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STATE OF NEW JERSEY

CIVIL SERVICE COMMISSION

In the Matter of Harry Tisch,
Program Support Specialist 1,
Assistance Programs (S2408N),
Statewide

Court Remand

CSC Docket No. 2017-2506

ISSUED: FEB 24 2017

(SLD)

The Superior Court of New Jersey, Appellate Division, reversed the Civil Service Commission's (Commission) decision to grant the Department of Human Services' (DHS) request for a waiver of the appointment requirement for the Program Support Specialist 1, Assistance Programs (S2408N), eligible list and remanded the matter for a hearing at the Office of Administrative Law (OAL). See *In the Matter of Harry Tisch, Program Support Specialist 1, Assistance Programs (S2408N), Statewide*, Docket No. A-5677-13T3 (App. Div. February 2, 2017). The court did not retain jurisdiction. Copies of the Appellate Division's decision and the Commission's decision, *In the Matter of Harry Tisch, Program Support Specialist 1, Assistance Programs (S2408N), Statewide* (CSC, decided July 15, 2014), are attached hereto and incorporated herein.

The facts of this matter are thoroughly discussed in the attached decisions. In the Commission's previous decision, it granted DHS' request for an appointment waiver for the January 4, 2013 certification for Program Support Specialist 1, Assistance Programs (S2408N). In doing so, the Commission noted that the employee who had been serving provisionally in the subject title since February 1, 2010, was appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2013, which the appointing authority had determined to be a more appropriate title for the duties the employee performed in that position. The Commission also noted that the job specifications revealed that an individual in the title of Information Technology Specialist performed different duties than an individual in the title of Program Support Specialist 1, Assistance Programs. Furthermore, the Commission found that given the disparity in job

duties and salary level, there was no evidence that DHS appointed the employee to the Information Technology Specialist title in an attempt to circumvent appointing Tisch, the number one-ranked veteran on the list, based on his veteran's status.¹ The appellant appealed that decision to the Appellate Division. The Appellate Division found that the Commission erred in granting the appointment waiver. Specifically, it found that the record was devoid of evidence pertaining to an alleged fiscal constraint suffered by DHS which would support its request for a waiver of the appointment requirement. Therefore, the Appellate Division questioned whether DHS' actions were merely to keep an ineligible candidate in a job that was governed by civil service. It also noted that upon the employee's appointment to Information Technology Specialist, her salary went from \$71,598 to \$71,698,² which it found "did not on its face suggest that the DHS was facing any fiscal constraints with respect to either title – indeed the opposite inference may be drawn." Moreover, the Appellate Division stated that "whether the two positions [at issue] are in fact separate and distinct is of small consequence." However, it found that the record below was undeveloped, and as such it was unable to determine whether DHS' actions were undertaken as part of an effort to sidestep the civil service rules and law. Consequently, the Appellate Division vacated the Commission's decision, with regard to the appointment waiver, and remanded the matter for a hearing and the effectuation of an appropriate remedy in the event DHS' actions are unsustainable.

CONCLUSION

In accordance with *N.J.S.A. 11A:4-5*, once the examination process has been initiated due to the appointment of a provisional employee or due to an appointing authority's request for a list to fill a vacancy, the appointing authority must make an appointment from the resulting eligible list if there are three or more interested and eligible candidates. The only exception to this mandate may be made for a valid reason *such as* fiscal constraints. In its initial decision, the Commission found that based on the disparity in job duties and salary level between the titles of Program Support Specialist 1, Assistance Programs and Information Technology

¹ However, the Commission denied the appellant's appeal of his non-appointment from the subject eligible list. Specifically, it noted that on an open-competitive certification, a veteran was only entitled to an appointment when an appointing authority made a regular appointment and since no appointment was made, Tisch's veteran's preference was irrelevant in determining whether an appointment waiver should be granted. The Commission also determined that it was not appropriate, at that time, to assess costs. Subsequently, in *In the Matter of Program Support Specialist 1 Assistance Programs (S2408N), Statewide* (CSC, decided April 15, 2015) the Commission assessed costs of the selection process in the amount of \$8,285 since neither DHS nor another State appointing authority had utilized the subject eligible list, by its expiration date.

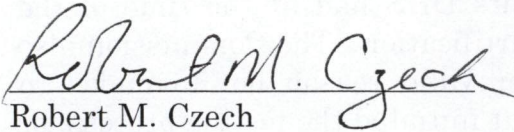
² Agency records indicate that, effective January 26, 2013, the employee's salary as a Program Support Specialist 1, Assistance Programs was \$75,200.21. Upon the June 29, 2013 appointment to the Information Technology Specialist title, the employee's salary was decreased to \$70,988.79. The employee then received an across the board increase which increased her salary to \$71,698.74, effective July 13, 2013.

Specialist, there was no evidence that DHS appointed the employee to the Information Technology Specialist title in an attempt to circumvent appointing Tisch based on his veteran's status. However, the Appellate Division did not agree. Rather, it has determined that a hearing is necessary to appropriately develop the record to determine what, if any, fiscal constraints DHS had at the time of the issuance of the subject eligible list and resulting certification. The Commission also notes that, along with fiscal constraints, another valid reason not to make an appointment from a list is if the vacant position that initiated the testing process for a specific title was initially misclassified and should have been filled using another title within the State Classification Plan. In other words, since the examination process in this case was initiated by a provisional appointment, it is assumed the position was properly classified as Program Support Specialist 1, Assistance Programs. However, given DHS' representation that the duties of the position were more closely aligned with the title of Information Technology Specialist, this assumption may not be valid. The examination itself must fairly test the Knowledge, Skills and Abilities (KSA) associated with the duties of the position. Thus, if the test that was called for was based on a position that was initially misclassified, use of the resulting eligible list makes little sense. Therefore, an important factor in the ultimate determination in this matter is also the appropriate original classification for the position encumbered at the time of the provisional appointment and subsequent appointment of the provisional employee to Information Technology Specialist. If the duties of the initial position were consistent with a Program Support Specialist 1, Assistance Programs classification, and continued to be so, clearly the appointment waiver would not be justified absent a clear showing of fiscal constraints. However, if the duties of the position were never consistent with a Program Support Specialist 1, Assistance Programs classification, or evolved and were not appropriate duties at the time DHS moved the employee to the title of Information Technology Specialist, the grant of the appointment waiver would have been appropriate even in the absence of fiscal constraints. Therefore, it is appropriate to remand this matter for a hearing in order for the parties to have the opportunity to present evidence on the above-noted issues and for an Administrative Law Judge to evaluate such evidence and assess the credibility of the parties. Therefore, in accordance with the Appellate Division's decision, the Commission grants a hearing at the OAL.

ORDER

Therefore, it is ordered that this matter be referred to the OAL for a hearing as a contested case.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22ND DAY OF FEBRUARY, 2017



Robert M. Czech
Chairperson
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and
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c: Harry Tisch
Denise Meckel
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Kelly Glenn
Beth Wood w/file

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5677-13T3

IN THE MATTER OF HARRY
M. TISCH, PROGRAM SUPPORT
SPECIALIST 1 ASSISTANCE
PROGRAMS (S2408N).
STATEWIDE.

Submitted February 3, 2016 – Decided February 2, 2017

Before Judges Koblitiz and Kennedy.

On appeal from the New Jersey Civil Service
Commission, Division of Appeal and
Regulatory Affairs, Docket No. 2014-1495.

Harry M. Tisch, appellant pro se.

John J. Hoffman, Acting Attorney General,
attorney for respondent New Jersey Civil
Service Commission (Melissa H. Raksa,
Assistant Attorney General, of counsel;
Pamela N. Ullman, Deputy Attorney General,
on the brief).

PER CURIAM

Harry M. Tisch, appellant, appeals a final agency action of the Civil Service Commission, granting a request by the Division of Human Services (DHS) for an appointment waiver from the January 4, 2013 certification for Program Support Specialist 1, Assistance Programs, and denying his request for appointment

from the certification. For reasons stated later in this opinion, we reverse and remand, in part, and we affirm, in part.

The facts are not contested. Tisch is a Vietnam-era veteran. On June 12, 2012, Tisch and one hundred and fourteen other qualified applicants undertook a written examination for the title of Program Support Specialist 1, Assistance Programs, within the DHS. The examination had been required because the DHS had provisionally appointed H.M. to the title on February 1, 2010. The examination resulted in a list of seventy-three certified eligible candidates on January 3, 2013, with Tisch as the number one veteran's preference applicant. H.M. had applied to take the examination, but had been deemed ineligible.

The DHS thereafter failed to act upon the certification until early June 2013, when Tisch was summoned for an interview. After being interviewed, Tisch received an email from a DHS representative dated June 6, 2013, inquiring if he was "interested" in the position with a starting salary of \$65,890.76. Tisch said he was interested in the job.

Tisch later learned that on June 29, 2013, the DHS transferred H.M. to the non-competitive title of Information Technology Specialist. Moreover, by letter dated July 2, 2013, the DHS notified all the eligible candidates in the certification that the position of Program Support Specialist 1

was not being filled due to "fiscal restraints." Shortly thereafter, the DHS requested the Civil Service Commission to approve its request for an "appointment waiver" respecting the certified list, citing "fiscal constraints" and stating that no one was at that time serving "provisionally" in the subject title.

Tisch then appealed his non-appointment, and objected to the DHS request for an appointment waiver. The Civil Service Commission held that the June 6, 2013 email was not a "bona fide offer of employment" and that the statutory veterans' preference did not create an entitlement to appointment; but rather, only applies when an appointing authority makes a "regular appointment."

As to the appointment waiver, the Civil Service Commission held that Tisch had not presented any evidence to support his argument that the DHS had "attempt[ed] to circumvent" the requirements of the Civil Service Act, and that the DHS had presented "sufficient justification" for its appointment waiver.

Tisch subsequently sought reconsideration of the determinations of the Civil Service Commission, but the request was denied. This appeal followed.

We consider the Board's final decision through the prism of a limited standard of appellate review. "An administrative

agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)).

As the Supreme Court noted in Herrmann, "[t]hree channels of inquiry inform the appellate review function." Id. at 28. The reviewing court must first consider "whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law[.]" Ibid. (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)). Second, the court must assess "whether the record contains substantial evidence to support the findings on which the agency based its action[.]" Ibid. (quoting Mazza, supra, 143 N.J. at 25). Third, the court should evaluate "whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Ibid. (quoting Mazza, supra, 143 N.J. at 25). "When an agency's decision meets [these] criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." Ibid. (citing In re License Issued to Zahl, 186 N.J. 341, 353 (2006); Brady v. Bd.

of Review, 152 N.J. 197, 210 (1997); Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)).

As we explained in Borough of Fanwood v. Rocco, 59 N.J. Super. 306, 315-19 (App. Div.), aff'd, 33 N.J. 404 (1960), not every agency decision is entitled to the same degree of deference, or any deference at all. When an agency head applies a purely legal standard to decide a question of law, we apply the same standard of review as we apply to legal determinations by trial courts. Id. at 315. When an agency head decides a disputed question of fact, if "the evidence is not there, no amount of 'discretion' can supply the deficiency" and we reverse. Id. at 317. "The third and last of the classes into which we have chosen to divide the cases for the purpose of this analysis is that in which the appeal to the [agency head] is from action taken by the local agency which involved the local agency's discretion." Ibid. In this latter class of cases,

When there is an appeal to this court from the action of the [agency head] in cases involving the exercise of municipal discretion, we take into consideration and give due weight to the fact that the [agency head] has special expertness and broad experience in this general field. But our obeisance to that expertness and experience is not equally deep in all cases. It depends upon the issues in each case. If the case is one which he is plainly better equipped than we are to decide, because of his expertness, knowledge and experience, we naturally defer to his judgment. In some cases that

deference would be almost to the point of considering his judgment conclusive. On the other hand, where the issues are such that we can evaluate them as well as he, we do not defer to his expertness to the same degree.

[Id. at 319 (citations omitted).]

Now, with these principles as our guide in the case before us, we initially turn to the Commission's ruling with respect to the appointment waiver as it pertains to the January 3, 2013, list of eligible applicants. The statute governing appointment waivers, N.J.S.A. 11A:4-5, provides:

Once the examination process has been initiated due to the appointment of a provisional or an appointing authority's request for a list to fill a vacancy, the affected appointing authority shall be required to make appointments from the list if there is a complete certification, unless otherwise permitted by the commission for valid reason such as fiscal constraints. If the commission permits an appointing authority to leave a position vacant in the face of a complete list, the commission may order the appointing authority to reimburse the commission for the costs of the selection process

The DHS had offered its concern for "fiscal constraints" as the sole justification for its decision not to make the required appointment from the list. We must view its request, and the Commission's acceptance of its proposal, from the perspective of the purposes underlying the Civil Service legislation.

The New Jersey Constitution reaffirms our long-standing commitment that appointments and promotions in the Civil Service shall be made "according to merit and fitness." N.J. Const. art. VII, § 1, ¶ 2. The 1986 reform of the Civil Service Act (Act) recognizes that commitment. For the selection and appointment of civil-service employees, the Commissioner must administer examinations that "test fairly the knowledge, skills and abilities" required to perform the task of a given job classification. N.J.S.A. 11A:4-1(a). Those examinations "may include, but are not limited to, written, oral, performance [tests] and evaluation of education and experience." Ibid. On the basis of such tests, the Commissioner establishes an "eligible list." Once the Commissioner has certified an eligible list, an appointing authority must make its appointments from the list. N.J.S.A. 11A:4-5.

Although administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review. Administrative agencies must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Van Holten Grp. v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990) (quoting Crema v. Dep't of Env'tl. Prot., 94 N.J. 286, 301 (1983)). When the absence of particular

findings hinders or detracts from effective appellate review, the court may remand the matter to the agency for a clearer statement of findings and later reconsideration. In re Howard Sav. Inst., 32 N.J. 29, 53 (1960).

Vacancies in the civil service, as we noted, are filled by promotional examination, N.J.S.A. 11A:4-2, which the Commissioner is authorized to announce and administer. N.J.S.A. 11A:4-1(a). The examination process is triggered by either the appointment of a provisional to a civil service position or the appointing authority's request for a list to fill a vacancy. N.J.S.A. 11A:4-5. Based on the outcome of the examination, along with other factors, the Commissioner provides for the establishment, certification, and cancellation of eligible lists of candidates. N.J.S.A. 11A:4-4. Once the examination process has been initiated and there is a complete certification, the appointing authority is required to make appointments from the list, in accordance with the "rule of three"¹ "unless otherwise permitted by the Commissioner for valid reason such as fiscal

¹ The "rule of three" requires that the appointing authority make the appointment from the eligible list if there are three or more interested and eligible candidates, and appoint one of the top three interested eligibles. N.J.S.A. 11A:4-8; N.J.A.C. 4A:4-4.8. The "rule of three" "is intended to guarantee the appointing authority an opportunity to exercise minimal discretion in the selection of particular employees." Nunan v. N.J. Dep't of Pers., 244 N.J. Super. 494, 497 (App. Div. 1990), certif. denied, 126 N.J. 335 (1991).

constraints." N.J.S.A. 11A:4-5. In other words, it is only under certain limited circumstances that the Commissioner may grant the appointing authority a waiver of the requirement to make the appointment from the eligible list and, therefore, leave the position vacant in the face of a complete list.

The Administrative Code implements the statutory directive and provides that an appointing authority may:

for valid reasons such as fiscal constraints, petition the Commission for permission not to make a permanent appointment. The Commission may grant such petition, but may order the appointing authority to reimburse the Commission for the costs of the selection process. . .

[N.J.A.C. 4A:10-2.2(a)2.]

Now, in the case before us, the Commission granted DHS's request for a waiver of appointment ostensibly because of an alleged fiscal constraint. However, the record is devoid of any evidence pertaining to the alleged fiscal constraint. Further, when we consider the individual circumstances of the DHS's actions in this matter and its decision to leave the position of Program Support Specialist 1 vacant in the face of a complete and certified list, we question whether the DHS had ever acted to address a fiscal crises at all, and whether it was acting to keep an ineligible candidate, H.M., in a job that is governed by civil service.

In this case, we note that H.M. had served provisionally as a Program Support Specialist 1 for over three years before her inappropriate continuance in that job mandated the calling of a competitive examination. She was ineligible to even sit for that examination, yet she remained a provisional in the title until June 29, 2013, when the DHS determined that it did not need a Program Support Specialist and removed her from that title and employed her as an Information Technology Specialist, at an annual salary of \$71,698. Her prior salary of \$71,598 as a Program Support Specialist 1 does not on its face suggest that the DHS was facing any fiscal constraints with respect to either title -- indeed the opposite inference may be drawn.

These circumstances suggest that the DHS may have acted in violation of both express and implied legislative policies underlying Civil Service laws. Those policies dictate that appointments and promotions in the civil service be made according to merit and fitness, measured as far as practicable by competitive examination. Whether the two positions of Program Support Specialist and Information Specialist are indeed functionally equivalent or not, is, under these circumstances irrelevant to the question of the existence of a fiscal constraint. Indeed, here, the DHS's fiscal condition provides no justification for a waiver of appointment to a position that

is essentially occupied by a provisional who has remained in the title for well over the one-year period allowed by law, N.J.S.A. 11A:4-13(b), to the preclusion of those eligible candidates who legitimately qualified for the position through competitive examination. Consequently, whether the two positions are in fact separate and distinct is of small consequence.

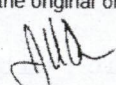
Of course, the problem here is that the record below does not allow a finding either way. There is, for instance, no proof of the duties performed by H.M. in each position. As the record stands, DHS's facially suspect action in changing H.M.'s job title within six months after the Department certified the complete list of eligibles for the former position remains unexplained and, worse yet, unjustified. This undeveloped record has prevented us, in this instance, from determining whether the DHS had good cause, such as a "fiscal constraint" to justify its request for an appointment waiver, and, more disturbingly, whether its actions were undertaken as part of an effort to sidestep the civil service system here in New Jersey. Therefore, we reverse the Commission's grant of an appointment waiver for the position of Program Support Specialist 1 and we remand for a hearing and determination consistent with our opinion, and the effectuation of an appropriate remedy in the event the DHS's actions herein are unsustainable.

We agree with the Commission's determination that the DHS interview of Tisch and its later communication with him did not give rise to a binding contract of employment. We also affirm the Commission's determination that, on the record developed to date, Tisch is not entitled to be hired by the DHS as a matter of law.

As the Commission noted, there is no constitutionally-vested right to appointment to a civil service position simply because of placement on the eligible list, and that Tisch is not automatically entitled to the position of Program Support Specialist 1 merely because of his eligibility ranking. Nunan, supra, 244 N.J. Super. at 497. He is, however, entitled to the assurance that, so long as the list remains in force, no appointment will be made except from that list. In re Crowley, 193 N.J. Super. 197, 210 (App. Div. 1984). He is also entitled to be dealt with fairly.

Affirmed, in part, and reversed and remanded, in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

B36



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Harry Tisch,
Program Support Specialist 1,
Assistance Programs (S2408N),
Statewide

Request for Reconsideration

CSC Docket No. 2014-1495

ISSUED: JUL 16 2014

(SLD)

Harry Tisch, represented by Steven W. Griegel, Esq., requests reconsideration of the attached final administrative decision, rendered on October 16, 2013, which denied his appeal of his non-appointment and granted the Department of Human Services' (DHS) request for a waiver of the appointment requirement for the Program Support Specialist 1, Assistance Programs (S2408N), eligible list.

By way of background, DHS provisionally appointed Hope Morante, pending open-competitive examination procedures, to the title of Program Support Specialist 1, Assistance Programs, effective February 1, 2010. As a result of the provisional appointment, an examination was announced with a closing date of November 23, 2011. Although Morante applied, she was deemed ineligible. The resulting eligible list of 73 eligibles promulgated on January 3, 2013 and expires on January 2, 2015. It is noted that Tisch was the first ranked veteran eligible. The appointing authority took no action to obviate the need for the examination at the time of the announcement or prior to the administration of the examination. By letter dated July 2, 2013, the appointing authority notified all eligibles, including Tisch, that it had decided not to fill the position "due to fiscal restraints," and that their names would be retained for future certifications. Thereafter, the appointing authority requested an appointment waiver. The appointing authority's request was acknowledged and it was advised that if its request were granted, it could be assessed for the costs of the selection process in the amount of \$8,285. The appointing authority argued that its request should be granted due to fiscal constraints and since no one was serving provisionally in the subject title. In this

regard, it noted that Morante was appointed to the more appropriate non-competitive title of Information Technology Specialist, effective June 29, 2013. Additionally, it maintained that it intended to utilize the eligible list, when a vacancy occurs, and a hiring freeze exemption has been approved.

On appeal to the Civil Service Commission (Commission), Tisch argued that the appointing authority failed to act upon the subject certification until the beginning of June 2013, at which time he was requested to come in for an interview. Tisch claimed that he appeared for the interview and "in the interim" on June 6, 2013, he claimed to have received an e-mail in which he was asked if he was interested in the position at a salary of \$65,890.76. Tisch maintained that he returned the e-mail, by fax, with a copy of his military information and a response on the bottom of the e-mail. In support, he submitted the June 6, 2013 e-mail, with his hand written comment, which indicated in part, that he was "Looking forward to an interview, hopefully next week." Tisch claimed that this e-mail was proof that he was initially offered the position; however, without a start date. He argued that after he complained to the Division of Classification and Personnel Management (CPM), he was immediately informed that he was not going to be hired because the position had been eliminated. Tisch maintained that the appointing authority's failure to hire him, and its subsequent elimination of the position was done "spitefully" because he questioned the delay in his hiring. Tisch also argued that due to his veteran's preference, the appointing authority's request for an appointment waiver should be denied. In this regard, he asserted that he passed the test and if an appointment waiver was granted, then the entire purpose of the Civil Service system was moot. Moreover, Tisch maintained that he was told that the position had been eliminated, not that the appointing authority was requesting an appointment waiver.

Based on the foregoing, the Commission initially noted that *N.J.S.A. 11A:5-6, N.J.A.C. 4A:4-4.8(a)3i and N.J.A.C. 4A:5-2.1* provide that, whenever a disabled veteran or veteran is certified from an open competitive list *and a regular appointment is to be made*, the appointing authority shall first appoint disabled veterans and then veterans in the order of ranking. Therefore, on an open-competitive certification, a veteran is only entitled to an appointment when an appointing authority makes a regular appointment. *See In the Matter of Alan Gatto, Budget Analyst 3 (S0958L), Statewide (CSC, decided July 27, 2011).* Since no appointment was made in the instant matter, the Commission determined that Tisch's veteran's preference was irrelevant in determining whether an appointment waiver should be granted. In granting the appointment waiver, the Commission noted Morante had been appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2013, which the appointing authority had determined to be a more appropriate title for the duties Morante performed in her position. The Commission also noted that the job specifications revealed that an individual in the title of Information Technology Specialist performed different

duties than an individual in the title of Program Support Specialist 1, Assistance Programs. Furthermore, the Commission found that given the disparity in job duties and salary level, there was no evidence that DHS appointed Morante to the Information Technology Specialist title in an attempt to circumvent appointing Tisch based on his veteran's status.¹

In the instant matter, the petitioner argues that the Commission erred in finding that he was not entitled to the position and granting the appointing authority's appointment waiver request. In this regard, he asserts that he was not "treated fairly" as required by the Appellate Division's decision in *In the Matter of Code Enforcement Officer (M00410), Jersey City, et al.*, 349 N.J. Super. 426 (App. Div. 2002), because a provisional employee was kept in the position he was entitled to for three years. Moreover, he maintains that Morante's provisional appointment violated N.J.S.A. 11A:4-13(b), which provides that a provisional appointment may not exceed 12 months. The petitioner asserts that if this agency had moved with "any sort of proper speed," his rights would not have been violated. Moreover, the petitioner reiterates that the request for an appointment waiver was made immediately after his interview, wherein he was asked if he would accept a certain salary, at which point it became impossible to delay his appointment any longer. He maintains that the Commission ignored this obvious fact and accepted at face value that there were "fiscal" reasons for the appointment waiver request. The petitioner also claims that after he had requested an extension to file the instant request for reconsideration, he received a notice that the position was cancelled. Therefore, he maintains that this "coincidence" is more evidence that he was treated unfairly. Furthermore, the petitioner maintains that since the "position" was "cancelled," he wants "proof" that the costs of the selection process have been paid.

Additionally, the petitioner notes that the Appellate Division, in *Code Enforcement Officer, supra*, stated that it was a violation to "rotat[e] [provisional employees] through similar positions in circumvention of [civil service] appointment requirements." Therefore, he asserts that since the Commission noted that Morante was moved to a title that was "more appropriate for the duties performed" by her, the Commission should have found that the appointing authority had circumvented the civil service system. Moreover, the petitioner argues that the titles of Program Support Specialist 1, Assistance Programs and Information Technology Specialist are completely different titles, and therefore, he does not understand how the appointing authority can claim that Morante was appointed to a title more appropriate to her duties. Furthermore, the petitioner argues that the fact that the Information Technology Specialist title is a non-competitive title, is more evidence that her appointment was inappropriate.

¹ The Commission also determined that it was not appropriate, at that time, to assess costs since the appointing authority indicated that it hoped to utilize the subject eligible list, and that the eligible list was a Statewide list, thereby finding that utilization by DHS or another appointing authority was probable.

The petitioner also argues that the Commission made an error in interpreting the facts. Specifically, he asserts that although the Commission noted that Morante was appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2013, it later noted that she was appointed to that title on June 29, 2012. He maintains that the Commission then used the incorrect 2012 date to make the finding that "there are no employees serving provisionally in the subject title." The petitioner argues that if the Commission had realized that the title was not vacated until after the certification, the Commission's determination would have been different, since the appointing authority's actions would have been much more obvious. The petitioner also argues that Morante had failed to meet the requirements to be appointed to the subject title, which she had held provisionally, in violation of *N.J.S.A. 11A:4-13(b)* which requires that provisional appointees meet the requirements for the position.

Finally, the petitioner argues that the Commission erred in accepting the "fiscal" excuse for granting the appointment waiver request since it was "obviously" pretextual. In this regard, the petitioner asserts that based on his foregoing arguments, it is obvious that the appointing authority manipulated the system and there were no "fiscal" reasons for the request. Specifically, he notes that Morante's salary in the subject position was \$72,097, however, her salary as an Information Technology Specialist was only \$400 less, or \$71,698.74. Therefore, it is clear that Morante "was not moved and [the petitioner's] job was not cancelled for financial reasons." Accordingly, the petitioner requests a hearing, his immediate appointment to the subject position, and any other relief that is available.

In response, the appointing authority relies on the Commission's previous decision.

CONCLUSION

Initially, the petitioner requests a hearing in this matter. Requests for reconsideration are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. The instant request for reconsideration appears to be based on the assertion that the

Commission made an error by denying the petitioner's appeal of his non-appointment. However, a review of the record in the instant matter reveals that reconsideration is not justified. In this regard, the petitioner has failed to provide any documentation which establishes that the Commission's decision was contrary to the evidence presented. Instead, the petitioner merely reiterates his prior arguments and claims that the Commission made an error in noting Morante's appointment date to the title of Information Technology Specialist in the conclusion. However, the Commission does not agree that a typographical error as to Morante's appointment date in its conclusion warrants reconsideration. In this regard, the petitioner acknowledges that Morante's appointment date was correctly noted earlier in the decision. The petitioner appears to disregard this fact and claims that without this error, the Commission would have not stated that no provisionals was serving in the subject title and would have denied the appointment waiver request. However, the Commission did not base its conclusion that there were no provisionals serving in the subject title with the appointing authority on Morante's appointment date to Information Technology Specialist. Rather, it was based on the fact that agency records indicated that, at the time of the Commission's decision, there were no provisionals serving in the subject title with the appointing authority.

Additionally, the Commission does not agree that the Appellate Division's decision in *Code Enforcement Officer (M00410)*, *supra*, requires reconsideration. In this regard, the facts in this matter are not analogous. Specifically, in that matter Jersey City had appointed over 40 individuals provisionally to the dual title of Code Enforcement Officer/Program Monitor shortly before the M00410 eligible list promulgated, with at least one appointment occurring after the promulgation of that eligible list. Jersey City then changed the provisionals' titles to Code Enforcement Officer and sometime later Jersey City changed the provisionals' titles back to Code Enforcement Officer/Program Monitor. Moreover, the former Merit System Board (Board) did not act until after the eligible list had expired, although provisionals continued to serve in the title. The Appellate Division noted that although the Board found that Jersey City had circumvented its rules, by changing the provisionals' titles to a title that was substantially similar and provisionals were still serving at the time of Jersey City's request for an appointment waiver, the Board approved the request for an appointment waiver. However, in the instant matter, the Commission did not find that the appointing authority was attempting to circumvent its rules. In this regard, although Morante was appointed to a non-competitive title of Information Technology Specialist, the appointing authority asserts that that title was more appropriate to the duties she performed and, as noted by the petitioner, individuals in the two titles perform significantly different duties, whereas in *Code Enforcement Officer (M00410)*, the individuals in the titles of Code Enforcement Officer/Program Monitor and Code Enforcement Officer performed substantially the *same* duties. Therefore, there is no evidence that the appointing authority in the instant matter was attempting to circumvent

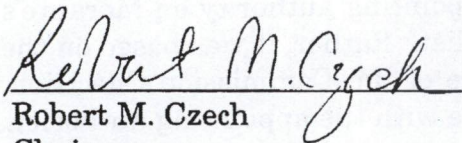
Civil Service law or rules. Accordingly, the petitioner has failed to present a sufficient basis for reconsideration of the Commission's prior decision.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JULY, 2014


Robert M. Czech
Chairperson
Civil Service Commission

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Attachment

c: Harry Tisch
Steven W. Griegel, Esq.
Antoinette Sargent
Joseph Gambino



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Harry Tisch,
Program Support Specialist 1,
Assistance Programs (S2408N),
Statewide

Appointment Waiver Request
Administrative Appeal

CSC Docket No. 2014-188 and
2014-345

ISSUED: **OCI 17 2013** (SLD)

The Department of Human Services (DHS) requests permission not to make an appointment from the January 4, 2013 certification for Program Support Specialist 1, Assistance Programs (S2408N). Harry Tisch appeals his non appointment from the subject certification and challenges the request for an appointment waiver. Since these matters concern similar issues, they have been consolidated herein.

The record reveals that DHS provisionally appointed Hope Morante, pending open-competitive examination procedures, to the title of Program Support Specialist 1, Assistance Programs, effective February 1, 2010. As a result of the provisional appointment, an examination was announced with a closing date of November 23, 2011. One hundred and fifteen applicants, including Tisch, were admitted to the written examination which was held on June 12, 2012. Although Morante applied, she was deemed ineligible. The resulting eligible list of 73 eligibles promulgated on January 3, 2013 and expires on January 2, 2015. It is noted that Tisch was the first ranked veteran eligible. The appointing authority took no action to obviate the need for the examination at the time of the announcement or prior to the administration of the examination. By letter dated July 2, 2013, the appointing authority notified all eligibles, including Tisch, that it had decided not to fill the position "due to fiscal restraints," and that their names would be retained for future certifications.

Thereafter, the appointing authority requested an appointment waiver. The appointing authority's request was acknowledged and it was advised that if its

request were granted, it could be assessed for the costs of the selection process in the amount of \$8,285. The appointing authority argues that its request should be granted due to fiscal constraints and since currently no one is serving provisionally in the subject title. In this regard, it notes that Morante was appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2013. Specifically, the appointing authority asserts that it determined that the title of Information Technology Specialist was a more appropriate title for the duties performed by Morante in her position. Additionally, it asserts that it intends to utilize this eligible list, when a vacancy occurs, and a hiring freeze exemption has been approved. Therefore, it requests that the costs of the selection process be waived pending the expiration of the subject eligible list.

On appeal, Tisch argues that the appointing authority failed to act upon the subject certification until the beginning of June 2013, at which time he was requested to come in for an interview. Tisch claims that he appeared for the interview and it went well. Moreover, "in the interim" on June 6, 2013, he claims to have received an e-mail in which he was asked if he was interested in the position at a salary of \$65,890.76. Tisch maintains that he returned the e-mail, by fax, with a copy of his military information and a response on the bottom of the e-mail. In support, he submits a June 6, 2013 e-mail from a Personnel Assistant with the appointing authority which states:

Please contact me at . . . regarding the subject certification in which you replied interested. We would like to know if you are interested in this position with a starting salary of \$65,890.76.

Tisch's hand written comment on the bottom of the e-mail indicates in part that he was "Looking forward to an interview, hopefully next week." Tisch claims that this e-mail is proof that he was initially offered the position; however, without a start date. He argues that after he complained to the Division of Classification and Personnel Management (CPM), he was immediately informed that he was not going to be hired because the position had been eliminated. Tisch maintains that the appointing authority's failure to hire him, and its subsequent elimination of the position was done "spitefully" because he questioned the delay in his hiring.

Tisch also argues that due to his veteran's preference, the appointing authority's request for an appointment waiver should be denied. In this regard, he asserts that he passed the test and if an appointment waiver is granted then the entire purpose of the Civil Service system is moot. Moreover, Tisch asserts that he was told that the position had been eliminated, not that the appointing authority was requesting an appointment waiver. He maintains that the reason for his non-appointment can only be one or the other but it cannot be for both reasons.

A review of personnel records indicates that Maronte was appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2013. It is noted that there are currently no employees serving provisionally in the title of Program Support Specialist 1, Assistance Programs with the appointing authority.

A review of the job specification for Program Support Specialist 1, Assistance Programs (salary range R27) reveals that an individual in that title supervises the work of a professional unit responsible for performing activities to maintain, monitor and/or implement client services/assistance programs or maintains, monitors and/or implements a complex client services/assistance program; and acts as a liaison between the agency and other public and/or private organizations. A review of the job specification for Information Technology Specialist (salary range P21) reveals that an individual in that title assists in at least one of the following areas: the design and preparation of least complex operation routines and computer programs for electronic data processing equipment utilizing required and current software, operating systems, and multiprogramming technology; the control and/or implementation/maintenance of highly technical operating systems associated with new generations of computers to function toward optimum utilization of available hardware/software using comprehensive knowledge of the operating system function; and the development, implementation, and maintenance of multi-network, multi-user Local Area Networks (LAN), Metropolitan Area Networks (MAN), and/or Wide Area Networks (WAN), maintenance of centralized, decentralized and remote network services, network security, data integrity, network performance monitoring, network problems resolution, and user support.

CONCLUSION

Initially, Tisch argues that he was given an offer of employment, based on the June 6, 2013 e-mail, and therefore must be appointed. However, the Civil Service Commission (Commission) does not agree that Tisch was given an offer of employment. Rather, based on Tisch's response to the June 6, 2013 e-mail, it is clear, that the salary amount was provided to candidates to determine their interest in the position. In this regard, Tisch's response to the June 6, 2013 e-mail clearly indicates that he is "looking forward to an interview." Thus, it is unreasonable to conclude that a *bona fide* offer of employment was made.

With regard to Tisch's argument that the appointing authority's request for an appointment waiver should not be granted because he possesses veteran's preference, the Commission notes that *N.J.S.A. 11A:5-6*, *N.J.A.C. 4A:4-4.8(a)3i* and *N.J.A.C. 4A:5-2.1* provide that, whenever a disabled veteran or veteran is certified from an open competitive list *and a regular appointment is to be made*, the appointing authority shall first appoint disabled veterans and then veterans in the order of ranking. Therefore, on an open-competitive certification, a veteran is only entitled to an appointment when an appointing authority makes a regular

appointment. See *In the Matter of Alan Gatto, Budget Analyst 3 (S0958L), Statewide* (CSC, decided July 27, 2011). Since no appointment was made in the instant matter, Tisch's veteran's preference is irrelevant in determining whether the appointment waiver should be granted.

In accordance with *N.J.S.A. 11A:4-5*, once the examination process has been initiated due to the appointment of a provisional employee or due to an appointing authority's request for a list to fill a vacancy, the appointing authority must make an appointment from the resulting eligible list if there are three or more interested and eligible candidates. The only exception to this mandate may be made for a valid reason such as fiscal constraints.

In the instant matter, the examination for the subject title was generated as a result of the provisional appointment of Morante. After a complete certification was issued, the appointing authority requested an appointment waiver since Morante had been appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2012. Specifically, the appointing authority indicated that the title of Information Technology Specialist was more appropriate for the duties performed by Morante's position. As noted above, the job specifications reveal that an individual in the title of Information Technology Specialist performs different duties than an individual in the title of Program Support Specialist 1, Assistance Programs. Moreover, personnel records reveal that there are no employees serving provisionally in the subject title. Finally, although Tisch argues that the request for the appointment waiver was made to spite him, he provides no evidence in support. Moreover, given the disparity in job duties and salary level, there is no evidence that DHS appointed Morante to the Information Technology Specialist title in an attempt to circumvent appointing Tisch based on his veteran's status. Accordingly, based on the foregoing, the appointing authority has presented sufficient justification for the appointment waiver.

Although the appointment waiver is granted, both *N.J.S.A. 11A:4-5* and *N.J.A.C. 4A:10-2.2(a)2* state that if an appointing authority receives permission not to make an appointment, it can be ordered to reimburse the costs of the selection process. While administering examinations and providing the names of eligible job candidates to the jurisdictions under the Civil Service system are two of the primary activities of this agency, these costly efforts are thwarted when appointing authorities fail to utilize the resulting eligible lists to make appointments and candidates have needlessly expended their time, effort and money to take these examinations in hopes of being considered for a permanent appointment. However, the Civil Service Commission notes that the subject eligible list, which is valid for all State departments that utilize the subject title, does not expire until January 2, 2015. Moreover, the appointing authority asserts that it will attempt to utilize the list prior to its expiration. Thus, utilization by this appointing authority or another appointing authority is probable. Accordingly, under the particular circumstances

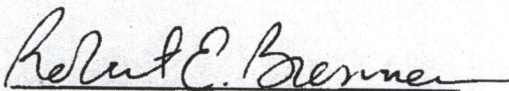
of this matter, it would not be appropriate to assess the appointing authority for the costs of the selection process at this time. *See e.g., In the Matter of Supervising Administrative Analyst (PS1837I), Department of Corrections* (MSB, decided March 22, 2006) (Not appropriate to assess the Department of Corrections for the costs of the selection process since it had indicated its intention to utilize the eligible list prior to its expiration date). Nevertheless, in the event that the appointing authority, or another appointing authority, fails to utilize the list by its expiration date, this matter can be reviewed to ascertain whether an assessment for the costs of the selection process should be made. *See e.g., In the Matter of Supervising Administrative Analyst (PS1837I), Department of Corrections* (MSB, decided April 11, 2007) (Costs assessed upon the expiration of the eligible list since the Department of Corrections failed to utilize the eligible list and there was no evidence that it had even attempted to utilize the eligible list).

ORDER

Therefore, it is ordered that the request for the waiver of the appointment requirement be granted and no selection costs presently be assessed. It is also ordered that Tisch's appeal be denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16TH DAY OF OCTOBER, 2013



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Presiding Member

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c: Harry Tisch
Antoinette Sargent
Kenneth Connolly
Beth Wood

of the matter, it is not to be anticipated that the Commission will be able to complete its work by the end of the calendar year. It is, however, the Commission's intention to submit a report to the House of Representatives by the end of the year. The Commission is also planning to hold a series of public hearings on the matter in the near future. It is hoped that these hearings will provide an opportunity for the public to express its views on the matter. The Commission is also planning to hold a series of public hearings on the matter in the near future. It is hoped that these hearings will provide an opportunity for the public to express its views on the matter.

CONCLUSION

It is the Commission's intention to submit a report to the House of Representatives by the end of the year. The Commission is also planning to hold a series of public hearings on the matter in the near future. It is hoped that these hearings will provide an opportunity for the public to express its views on the matter.

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FOR THE COMMISSIONER
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