



STATE OF NEW JERSEY

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

In the Matter of Helen Austerlitz,
Board of Public Utilities

Administrative Appeal

CSC Docket No. 2017-3781

ISSUED: APRIL 2, 2018 (ABR)

Helen Austerlitz, an Administrative Assistant 3 with the Board of Public Utilities (BPU), requests a retroactive appointment to January 9, 2017, based on an administrative error.

By way of background, the petitioner was permanently appointed to the title of Technical Assistant 3 by the Department of the Treasury (Treasury), effective January 26, 2015. The petitioner subsequently took the open competitive examination for Administrative Assistant 3 (S0633T), achieved a passing score and was ranked as a non-veteran on the subsequent eligible list, which promulgated on August 4, 2016 and expires on August 3, 2019. Thereafter, a certification (OS160544) from the subject eligible list, containing six names, was issued to the BPU on August 8, 2016 with a disposition due date of November 8, 2016. The petitioner was listed in the sixth position and reachable for appointment. The Division of Agency Services (Agency Services) subsequently extended the disposition due date to January 8, 2017. However, agency records indicate that the certification was not returned to Agency Services until March 6, 2017. The petitioner began working for the BPU on January 9, 2017, performing the duties of an Administrative Assistant 3. The BPU subsequently learned that her appointment to the title of Administrative Assistant 3 had not been approved, because it had failed to secure the requisite hiring freeze exemption from the Office of the Governor and Agency Services. On February 7, 2017, the BPU secured the necessary approval from the Office of the Governor to appoint the petitioner to the subject title. On March 24, 2017, the disposition of the August 8, 2016 certification was recorded, indicating the petitioner's appointment to the subject title with the

BPU, effective February 18, 2017, the date approved by Agency Services. No other appointments were made from the subject certification. However, it is noted that the petitioner has been performing the duties of an Administrative Assistant 3 with the BPU since January 9, 2017.

On appeal, the petitioner argues that she should receive differential back pay to January 9, 2017, the date she began her employment with the BPU. She asserts that she should not be penalized for the BPU's error, as she began performing the duties of an Administrative Analyst 3 with the BPU in good faith on January 9, 2017 based upon the BPU's December 13, 2017 offer of employment. She submits that while she performed the duties of an Administrative Assistant 3 with the BPU, she continued to receive the salary of her former title of Technical Assistant 3 through the Treasury until she was placed on the BPU's payroll with her correct pay, effective February 18, 2017. The petitioner submits a copy of the BPU's December 13, 2017 offer of employment.

In response, the BPU confirms that, due to an administrative error, it failed to secure the requisite hiring freeze exemption approval until after the petitioner began working for it on January 9, 2017. The BPU explains that it mistakenly believed that it did not need approval from the Office of the Governor because a certification had been issued. It maintains that it did not learn of the mistake until January 13, 2017, when Agency Services advised it that a freeze exemption was required. The BPU submits that it requested a hiring freeze exemption from the Office of the Governor on January 17, 2017, which was approved on February 7, 2017. Subsequently, Agency Services approved the petitioner's appointment, effective February 18, 2017. The BPU states that it thereafter requested this agency's approval to provide the petitioner with back pay from to January 9, 2017 to her appointment date. However, its request was denied because it was for a period prior to the date that the Office of the Governor approved the subject appointment. The BPU does not state a position regarding the petitioner's request for a retroactive appointment.

Agency records indicate that Austerlitz has successfully completed her working test period as an Administrative Assistant 3.

CONCLUSION

N.J.A.C. 4A:4-1.10(c) provides that, when a regular appointment has been made, the Commission may order a retroactive appointment date due to administrative error, administrative delay or other good cause. Generally, this unique remedy has been reserved for two particular situations. First, the Commission has granted retroactive permanent appointment dates in circumstances in which an employee was actually serving in and performing the duties of a title, but due to some error or other good cause, his attainment of

permanent status was delayed or hindered. The second situation in which an employee may be awarded a retroactive date of permanent appointment is where the name of an employee, whose appointment would have otherwise been mandated, was improperly removed from or bypassed on an eligible list, thereby preventing their appointment. When the Commission subsequently corrects the improper list removal or bypass, the Commission also orders the employee's appointment and a retroactive permanent appointment commensurate with the date on which others were appointed from the certification of the eligible list. See *In the Matter of Neil Layden* (MSB, decided March 23, 2005); *In the Matter of Ciri Castro, Jon Martin, and Luis Sanchez* (MSB, decided January 12, 2005).

N.J.A.C. 4A:4-4.8(b) provides, in relevant part, that an appointing authority shall notify the Civil Service Commission of the disposition of the certification by the disposition due date in the manner prescribed by the Chairperson or designee. In State service, the report of disposition of the certification shall include:

1. the name of the eligibles to be permanently appointed;
2. the effective date of the requested permanent appointments;

4. In situations where an appropriate list is used, the title and functions of the appointee's employment;

6. Any other requested information.

In the instant matter, the appellant's name was certified to the BPU on August 8, 2016. Based upon an offer of employment, the petitioner began serving with the BPU and performing the duties of an Administrative Analyst 3, effective January 9, 2017. However, the BPU did not have the authority to permanently appoint the petitioner, effective January 9, 2017, as its failure to secure a hiring freeze exemption from the Office of the Governor constituted a failure to provide Agency Services with all information required to dispose of the August 8, 2016 certification. Consequently, there is no basis to approve a retroactive appointment of the petitioner to the Administrative Assistant 3 title to January 9, 2017. Nevertheless, given that the Office of the Governor approved the petitioner's appointment on February 7, 2017, the petitioner was serving with the BPU as of that date and she was performing the duties of an Administrative Assistant 3, good cause exists to grant her a retroactive date of appointment of February 7, 2017. As the petitioner has completed her working test period, her permanent appointment should be recorded as February 7, 2017. See *In the Matter of Robert Turkowsky* (MSB, decided February 26, 2003); *In the Matter of Winfred Christy* (MSB, decided January 15, 2003). Furthermore, the petitioner shall be entitled to differential back pay from February 7, 2017 to February 18, 2017. Finally, the retroactive date of seniority shall be used in the event of a layoff.

With regard to the appellant's request to differential back pay for the period between January 9, 2017 and February 6, 2017, *N.J.A.C.* 4A:2-1.5(b) provides, in pertinent part, that back pay for appeals that are not based on disciplinary action or the challenge of the good faith of a layoff "may be granted . . . where the Commission finds sufficient cause based on the particular case." The petitioner's request for differential back pay from January 9, 2017 to February 6, 2017 is denied because she could not have been appointed as an Administrative Assistant 3 until the BPU secured approval from the Office of the Governor. Accordingly, she has failed to present any basis to grant her request for differential back pay from January 9, 2017 to February 6, 2017. However, it is noted that if the appellant, while serving in the title of Technical Assistant 3 with the BPU during that period, was performing higher level out-of-title duties, she may request that such duties be compensated via a one-time lump sum salary adjustment.¹

ORDER

Therefore, it is ordered that this request be granted, in part, and the petitioner's records be amended to reflect a retroactive appointment date of February 7, 2017 and that she receive differential back pay.

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 27TH DAY OF MARCH, 2018

Deirdre L. Webster Cobb

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¹ Such salary adjustments must be reviewed and approved by the appointing authority and the Salary Adjustment Committee and are not subject to review by or appeal to the Commission.

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