinez*, 956 A.2d 386, 388 (N.J. Super. 2008). A promotional list reflecting that ranking, which listed Martinez as first, was promulgated by the State Department of Personnel on June 22, 2006. *Ibid*.

(iii) Szczygiel And City Enter Into Confidential Settlement Agreement

Szczygiel and the City entered into a confidential Settlement Agreement that settled his by-pass lawsuit against the City. A. 38. The State was not a party to that Settlement Agreement. Under the terms of the Settlement Agreement, the City agreed that Szczygiel's status as Captain be retroactive to June 25, 2004, for purposes of the Deputy Chief promotion. A. 39. The City also agreed that when Szczygiel's examination for Deputy Chief was graded, if he ranked first on the Deputy Fire Chief's list, the City would request that the list be certified and that the City would promote Szczygiel to the position of Deputy Fire Chief. A. 38. The Agreement stated that if Szczygiel did not score highest on the examination, any future promotion would be "in accordance with New Jersey Department of

Personnel Rules and Regulations and be within the sole administrative discretion of the City of Passaic Appointing Authority." A. 39. The City and Szczygiel also agreed that Szczygiel can enforce the Settlement Agreement, and that the Agreement would bar any future claims. A. 41-42. The City paid Szczygiel $250,000 in final satisfaction of his claims. A. 38.

(iv) Merit Systems Board Order Granting Szczygiel A Retroactive Date Of Appointment

Because the State and not the City determines who is eligible to take a promotional examination, and because the State had found Szczygiel unqualified to take the Deputy Fire Chief examination, the City petitioned the MSB to grant Szczygiel a retroactive appointment date to Fire Captain and to relax the civil service rules to admit Szczygiel to the Deputy Fire Chief examination he took on a conditional basis in March 2006, score his examination, and, if he passed, allow him to be ranked on the Deputy Fire Chief eligible list. A. 46, 48. On January 31, 2007, the MSB entered an order granting Szczygiel a retroactive date of appointment to Fire Captain of June 25, 2004, pursuant to the City's request. A. 47, 48; see also A. 46 (City of Passaic Mayor's Letter to Division of Merit System Practices and Labor Relations). The MSB also determined that while Szczygiel "did not meet the one-year-in-grade requirement as of the closing date, in light of

the agreement of the parties, the retroactive date of seniority and [Szczygiel's] service as a Fire Captain for the past one year and ten months, good cause exists to relax the provisions of N.J.A.C. 4A:4-2.6(a)(1)." A. 48. The MSB stated that under N.J.A.C. 4A:1-1.2(c), it may "relax a Department of Personnel rule for good cause in a particular situation." A. 48. The MSB further ordered that Szczygiel's examination be scored and that if he passed, his name be added to the eligible list. A. 49.

(v) Szczygiel Appointed Deputy Fire Chief

On February 1, 2007, the City's incumbent Fire Chief retired and he was replaced as Chief by Deputy Fire Chief Patrick Trentacost, thus creating a Deputy Fire Chief vacancy. See *In re Martinez*, 956 A.2d 386, 388 (N.J. Super. 2008). On February 2, 2007, Fire Chief Trentacost designated Martinez as "Acting Deputy Chief 'until further notice.'" *Ibid.* Martinez served as an Acting Deputy Fire Chief for about two months, but the City never made his promotion permanent. *Ibid.*

While Martinez was serving as an Acting Deputy Fire Chief, Szczygiel's examination was graded and his name was added to the Deputy Fire Chief list. Neither Martinez, then the highest ranking applicant on the test, nor any other candidates on the Deputy Chief promotional list, were notified of the confidential

settlement between the City and Szczygiel. *Martinez*, 956 A.2d at 389. Based on his score, and the MSB's order relaxing the one-year time-in-grade requirement, Szczygiel was ranked as the number one non-veteran eligible, having scored higher on the examination than Martinez. *Id.* at 390. The new Deputy Fire Chief list was certified on March 7, 2007, ranking Szczygiel as first on the list, and Martinez second. *Id.* at 391. On April 2, 2007, Szczygiel was promoted to the rank of Deputy Fire Chief of the Passaic Fire Department. *Ibid.*

c. Martinez Appeals City's Decision To Appoint Szczygiel Deputy Fire Chief Pursuant To The Terms Of The Settlement Agreement

(i) Martinez's Proceedings Before The MSB

Martinez appealed to the MSB the adding of Szczygiel's name to the Deputy Fire Chief list and the City's decision to promote Szczygiel over him. *Martinez*, 956 A.2d at 391. Martinez argued, *inter alia*, that MSB's waiver of the one-year time-in-grade requirement violated the terms of the 1980 Consent Decree in *United States* v. *New Jersey*, Nos. 77-2054 & 79-184 (D.N.J.). *Id.* at 391-392. Martinez contended that the City deviated from the terms of the Decree without permission from the Department of Justice. *Ibid*. The City opposed Martinez's administrative appeal. Szczygiel also participated in the appeal, and argued, *inter alia*, that Martinez lacked standing to attack his settlement with the City. *Id*. at

392.

On July 27, 2007, the MSB entered a decision denying Martinez's appeal. A. 50, 58. The MSB held that Martinez had standing under state law to challenge the City's decision to relax the one-year time-in-grade requirement, and thereby standing to challenge Szczygiel's eligibility to take the Deputy Fire Chief examination. A. 54-55. The MSB held, however, that Szczygiel's appointment should *not* be set aside because it is "solely within the appointing authority's discretion whether to defend its actions or to settle." A. 55. The MSB rejected Martinez's claim that the City was obligated to fill the Deputy Fire Chief position promptly when it became vacant in February 2007. A. 56. The MSB found that none of the individuals, including Martinez who had served as an "Acting" Deputy Fire Chief, had a "vested right to an appointment." A. 56.

The MSB found further "good cause" for relaxing the time-in-grade rules to Szczygiel's benefit, and held that there was no violation of the "Rule of Three" because "[Szczygiel] is the number one ranked eligible and no higher ranked eligibles [were] bypassed for appointment." A. 57. The MSB held that awarding Szczygiel additional service time at the Captain's rank and relaxing the one-year time-in-grade requirement did not violate the 1980 Consent Decree because good cause was found to relax the state civil service rules and "accept the time

[Szczygiel] served as a Fire Captain after the closing date to satisfy the one-year-in-grade requirement and make him eligible for the Deputy Fire Chief * * * examination." A. 57. Martinez appealed to the superior court of New Jersey.

(ii) Martinez's Proceedings In State Superior Court

On appeal, the superior court on September 30, 2008, entered a decision that affirmed in part and vacated in part the MSB's decision, and remanded the case to the MSB for further proceedings. *Martinez*, 956 A.2d 386 (N.J. Super. 2008). The superior court observed that a central facet of the state Civil Service Act is the "Rule of Three," which is set out under N.J.S.A. 11A:4-8. *Id.* at 394. This statute requires that after a civil service examination is administered by the Department of Personnel, the Commissioner "shall certify the three eligibles who have received the highest ranking on an open competitive or promotional list against the first provisional or vacancy." N.J.S.A. 11A:4-8; see *Martinez*, 956 A.2d at 394. "A certification that contains the names of at least three interested eligibles shall be complete and a regular appointment shall be made from among those eligibles." *Ibid*. (quoting N.J.S.A. 11A:4-8). The legislative objectives served by the Rule are to "ensur[e a]ppointments based on merit as determined by competitive examinations while [still] affording the appointing authority *some discretion to accommodate other merit criteria*." *Ibid.* (quoting *Gallagher* v. *Mayor and*

Council of the Town of Irvington, 463 A.2d 969 (N.J. Super. 1983)).

The superior court stated that despite Szczygiel's tenure "of only about ten months as Captain between April 2005 and the February 2006 exam closing date, the [MSB] found good cause to allow him to compete for the Deputy Chief position" because the City allegedly wrongfully delayed his progress from Fire Lieutenant to Fire Captain. *Martinez*, 956 A.2d at 395. The superior court stated that since the judicial system "strongly favors settlements," the City did not have to await a formal adjudication of the by-pass lawsuit to justify accommodating Szczygiel. *Ibid.* The superior court determined that Martinez "failed to show that the Board acted arbitrarily or capriciously in relaxing the service time requirement for Szczygiel." *Ibid*.

The superior court determined that questions remained as to whether the accommodation to Szczygiel violated the 1980 Consent Decree, "which remains in force today." *Martinez*, 956 A.2d at 396. The superior court noted that the Decree states that the one-year-in-grade requirement governs applicants for job titles above Fire Lieutenant or Fire Captain, and the 1980 Consent Decree "contains no exceptions to that mandate." *Ibid*. The superior court determined that the Decree does not appear to authorize a waiver of the service time requirement for good cause found under state law, and nothing suggests that the Department of Justice

would consent to a waiver of the requirement. *Ibid.* The superior court determined that the question of compliance with the 1980 Consent Decree "is best reserved for the Department of Justice and the United States District Court," as these issues "should be sorted out * * * in a federal tribunal." *Ibid.* The superior court thus affirmed the MSB's waiver of one-year time-in-grade requirement to Szczygiel under N.J.A.C. 4A:1-1.2, "without prejudice to the possibility that the United States may object to that disposition and seek appropriate remedies in federal court." *Martinez*, 956 A.2d at 397.

The superior court found problematic the aspect of Szczygiel's settlement that guaranteed he would receive the promotion to Deputy Chief "so long as he scored first on the promotional exam." *Martinez* , 956 A.2d at 397. The superior court noted that the MSB was not informed of the guarantee prior to its January 31, 2007, final determination in the matter, and that the guarantee was not disclosed to Martinez, "who had every right to expect when he applied for the job and sat for the examination that the normal selection process under the Rule of Three would be followed." *Ibid*. The superior court stated that the guarantee, which was tied exclusively to Szczygiel's test score, "deviate[d] from the Rule of Three's aim to include 'other merit criteria' in the selection process, independent of test scores." *Id.* at 397. The superior court determined that it could not enforce

the guarantee contained in the City's settlement, and thus "severed that provision from the settlement," leaving the remaining provisions of the Agreement enforceable. *Id*. at 397-398.

Following the superior court's decision, the Department of Justice wrote a letter to the City recommending that the City apply the one-year time-in-grade requirement of N.J.A.C. 4A:4-2.6(a)(1) to the Deputy Chief selection process, and stating that proper application of state law requirements complies with paragraph 7(b) of the 1980 Consent Decree. A. 59, 61-62. The United States stated in the letter that if the State "were to issue a certification for the Passaic Deputy Chief position that contains Mr. Szczygiel's name it would violate paragraph 7(b) of the Consent Decree." A. 61. The United States stated further that "[a]t no time has the United States agreed to waive the requirements of paragraph 7(b) with regard to this position." A. 61-62.

(iii) Remand Of Martinez's Proceedings To Merit Systems Board (Re-named Civil Service Commission)

On remand to the now state-Civil Service Commission (CSC) (formerly the MSB), the CSC entered an order on December 4, 2008, recognizing that the 1980 Consent Decree in the *United States* v. *New Jersey* case "applies to all levels of the fire department, including Deputy Fire Chief." A. 71. After stating that the CSC

has "inherent power to reconsider and modify prior decisions," the CSC reversed its prior decision to relax the one-year time-in-grade requirement for Szczygiel. A. 72-73.

The CSC observed that the one-year time-in-grade requirement in paragraph 7(b) of the Consent Decree "is consistent with N.J.A.C. 4A:4-2.6(a), which provides that applicants must meet certain criteria, including a one-year time-in-grade requirement, as of the closing date of the examination." A. 72. The CSC stated that "while Civil Service rules may be relaxed for good cause, the above term of the Consent Decree essentially precludes relaxation of the one-year-in-grade requirement found in N.J.A.C. 4A:4-2.6(a) for fire departments covered by the Consent Decree." A. 72. The CSC found further that

> [b]ased on longstanding use of these terms, the provision at issue does not allow for the year-in-grade to be satisfied *after* the closing date for applications. Since this rule cannot be relaxed, the only avenue to permit applicants not meeting the one-year-in-grade requirement to be admitted to examinations in these jurisdictions is to obtain a waiver from the Department of Justice. However, the Department of Justice has indicated that at no time has it agreed to waive the time-in-grade requirement.

A. 72. The CSC rejected Szczygiel's contention that the Department of Justice "waived its right to interfere by delaying its determination." A. 72-73.

The CSC ordered that Szczygiel's name be "removed from the Deputy Fire Chief * * * eligible list," that a "new certification for the Deputy Fire Chief title be

issued and that the City of Passaic utilize the 'rule of three' procedures in making an appointment." A. 73. The CSC ordered that the Deputy Chief appointment be made by December 14, 2008, and that once an appointment from the new certified list is made, "Szczygiel shall be returned to his permanent Fire Captain position." A. 73. Following the CSC's December 4, 2008, order removing his name from the Deputy Fire Chief eligibility list, Szczygiel moved the superior court to stay the CSC's decision. On December 12, 2008, the superior court granted Szczygiel's motion to stay "on the condition that one or more of the affected parties promptly bring an application to the federal court to obtain a merits disposition of whether the 1980 Consent Decree requires Szczygiel's removal." A. 75-76. The superior court imposed the stay to "preserve the status quo, and to avoid interim disruption within the Fire Department, pending the federal court's disposition." A. 76.

d. Szczygiel Requests To Intervene In United States *v.* New Jersey

On January 23, 2009, Szczygiel filed a Memorandum in Support of a Motion to Intervene in *United States* v. *New Jersey*.[2] S.A. 1. The United States opposed the arguments set out in Szczygiel's memorandum in support of intervention. S.A. 24. The State of New Jersey also opposed Szczygiel's request

[2] Szczygiel did not file either a complaint in intervention, a motion to intervene, or any accompanying pleading that sets out the claim or claims for which intervention is sought, as required by Federal Rule of Civil Procedure 24(c).

for intervention, contending that Szczygiel lacked standing to intervene. S.A. 16.

2. District Court's Order Denying Szczygiel Intervention

On May 9, 2009, the district court entered an order denying Szczygiel intervention. A. 2-5.

The district court stated that it was "unclear what relief Szczygiel is seeking through this motion as he, at several points in his motion papers, says he lacks standing to intervene." A. 4. The district court interpreted Szczygiel's motion to request "one of two types of relief: to deny his motion to intervene for lack of standing or on the grounds of abstention; or alternatively to permit him to intervene so he can establish that the 1980 Consent Decree no longer has force." A. 4. The district court determined that, "[a]s Szczygiel readily admits, he lacks standing to intervene." A. 4. Citing this Court's decision in *Antonelli* v. *State of New Jersey*, 419 F.3d 267 (3d Cir. 2004), the district court held that Szczygiel had no standing to intervene to enforce or challenge the 1980 Consent Decree, since he was not a party to it. A. 4. Szczygiel appealed.

STANDARD OF REVIEW

This Court reviews legal conclusions of standing *de novo*, and the underlying factual determinations for clear error. *Interfaith Cmty. Org.* v. *Honeywell Intern.*, *Inc.*, 399 F.3d 248, 253 (3d Cir. 2005), cert. denied, 545 U.S. 1129 (2005). The Court "reviews[s] the denial of a motion to intervene as of right for abuse of discretion." *United States* v. *Alcan Aluminum, Inc.*, 25 F.3d 1174, 1179 (3d Cir. 1994).

SUMMARY OF ARGUMENT

A. The district court correctly denied Szczygiel intervention on the ground that he lacked standing to intervene. Although the circuits are divided on the question whether Article III standing is required for intervention, standing should be required at least where, as here, there is no party with standing on the same side of the case as the applicant for intervention. As the district court correctly ruled, Szczygiel conceded that he lacks standing to intervene, and this Court's decision in *Antonelli* v. *New Jersey*, 419 F.3d 267 (3d Cir. 2005), compels the conclusion that he lacks standing to intervene in this litigation to argue that the 1980 Consent Decree should no longer have any force or effect.

B. Should this Court decide that Szczygiel does not need to establish Article III standing in order to intervene in this case, it should nevertheless affirm

the district court's judgment on the alternative ground that he fails to meet the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). This Court may affirm on any ground apparent from the record, even if the district court did not reach it. Szczygiel has no legally protected interest the Deputy Fire Chief position. Indeed, he obtained that position on the basis of a confidential Settlement Agreement with the City of Passaic that plainly violated the one-year time-in-grade provision of the Consent Decree. Because he has not alleged that the one-year requirement has denied him an employment opportunity on the basis of his race, or has deprived him of seniority rights, he has failed to demonstrate a legally protectable interest sufficient to justify intervention of right in this litigation.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DENIED INTERVENTION ON THE GROUND THAT SZCZYGIEL LACKS STANDING

In order to intervene, an applicant must have standing. See, *e.g.*, *Flying J, Inc.* v. *Van Hollen*, 578 F.3d 569, 571, 573 (7th Cir. 2009) (Posner, J.) (standing required for intervention); *United States* v. *Metropolitan St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009) ("In our circuit, a party seeking to intervene

must establish Article III standing in addition to the requirements of Rule 24.").[3] The district court correctly held that Szczygiel lacks standing to intervene in this action.

In holding that Szczygiel lacks standing, the district court first noted that he "readily admits [that] he lacks standing to intervene." A. 4. That finding is supported by the record. See, *e.g.*, S.A. 2 (Memorandum of Law in Support of Motion to Intervene By Christopher Szczygiel, at p. 2) ("Intervenor * * * has [no] standing to challenge the enforcement or non-enforcement of the consent Decree without consent to intervene for those purposes from the United States Department of Justice."); S.A. 11 (*id.* at 11) (since Szczygiel is not a party to the Consent Decree, he has no right to intervene to litigate the force and effect of the Decree).

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[3] But see, *e.g.*, *Purnell* v. *City of Akron,* 925 F.2d 941, 948 (6th Cir. 1991) (citing *United States Postal Serv.* v. *Brennan,* 579 F.2d 188, 190 (2d Cir. 1978)) (if there is a case or controversy between the existing parties, no need exists to require standing of an applicant for intervention). This Court has noted this circuit split, but has not yet ruled on the question. See *Greene/Guilford Envtl. Ass'n* v. *Wykle,* 94 F. App'x 876 (3d Cir. 2004). See also *Diamond* v. *Charles,* 476 U.S. 54, 68 n.21 (1986) (noting circuit split). The United States sees no principled basis for holding that proposed intervenors need not possess standing, particularly where, as here, there is no other party *on the same side of the case as Szczygiel* who possesses standing (*i.e.,* no party in the case is seeking to terminate the Decree). Cf. *San Juan County, Utah* v. *United States,* 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("[P]arties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case.") (internal quotation marks and citation omitted).

Second, the district court held that this Court's decision in *Antonelli* v. *New Jersey,* 419 F.3d 267 (3d Cir. 2005), compelled the conclusion that Szczygiel lacks standing to intervene. That conclusion, too, was correct.

Antonelli involved the the same consent decree that is at issue in this case. Pursuant to the 1980 and the 1990 supplemental consent orders, the defendants administered an examination in 1999, which non-minority individuals and their union claimed was administered and scored in a manner that violated their rights under the Equal Protection Clause. They also claimed that the parties to the decrees violated the decrees.

Of particular relevance here, the district court held that the plaintiffs lacked standing to *enforce* the consent decrees. See *Antonelli*, 419 F.3d at 272. This Court affirmed the district court's holding. In so ruling, the Court stated:

> The District Court correctly held that the Appellants do not have standing to enforce the Consent Decrees * * * because they were not parties to the Consent Decrees * * * , the Consent Decrees do not contemplate such action and the Appellants were not intended beneficiaries of [the decrees]. See *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 750 * * * (1975) ("A consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefitted by it."); *Cicirello* v. *New York Tel. Co.,* 123 F.R.D. 523, 526 (E.D. Pa. 1989) (indicating that it is necessary to look to the consent decree itself to see whether it contemplates enforcement by non-parties).

Id. at 273.

In this case, Szczygiel sought intervention to establish that his confidential Settlement Agreement with the City did not violate the Consent Decree. Perhaps recognizing that his confidential Settlement Agreement directly contravened the one-year time-in-grade requirement of the Consent Decree, Szczygiel sought intervention to argue that Consent Decree should no longer be accorded any force or effect. See, *e.g.,* S.A. 3 (Memorandum in Support of Motion to Intervene at p. 3) (intervention sought to establish that, "the underlying purposes of racial parity having been achieved in the Fire Department of the City of Passaic, * * * the Consent Decree is no longer a necessary injunctive mechanism for remediation of the deprivation of rights historically affected"); S.A. 15 (*id*. at 15) ("Intervenor should be permitted to establish the Consent Decree is of no force or effect to the underlying contract between the Intervenor and the City of Passaic."); S.A. 4 (*id.* at 4) (same); see also S.A. 64-65 (Szczygiel's Supplemental Letter Brief In Reply To Opposition To Motion To Intervene at pp. 20-21) (same).

Like the plaintiffs/appellants in *Antonelli,* Szczygiel is not a signatory to the Consent Decree, nor is he an intended beneficiary of the Decree. To be sure, plaintiffs/appellants in *Antonelli* were held to lack standing to *enforce* the decree. In this case, Szcyzygiel, in contrast, seeks to intervene to establish that the decree should no longer be in effect. But, just as the Consent Decree does not

contemplate *enforcement* by non-parties to the decree, see *Antonelli,* 419 F.3d at 273, neither does it contemplate *termination* by non-parties (see A. 15-16, providing for termination of the decree upon joint motion by the *parties*). Thus, the principles that motivated this Court's decision in *Antonelli* that the plaintiffs/appellants lacked standing to *enforce* the decree fully support the district court's conclusion that Szczygiel lacks standing "to intervene so he can establish that the 1980 Consent Decree no longer has force." A. 4. As the United States correctly argued below in its Memorandum in Opposition to Intervention, p. 10 n.6, since Szczygiel has conceded that he lacks standing to enforce the decree, he "also lacks standing to seek a modification to or termination of the consent decree." S.A. 33, n.6.

To be sure, the plaintiffs/appellants in *Antonelli* were necessarily determined to have standing to argue "whether New Jersey violated [their] rights under the Equal Protection Clause of the Fourteenth Amendment" in administering and scoring the 1999 examination. *Antonelli*, 419 F.3d at 273-274. But Szczygiel's intervention papers do not allege that any provision of the Consent Decree deprives him of any right protected by the Constitution or federal anti-discrimination laws. Rather, his intervention papers assert that "the Consent Decree has been arbitrarily and/or erroneously applied to deprive him of a

cognizable right, namely, his continued employment as a Deputy Fire Chief in the City of Passaic." S.A. 2 (Memorandum Of Law In Support Of The Motion To Intervene at p. 2). But Szczygiel has no right under either federal or state law to the Deputy Chief position. Indeed, his appointment to that position was accomplished by means of his confidential Settlement Agreement with the City of Passaic, which directly contravened a provision of the Consent Decree requiring a minimum of one-year time-in-grade before promotion to the Deputy Fire Chief rank, as well as State civil service law. Those provisions are wholly race-neutral. Szczygiel does not – and cannot – claim that the one-year requirement deprives him of equal protection or any other federally-protected employment right. Accordingly, the district court correctly determined that this Court's decision in *Antonelli* compels the conclusion that Szczygiel lacks standing to intervene in this litigation to challenge the continued effectiveness of the entire Consent Decree.

II

SZCZYGIEL DOES NOT HAVE A SUFFICIENT INTEREST IN THIS LITIGATION TO SATISFY THE REQUIREMENTS FOR INTERVENTION OF RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Even if this Court rules that applicants for intervention do not need to have standing, it should nevertheless affirm the district court's denial of intervention on

the ground that Szczygiel fails to meet the requirements of Federal Rule of Civil Procedure 24. The Court may affirm a judgment on grounds other than those relied upon by the district court. See, *e.g.*, *In re Mushroom Transp. Co.*, 382 F.3d 325, 344 (3d Cir. 2004) ("Of course, we may affirm the district court on grounds different from those relied on by the district court."); *Kabakjian* v. *United States,* 267 F.3d 208, 213 (3d Cir. 2001) ("We may affirm a judgment on any ground apparent from the record, even if the district court did not reach it.").

Federal Rule of Civil Procedure 24(a)(2) provides for intervention of right to anyone who "claims an interest relating to the * * * transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." As this Court's decisions make clear, it will examine the "impairment" element of Rule 24(a)(2) only after the applicant for intervention "has shown a protectable legal interest." *Liberty Mut. Ins. Co.* v. *Treesdale, Inc.*, 419 F.3d 216, 227 (3d Cir. 2005); see also *Brody* v. *Spang*, 957 F.2d 1108, 1122-1123 (3d Cir. 1992).

Szczygiel is not entitled to intervention as of right in this case because he has

no legal interest in the position of Deputy Fire Chief.[4] He asserted in the district court that he has "a sufficiently cognizable interest in the subject matter of this litigation [because he] has held the position of Deputy Fire Chief for nearly two years, has performed in an exemplary fashion in his position of deputy fire chief, all in reliance upon the settlement between [himself and] the City of Passaic." S.A. 61 (Szczygiel's Supplemental Letter Brief in Support of Motion to Intervene, p. 17). Those assertions, however, do not establish that he has a legal interest in the Deputy Fire Chief position. Indeed, as indicated, his appointment to that position was pursuant to an agreement with the City that plainly conflicted with the one-year time-in-grade requirement of the Consent Decree.

Szczygiel's lack of a protectable legal interest distinguishes this case from other federal employment discrimination cases in which intervention of right has been allowed. For example, *Brennan* v. *New York City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001), involved an action by the United States alleging employment discrimination by the New York City Board of Education and various City

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[4] Szczygiel not only fails to meet the substantive requirements of Rule 24, but also has failed to comply with the Rule's procedural requirements as well. As noted above (p. 16, n.2, *supra*), Szczygiel failed to file a complaint in intervention, or a motion to intervene, "stat[ing] the grounds for intervention and * * * accompanied by a pleading that sets out the claim or defense for which intervention is sought," as required by Rule 24(c).

officials. The parties reached a settlement agreement, and moved for a fairness hearing and approval by the district court. The agreement conferred certain employment rights on individuals who were African-American, Hispanic, Asian, or female. A group of incumbents moved to intervene pursuant to Rule 24(a)(2) to protect their employment status, particularly their seniority rights. The district court denied intervention on the ground that they had not asserted a cognizable interest under Rule 24, in part because they had no property right in their positions and because any adverse effect of the agreement upon them was remote and speculative.

The Second Circuit reversed, and directed the district court to permit the appellants to intervene. In so ruling, the court of appeals noted that the appellants had no property rights in their positions. *Brennan*, 260 F.3d at 130. The court went on to say, however, that Rule 24(a)(2) does not require a property interest; rather, it requires an interest in the property or transaction that is the subject of the litigation. *Ibid*. The court noted that the appellants claimed that the race-, ethnic-, and gender-conscious remedies constituted impermissible discrimination against them, and stated that "an adverse employment action based on race, ethnicity or gender is clearly illegal." *Id.* at 131. The court also noted that "seniority rights are for many purposes legally cognizable rights." *Ibid.* In so ruling, the court noted its

"agree[ment] with the caselaw in numerous other circuits holding that the kind of interest asserted by appellants here is cognizable under Rule 24(a)(2)." *Ibid.* All of the cases cited involved allegations of unlawful discrimination or impairment of seniority rights. See *id.* at 131-132.

Unlike the appellants in *Brennan*, or the applicants for intervention in the cases cited therein, Szczygiel does not contend that the Consent Decree discriminates against him because of his race or impairs his seniority rights. Rather, he contends that the one-year time-in-grade provision of the Decree improperly interferes with his agreement with Passaic, and seeks to intervene in order to demonstrate – not that the one-year requirement discriminates against him because of his race – but that the entire Consent Decree should be invalidated because it "no longer has any meaning or necessity for its originally intended purpose." S.A. 64 (Szczygiel's Supplemental Letter Brief in Support Of Motion To Intervene, p. 20). That interest, we submit, is plainly insufficient to satisfy the requirements of Rule 24(a)(2). [5]

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[5] Szczygiel's Brief as Appellant in this Court contains no argument that the district court abused its discretion in failing to grant him permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). Accordingly, that argument is waived. See, *e.g.*, *Laborers' Int'l Union of N. Am., AFL-CIO* v. *Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue

(continued...)

CONCLUSION

This Court should affirm the district court's denial of Szczygiel's request to intervene.

Respectfully submitted,

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[5](...continued)
. . . will not suffice to bring that issue before this court.") (internal quotation marks omitted).

CERTIFICATE OF COMPLIANCE

I certify that this Brief For The United States As Appellee complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7). This brief contains 6450 words, as calculated by the WordPerfect X4 word-count system. The typeface is Times New Roman, 14-point font.

I also certify that the electronic copy and hard copies of this brief are identical. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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CERTIFICATE OF SERVICE

I certify that on November 18, 2009, an electronic copy and ten hard copies of the Brief For The United States As Appellee were sent to the Court (hard copies via FedEx). I further certify that the following counsel of record are CM/ECF participants and will be served electronically:

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