

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

CSC Docket No. 2014-345

(Civil Service Commission, decided October 16, 2013)

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 (PS 1837I), 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 (PS 1837I), 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.