

In the Matter of Alan Gatto, Investigator Trainee, Taxation and Tax Representative Trainee, Department of the Treasury
CSC Docket No. 2011-2209
(Civil Service Commission, decided November 2, 2011)

Alan Gatto appeals his non-appointment to the noncompetitive title of Investigator Trainee, Taxation or Tax Representative Trainee with the Department of the Treasury (Treasury).

By way of background, in *In the Matter of Department of the Treasury, Trainee Titles* (CSC, decided August 18, 2010), the Civil Service Commission (Commission) granted Treasury's request to reallocate several trainee titles, including Investigator Trainee, Taxation and Tax Representative Trainee to the noncompetitive division of the career service on an interim basis to fill approximately 112 vacant positions. It noted that the noncompetitive designation would be effective September 11, 2010 through June 18, 2011. Additionally, the Commission determined that it was appropriate for the Division of Selection Services (Selection Services) to monitor the filling of these positions to ensure that they were in compliance with Civil Service regulations governing the noncompetitive division and that the appointments made were consistent with the spirit of Civil Service law and rules, *i.e.*, ensuring that appointments were made according to merit and fitness. Therefore, the Commission directed Treasury and Selection Services to establish a mutually agreeable monitoring plan.

Personnel records indicate that there are currently 88 individuals who were appointed to the noncompetitive title of Tax Representative Trainee, with 21 appointments effective October 23, 2010, 62 appointments effective October 25, 2010 and five appointments effective June 13, 2011. Personnel records also indicate that there are currently 19 individuals who were appointed to the noncompetitive title of Investigator Trainee, Taxation, with one appointment effective October 23, 2010 and 18 appointments effective October 25, 2010. Personnel records do not indicate that any of the individuals appointed to the titles of Tax Representative Trainee and Investigator Trainee, Taxation have applied for and/or possess veterans preference.¹ Although Gatto, a veteran, was interviewed on August 3, 2010, he was not appointed.

Staff of Merit System Practices and Labor Relations requested that Treasury submit additional information concerning the Trainee titles which were placed into the noncompetitive division pursuant to *In the Matter of Department of the Treasury, Trainee Titles, supra*. In particular, Treasury was requested to submit

¹ The information submitted by Treasury indicates that according to the Department of Military and Veterans Affairs, R.L. who was appointed as a result of this process, does possess veterans preference. However, R.L. was not appointed to one of the subject titles. Rather, he was appointed to the noncompetitive title of Information Technology Specialist, effective October 25, 2010.

the number of candidates, with corresponding data for each candidate interviewed, including: veterans status, copies of Trainee Interview Forms and selection process outcome. In response, Treasury indicated that it had interviewed 865 candidates. The candidates were rated as "Excellent," "Very Good," "Acceptable" and "Not Recommended" on the Trainee Interview Forms. Only candidates who scored "Excellent" during the interview were considered for appointment. Out of those candidates, only candidates who were identified by the interviewers as a "first" or "second" choice were offered employment. Of the 865 candidates interviewed, 14 were confirmed by the Department of Military and Veterans Affairs to be entitled to veterans preference. Out of the 14 veterans, only R.L., Y.H., R.H. and J.L. scored "Excellent" during the interview. However, only R.L. was ranked as a first or second choice and was offered employment to the noncompetitive title of Information Technology Specialist. One hundred and eighty-one candidates were offered employment, including R.L. Nineteen declined employment, and 162 were appointed, including R.L.

On appeal, Gatto argues that veterans preference applies to noncompetitive appointments. However, he maintains that although he met all conditions for hiring, Treasury refused to honor his veterans preference and appoint him to one of the positions. Gatto contends that despite requesting that Treasury provide him a reason for his non-appointment, Treasury has failed to provide him with any reason. Further, Gatto claims that although he contemplated filing a discrimination complaint alleging retaliation for filing a previous complaint, he decided not to file a complaint.

In response, Treasury asserts that the selection process, which was approved by this agency, included submission of documentation to support educational requirements, completion of a pre-interview questionnaire, a face-to-face interview and successful completion of a background investigation. Treasury notes that Gatto underwent an interview on August 3, 2010. During the interview, candidates were evaluated on their verbal and non-verbal communication skills. Treasury notes that while Gatto's communication skills were rated satisfactory, several documented areas of weakness resulted in the interview team not recommending him for appointment. In support, it submits a copy of Gatto's resume and the Trainee Interview Form, on which it was noted that his "Oral Communication" was "Satisfactory." However, the interview team checked off a weakness in "Enthusiasm" and noted that his "demeanor [was] negative" and his "expression [was] disgruntled [and] arrogant." The interview team also checked off a weakness for "Non-verbal" and noted that Gatto was comfortable and "displayed [a] sense of entitlement." The interview team noted that he appeared "unmanageable." Specifically, they noted that Gatto could not give any examples of "team effort" in any past project. Instead, he indicated that he always did everything himself and never worked with a team. Moreover, they noted that despite several opportunities, he failed to answer the conflict resolution question satisfactorily. The interview

team also noted that as soon as Gatto was greeted, he had a “judgment against a speech [made] by the Treasurer,” he made sure that they were aware of his veteran status, and he alluded to “being [not?] hired by OMB due to an undisclosed issue with the Department of the Treasury.” Additionally, the interview team noted that Gatto displayed a lack of professionalism, noting that his resume was constructed poorly. Specifically, a review of the resume indicates that Gatto submitted a resume which showed or “tracked” errors and/or changes that needed to be made to the resume. Additionally, Gatto indicated that as a Substitute Teacher from 1999 through the present, he had “passed all tests to pursue position as full time teacher, however due to no child left behind act, it is impossible to be hired.” He also indicated that as a Cost Accountant from 1984 to 1999, one of his key contributions was that he “kept the costs up to date on film products with resin prices swinging wildly and the owners refusing to hedge on commodity prices.” As a result, the Trainee Interview Form indicated that Gatto was “Not Recommended” for appointment.

Additionally, Treasury asserts that it recognizes its obligation to ensure compliance with the regulations governing veterans preference and therefore, it ensured that the recruitment was conducted in accordance with those regulations. Specifically, it asserted that candidates with veterans preference, who were recommended and identified for employment as either a primary or alternate candidate, were offered employment. However, since Gatto was not recommended for employment, an offer was not made to him. Consequently, Treasury argues that Gatto’s appeal is without merit and should be denied.

In response, Gatto acknowledges that he made the interview team aware that veterans preference applies to noncompetitive appointments. He maintains that perhaps because he is aware of Civil Service rules and “willing to fight for [his] rights someone could falsely claim that [he has] a sense of entitlement.” However, the opinion of him being disgruntled, negative and arrogant is “simply ridiculous.” In this regard, he maintains that as a substitute teacher for 10 years and in other business endeavors, he has been described as optimistic, cheerful and willing to do any task to accomplish a goal. Moreover, Gatto asserts that during the interview, he explained that he is normally the “go to guy that the team turns to when they want the job to be done correctly.” Gatto argues that the comment that he lacks enthusiasm is “really lame” as he wants to work for the State and “not become a high school cheerleader.” He also maintains that when he is asked a question, he will find out the correct answer, which is how a dedicated employee responds to a problem. However, he asserts that on the other hand, Treasury personnel has lied, violated rules, been rude, refused to give him information, not answered his written inquires and acted “totally unprofessional.” Gatto argues that he met all of the requirements for a position, and since Treasury has failed to present a legitimate reason for not hiring him, he should be appointed to the title. Finally, he questions

how many veterans were interviewed and hired for the position, as he believes that none were hired.

CONCLUSION

N.J.S.A. 11A:5-8 specifies that:

From among those eligible for appointment in the non-competitive division, preference shall be given to a qualified veteran. Before an appointing authority shall select a nonveteran and not appoint a qualified veteran, the appointing authority shall show cause before the Civil Service Commission why a veteran should not be appointed. In all cases, a disabled veteran shall have preference over all others.

N.J.A.C. 4A:5-2.3 provides that in making appointments in the non-competitive division, preference shall be given among qualified applicants to disabled veterans, then veterans.

While the Commission notes that Civil Service law and rules include a strong preference for veterans and disabled veterans, the establishment of veterans preference does not automatically entitle the veteran to a permanent appointment in a career service position. As noted above, *N.J.S.A.* 11A:5-8 permits an appointing authority not to appoint a qualified veteran for cause when making noncompetitive appointments. In *In the Matter of Andrew Triandafilou* (MSB, decided June 8, 2005), the Merit System Board (Board) delineated the standard necessary to remove qualified veterans from consideration for noncompetitive appointments. In *Triandafilou*, the Board stated that although *N.J.A.C.* 4A:5-2.3 does not specify the standard for the non-appointment of a veteran to a noncompetitive position, the rules regarding use of the preference in promotional examinations delineate what is required of an appointing authority to show cause as to why a veteran should be removed from a list. Thus, in the absence of any other specific regulatory procedure concerning noncompetitive positions, these rules are illustrative of what an appointing authority would need to demonstrate to substantiate not appointing an interested, qualified veteran.

In particular, *N.J.A.C.* 4A:5-2.2(c) provides that a non-veteran shall not be appointed unless the appointing authority shows cause why the veteran should be removed from the promotional list. *N.J.A.C.* 4A:4-4.7 *et seq.*, in conjunction with *N.J.A.C.* 4A:4-6.1 *et seq.*, delineates a number of reasons why a person may be denied an appointment and removed from the list. This would include the failure of a veteran applicant to complete required pre-employment processing. See *N.J.A.C.* 4A:4-4.7(a)11, which allows an eligible's name to be removed from an eligible list for

other valid reasons. In short, the Board in *Triandafilou* stated that these rules explain what an appointing authority would have to demonstrate in order not to make an appointment of an interested veteran eligible to a noncompetitive title. As such, an eligible who has established veterans preference does not necessarily have to be permanently appointed.

In the instant matter, Gatto argues that Treasury refused to honor his veterans preference and appoint him to one of the noncompetitive positions it was hiring for, even though his veterans preference applies to noncompetitive appointments. Treasury acknowledges that veterans preference is to be considered prior to making a noncompetitive appointment. However, it maintains that only candidates with veterans preference, who were recommended and identified for employment after the interview process, were offered employment. In this regard, the information submitted indicates that Treasury utilized the interview process to determine whether candidates should be offered the subject positions. Only candidates who scored "Excellent" were deemed to have "passed" the interview. The candidates were then ranked as first, second, *etc.*, choice for appointment and only candidates who were ranked as a first or second choice for appointment were offered employment. The Commission is satisfied that Treasury has demonstrated that it utilized a uniform selection process that did not adversely impact Gatto's veteran preference rights. However, in applying veterans preference to the candidates, all veterans who were deemed "Excellent" should have been offered employment, regardless of whether they were ranked as a first or second choice for appointment.

Upon a review of the record, the Commission finds that Treasury has presented sufficient reasons not to appoint Gatto. Specifically, Gatto had documented areas of weakness during the interview which resulted in the interview team rating him as "Not Recommended" for appointment. In support, the appointing authority submits a copy of Gatto's resume and the Trainee Interview Form, on which the interview panel noted several problems. Although Gatto disputes that Treasury has provided a legitimate reason for his non-appointment, other than his disagreement with the interviewers' conclusions, he has provided no documentation to dispute the findings of the interview panel.

However, although Treasury was not required to appoint Gatto pursuant to *N.J.S.A.* 11A:5-8 and *N.J.A.C.* 4A:5-2.3, the record does reveal that Treasury failed to offer employment to three veterans, Y.H., R.H. and J.L., who scored "Excellent" during the interview process. Since Treasury has indicated that Y.H., R.H. and J.L. scored "Excellent" and the Department of Military and Veterans Affairs has confirmed that they possess veterans preference, Y.H., R.H. and J.L. must be appointed if they are still interested in the positions.

The Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A.* 11A:10-3; *N.J.A.C.* 4A:10-2.1(a)2. *See In the Matter of Fiscal Analyst (M1351H), Newark, Docket No. A-4347-87T3 (App. Div. February 2, 1989).* Therefore, Treasury is ordered to notify this agency within 30 days of the issuance of this decision of either the permanent appointment of Y.H., R.H. and J.L. to the subject titles or provide documentation from Y.H., R.H. and J.L. indicating that they are not interested in the positions. If, at any time, Treasury does not adhere to the timeframe in this decision without an approved extension of time, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

ORDER

Therefore, it is ordered that Alan Gatto's appeal of his non-appointment be denied. It is also ordered that Treasury notify this agency within 30 days of the issuance of this decision of either the permanent appointments of Y.H., R.H. and J.L. to the subject titles or provide documentation from Y.H., R.H. and J.L. indicating that they are not interested in the positions.

If, at any time, Treasury does not adhere to the timeframes in this decision without an approved extension of time, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

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