



STATE OF NEW JERSEY

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

In the Matter of Maritza Avilleira,
et al., Judiciary Clerk 2 Bilingual in
Spanish and English, Monmouth
Vicinage

Administrative Appeal

CSC Docket Nos. 2018-2144, *et al.*

ISSUED: May 7, 2018 (RE)

Monmouth Vicinage (Monmouth), along with Maritza Avilleira and Maria Febles, request retroactive appointments for Maritza Avilleira, Maria Febles, and Miguel Rivera to January 2, 2014 in the title Judiciary Clerk 2, with Bilingual in Spanish and English.

By way of background, Monmouth posted a career opportunity on December 26, 2012 for “Judiciary Clerk 2 Bilingual (Provisional), Support Staff Band, Level 1 - 2 Basic, Classified.” Applicants submitted a cover letter and resume to Human Resources. Subsequently, the petitioners were offered employment in May 2013 and were provisionally appointed on June 3, 2013. On that date, Avilleira and Febles each received a “Report on Progress of Probationer” Report 1, which indicated that their working test period began with their appointments as a “probationer” on June 3, 2013. Monmouth did not provide this document for Rivera, but believe him to be similarly situated. At some point, Monmouth requested that the Bilingual Communicative Ability Test (BICAT) be given to the three employees in regard to the list for Judiciary Clerk 2, Bilingual in Spanish and English (S00633P), although Avilleira, Febles and Rivera were not on that list. They each took the BICAT around July 2013 and each passed. In October 2013, Febles received a “Report on Progress of Probationer” Report 2.

On August 3, 2015, Monmouth posted a career opportunity for “Judiciary Clerk 3, Support Staff Band, Level 3 - Journey (Career Service).” It indicated that the position was open to employees in the Monmouth Vicinage who had an aggregate of one year of permanent service as of the announced closing date in one

of four titles, including Judiciary Clerk 2 and Judiciary Clerk 2 Bilingual. Thereafter, in February 2016, it offered positions as a Judiciary Clerk 3 Bilingual to the three employees. They served for two weeks, or one pay period, when Monmouth informed them that Human Resources failed to recognize their provisional positions and that they had no permanent status as Judiciary Clerks 2. Monmouth told them that no test or resulting list was made available for them to be appointed from, and that they must return to their provisional appointments as Judiciary Clerks 2 and apply for the next examination. Then, on April 30, 2016, Avilleira, Febles and Rivera received provisional appointments in the title Judiciary Clerk 2 Bilingual in Spanish and English. Thereafter, Avilleira, Febles and Rivera received regular appointments on October 27, 2016 (Certification No. OS160359), December 7, 2016 (Certification No. OS160806), and September 14, 2016 (Certification No. OS160359), respectively. New working test period reports were then completed in May 2016 and September 2016 for Avilleira. Febles received undated reports in May 2017 for two-month periods starting December 7, 2016 and February 7, 2017. Reports were not submitted for Rivera, however, he was told that his working test period started May 13, 2016.

In two letters dated September 21, 2017, the first for Febles and the second letter for Avilleira and Rivera, Monmouth requested that the Division of Agency Services (Agency Services) provide retroactive permanency based on appointing authority error. Specifically, it states that it erroneously completed working test period forms upon their initial provisional appointments to the non-variant Judiciary Clerk 2 positions. Monmouth indicated that it advanced them prematurely on February 8, 2016 into the title Judiciary Clerk 3, Bilingual in Spanish and English, but notified them on February 26 that they were to be returned to their provisional titles and were instructed to take the examination for Judiciary Clerk 2, Bilingual in Spanish and English. Monmouth requested retroactive seniority to January 2, 2014 based on “when the certification was promulgated.” It argues that Human Resources had no record of their provisional status and, during their provisional terms, were treated and regarded as permanent employees by the appointing authority.

On December 20, 2017, Agency Services responded that Avilleira, Febles and Rivera received regular appointments from the eligible list for Judiciary Clerk 2, Bilingual in Spanish and English (S0110U), which promulgated on May 12, 2016 and expires May 11, 2019. Agency Services explained that as of the requested retroactive appointment date, January 2, 2014, there was a complete eligible list for Judiciary Clerk 2 (S0811R), and another one for Judiciary Clerk 2, Bilingual in Spanish and English (S0812R).¹ Agency Services indicated that the employees

¹ Judiciary Clerk 2 (S0632P) promulgated on November 29, 2012 and expired November 28, 2013. Judiciary Clerk 2, Bilingual in Spanish and English (S00633P) promulgated on November 29, 2012 and expired November 28, 2013. Judiciary Clerk 2 (S0811R) promulgated on January 2, 2014 and expired January 1, 2015. Judiciary Clerk 2, Bilingual in Spanish and English (S0812R) promulgated

were not on either eligible list, and could not have been appointed from Judiciary Clerk 2 (S0811R) on January 2, 2014.

Thereafter, appeals were received from Monmouth, Avilleira, and Febles. Monmouth states that it takes full responsibility for its administrative error which resulted in a premature advancement of one pay period on February 8, 2016. It states that Human Resources personnel erroneously communicated to Avilleira, Febles, and Rivera that they only had to pass the BICAT to become permanent. It states that Avilleira, Febles, and Rivera were not aware of the examinations for Judiciary Clerk 2 (S0811R), and Judiciary Clerk 2, Bilingual in Spanish and English (S0812R), which had closing dates in September 2013. Monmouth states that at that time Human Resources had no record of their provisional status and did not request a certification for the purpose of making their appointments. It states that while they were provisionals, they were treated and regarded as permanent employees, and passed all related career progression competences. They passed the examination for (S0110U) and their working test periods, and it is unfair for them to continue to be negatively impacted.

Avilleira and Febles argue that they experience frustration and stress over the situation, mental anguish and sleepless nights, humiliation from being demoted due to an oversight which they had no control over, and have lost more than \$10,000 in salary, had their pension negatively affected, and were precluded from advancement opportunities to a Judiciary Clerk 4. They argue that they have complied with requirements of the initial job of passing the BICAT and a four-month probationary period. They state that they relied on Human Resource's advice that this was the only requirement, and that they were not notified of the examination for Judiciary Clerk 2 (S0811R).

CONCLUSION

N.J.A.C. 4A:4-4.8(c), states, in pertinent part, that upon receipt of the certification, an appointing authority shall appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, and shall notify the Civil Service Commission (Commission) of the disposition of the certification by the disposition due date. *N.J.A.C.* 4A:4-1.5 states, in pertinent part, that a provisional appointment may be made only in the competitive division of the career service when there is no complete list of eligibles, and no one remaining on an incomplete list will accept provisional appointment. *N.J.A.C.* 4A:4-1.10(c), states that when a regular appointment has been made, the Commission may order a retroactive appointment date due to an administrative error, administrative delay or other good cause, on notice to affected parties.

on December 26, 2013 and expired December 25, 2014. It is noted also that Judiciary Clerk 2, Bilingual in Spanish and English (S0944S) promulgated on May 7, 2015 and expires May 6, 2018.

The Judiciary is unique in that it maintains a classification and compensation plan for titles allocated to the competitive division of the career service which consists of ten bands, with several levels in each band. As such, employees serving in job bands advance from lower to higher titles in the same band without this agency announcing or administering an examination for each higher title in the band. Thus, Judiciary employees serving in career service titles within a job band are not independent of civil service regulations. Rather, Judiciary employees in career service titles must be initially hired pursuant to and in accordance with civil service rules. Judiciary employees occupying career service titles enjoy the same statutory rights and privileges as non-judicial career service employees under Title 11A, Civil Service Act. The allocation of a title to the career service renders it subject to civil service rules and regulations. See *Michelle Thurber v. City of Burlington*, 191 N.J. 487 (2007).

The present issue is whether or not Avilleira, Febles and Rivera could have been appointed on the requested date, but though an action or error on the part of either the appointing authority or the Commission, were assigned later appointment dates. Based on the record, there is no evidence that they could have been appointed on the *requested* date.

First, it is noted that in *Thomas v. McGrath*, 75 N.J. 372 (1978), the Court addressed the issue of specifying the time when a Civil Service appointment achieves finality. It decided that appointing authorities are required to comply with all ministerial steps required by any rule, regulation and statute pertaining to appointments as a condition to making an appointment final. Thus, the steps necessary to perfect a regular appointment, which include Commission review and approval of a certification disposition proposed by an appointing authority, are required and necessary.

The appointing authority requests retroactive appointments for Avilleira, Febles and Rivera based on inappropriate advice it gave to them regarding their appointments. Shortly after the provisional appointments for Avilleira, Febles and Rivera were made in June 2013 to Judiciary Clerk 2, a list for Judiciary Clerk 2, Bilingual in Spanish and English (S0812R) was promulgated on December 26, 2013, and a list for Judiciary Clerk 2 (S0811R) was promulgated on January 2, 2014. Although these examinations were open-competitive, Avilleira, Febles and Rivera did not file applications for them. They also had not filed for the previous examinations, (S0632P) and (S0633P), of which the eligible lists were promulgated prior to their provisional appointments. There is no doubt that Avilleira, Febles and Rivera were provided with incorrect information from Monmouth. However, no remedy can be fashioned for these individuals because there were complete lists in existence for Judiciary Clerk 2 and Judiciary Clerk 2, Bilingual in Spanish and English at the time they were provisionally appointed in June 2013. As Avilleira, Febles and Rivera never received a regular appointment, Monmouth could not have

subjected them to the required working test period. In this regard, *N.J.A.C. 4A:4-5.1 et seq.*, provides that all regular appointments to a title in the career service shall be subject to a working test period of four months of active service. A regular appointment commences upon appointment from a certification and an employee then becomes permanent if he or she successfully completes the working test period.

Monmouth has argued that Human Resources had no record of the provisional status of Avilleira, Febles and Rivera but, during their provisional terms, were treated and regarded as permanent employees. However, as a State appointing authority, it has access to employee records in the Personnel Management Information System which tracks personnel activities, position activities, mass system changes, and payroll activity. Thus, Monmouth must have initiated personnel records to record provisional appointments as new hires. Therefore, it is incredulous that this appointing authority, responsible for certification activity for many positions, would not recognize newly-hired provisional appointees. Additionally, on June 11, 2013, Monmouth requested a certification (OS130366) from (S0632P) and indicated three provisional appointments. It received a 30-day extension for that certification, to October 11, 2013, and the BICAT was scheduled for and given to Avilleira, Febles and Rivera, although they had not filed applications for that examination. Subsequently, Monmouth requested that certification be cancelled on the basis that it was not going to fill its vacant positions. It cannot be ignored that Monmouth would not have been able to appoint Avilleira, Febles and Rivera to fill its vacancies since they were not on the list. In other words, Monmouth provided Avilleira, Febles and Rivera with provisional appointments in violation of *N.J.A.C. 4A:4-1.5*. The appointing authority is now arguing that those appointments should be recognized as regular appoints effective January 2, 2014. This is untenable.

The question before the Commission is whether or not retroactive appointment dates can be provided based on an administrative error. In this case, a review of the certification from which Febles was appointed indicates that there was no administrative error. The appointment date of December 7, 2016 on the certification (OS160806) matches that of her employment record and the date of the certification. She had not filed for an earlier examination, and did not appear on any previous eligible lists. No retroactive seniority is warranted.

Avilleira and Rivera had not filed for earlier examinations as well. However, their appointment dates on the certification (OS160359) does not match their employment record. Additionally, a review of the appointments from this list indicates possible violations of the "Rule of Three." As such, Agency Services must review the certification and determine if appointments were made properly. Other vicinages made appointments from the eligible list for (S0110U) and therefore other appointments may be affected by the correction of any error in the certification. Thus, Agency Services should review the certification to determine that correct

dates of appointment were applied. Therefore, there is no basis to provide Avilleira, Febles and Rivera with retroactive seniority.

ORDER

Therefore, it is ordered that these requests 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 2nd DAY OF MAY, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P. O. Box 312
Trenton, New Jersey 08625-0312

c: Maritza Avilleira (CSC Docket No. 2018-2144)
Maria Febles (CSC Docket No. 2018-2142)
Miguel Rivera (CSC Docket No. 2018-2143)
Gurpreet Singh
Kelly Glenn
Records Center