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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Interim Public
Health Recovery Division,
Department of Health

CSC Docket No. 2014-~~640~~ 894

Request for Reconsideration

ISSUED: DEC 19 2014 (CSM)

The Communications Workers of America (CWA), represented by Steven P. Weissman, Esq., requests reconsideration of the attached decision rendered on July 31, 2013, which permitted the Department of Health (DOH) to make temporary unclassified appointments to various career service titles in order to allow expedited staffing of its interim Public Health Recovery Division.

By way of background, the DOH established an interim Public Health Recovery Division that is responsible for the administration of DOH's portion of federal funds that have been allocated to New Jersey for Superstorm Sandy recovery efforts. These funds, as well as any funds provided hereafter, must be expended by September 30, 2017. Accordingly, the interim Public Health Recovery Division will phase down no later than September 30, 2017. Therefore, in order to ensure that necessary personnel can be appointed to appropriate job classifications to perform professional, administrative, and managerial tasks aimed at providing assistance in the aftermath of this disaster, the former Division of Classification and Personnel Management¹ requested authorization to allow unclassified appointments to be made to specific, appropriate career service titles in the DOH. Given the time frame it would take to administer competitive testing, the immediate need, and the fact that the interim Public Health Recovery Division was to be phased out by September 30, 2017, the Civil Service Commission concluded that competitive testing would not be practical and permitted the DOH to make unclassified appointments to various career service titles.

¹ Now the Division of Agency Services.

On reconsideration, the CWA argues that the DOH's request to make unclassified appointments to career service titles implicates the rights of employees and changes critical terms and conditions of employment. The CWA also states that the DOH did not provide it with notice that it was submitting the request, and, upon receipt, this agency did not notify the CWA of the application or afford it an opportunity to respond. Further, it states that neither the applicable statute nor the controlling regulation permits the Commission to allocate positions assigned to a career service title to the unclassified service. Additionally, the CWA contends that the Commission's action underscores why the statute and regulation do not allow the placement of career service positions in the unclassified service. For example, the CWA cited unanswered questions concerning layoff rights for employees in career service positions allocated to the unclassified service after funding for the positions in question is exhausted in 2017 and disciplinary appeal rights. Therefore, the CWA requests a complete copy of the Commission's file in this matter, including all correspondence between the Commission and the DOH on this matter, and all materials submitted by the DOH in support of its application.

By letter dated October 2, 2013, staff from the Commission's Division of Appeals and Regulatory Affairs (DARA) advised the parties that it had received this request for reconsideration and advised them the file materials could be reviewed in accordance with *N.J.A.C.* 4A:2-1.1(d)2. Although provided this opportunity, the parties did not schedule an appointment to review the file or submit any additional information or argument for the Commission to review.

CONCLUSION

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.

N.J.A.C. 4A:3-3.3(e) provides that in State service, each department and autonomous agency shall designate an individual as the agency representative to serve as its liaison with the appropriate Commission representative on all classification and compensation matters. *N.J.A.C.* 4A:3-3.3(f) provides that in State service, the agency representative shall provide notice to the affected and potentially affected negotiations representative upon submission of the following to the appropriate Commission representative. The Commission representative shall verify that proper notice has been given of each of the following:

1. Reorganizations;
2. Job content reevaluation requests;
3. Requests for new titles or title series;

4. Job specification modification requests;
5. Employee relations group changes; and
6. Establishment, modification, or termination of flexi-time programs, alternate workweek programs, and adjusted hours of operations.

N.J.S.A. 11A:3-6 states whenever the Commission considers moving a title from the career service to the unclassified service, the Commission shall first hold a public hearing before reaching a determination.

In the instant matter, the CWA has not met the standard for reconsideration. Initially, the CWA argues that it was not provided notice of the request to make temporary unclassified appointments in career service titles by either the DOH or this agency. However, in accordance with *N.J.A.C.* 4A:3-3.3(f), since this matter was not a reorganization, job content reevaluation request, job specification modification request, employee relations group change, or the establishment, modification, or termination of flexi-time programs, alternate workweek programs or adjusted hours of operations, neither the agency representative nor the Commission representative was required to notify the potentially affected negotiations representative. Moreover, as stated in the original determination, since the titles at issue are *not* to be considered unclassified except for specific limited duration positions in the interim Public Health Recovery Division, which were not then encumbered, a public hearing was not necessary since the rights of permanent career service employees would not be implicated. Nevertheless, in conjunction with the instant petition, the appointing authority was notified and the CWA was provided the opportunity to provide additional input. Accordingly, the Commission finds that all impacted parties have now been provided notice and the opportunity to comment regarding the request. Therefore, there is no basis on which to provide the petitioner a remedy based on its asserted lack of notice.

The petitioner argues that the Commission erred since it can only allocate a title, not a position, to the unclassified service. Thus, it maintains that the Commission cannot make a determination that a position classified by the title should be unclassified, while the title itself remains in the career service. The Commission disagrees. A "position" is defined to mean the assignment of specific duties and responsibilities requiring the employment of one person. A "title" means a descriptive name that identifies a "position" or "group of positions" with similar duties, responsibilities, and qualifications. At this juncture, it must be emphasized that the positions at issue are clearly limited in duration, as their funding must be expended by September 30, 2017. Thus, given the time constraints and the need to fill these positions, it is not inconsistent with *N.J.A.C.* 4A:3-1.3(a)5 to find that it is not practicable to utilize existing Civil Service announcement, examination, certification, and working test period procedures to determine merit and fitness for these specific positions only that will not exist after September 30, 2017. Indeed, in essence, these positions are analogous to fixed term positions, as it is evident the


interim Public Recovery Division will be phased down by no later than September 30, 2017. Misleading individuals who choose to assist in these disaster recovery efforts that they would have the benefits of tenure protections and the possibility of long-term employment associated with a permanent appointment would clearly be inconsistent with the intent of a grant to provide short-term recovery assistance. In response to the CWA's concern regarding disciplinary appeal and layoff rights, as noted in the original decision, since these appointments are in the unclassified service, appointees are not entitled to the tenure protections provided under Civil Service law and rules.

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 17TH DAY OF DECEMBER, 2014



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Attachment

c: Steven Weissman, Esq.
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In the Matter of Interim Public
Health Recovery Division,
Department of Health

CSC Docket No. 2014-170

STATE OF NEW JERSEY

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

Request for Unclassified Appointments
(CSM)
(Corrected Decision)

ISSUED: AUG 30 2013

The Division of Classification and Personnel Management (CPM) seeks Civil Service Commission (Commission) approval to make temporary unclassified appointments to various career service titles in order to allow expedited staffing of the interim Public Health Recovery Division, Department of Health (DOH).

By way of background, the DOH is establishing a new, interim Public Health Recovery Division that will be responsible for the administration of DOH's portion of federal funds that have been allocated to New Jersey for Superstorm Sandy recovery efforts. Additionally, supplemental funding has been allocated to the Department of Human Services (DHS), and shared with the DOH, and the Department of Children and Families (DCF). The funds are designed to address expenses resulting from Superstorm Sandy, including social, health, and behavioral health services, as well as the repair, renovation and rebuilding of health care, child care and other social services facilities. These funds, as well as any funds provided hereafter, must be expended by September 30, 2017. Accordingly, the interim Public Health Recovery Division will phase down no later than September 30, 2017. Therefore, in order to ensure that necessary personnel can be appointed to appropriate job classifications to perform professional, administrative, and managerial tasks aimed at providing assistance in the aftermath of this disaster, CPM requests authorization to allow unclassified appointments to be made to specific, appropriate career service titles in the DOH.

CPM presents that the basis for allowing unclassified appointments to be made to specific, appropriate, career service titles is the immediate need for staff in order to meet strict timelines mandated for the administration of the federal funds

it has been granted to assist the citizenry of New Jersey in coping with the disastrous impact of Superstorm Sandy. Further, CPM underscores that the nature of positions involving disaster relief does not lend itself to tenure. Finally, given the nature of disaster recovery positions, there is a need for flexibility in the selection process. In this case, CPM emphasizes that it is imperative that the DOH have the ability to fill positions in the interim Public Health Recovery Division dedicated to address the expenses resulting from Superstorm Sandy, including social, health, and behavior services, as well as the repair, renovation and rebuilding of health care, child care, and other social services facilities. In this regard, it notes that the appropriations received by the State are for recovery efforts through September 30, 2017. Thus, it would be impractical to make permanent appointments to any positions to perform these disaster relief duties since the positions are, at the outset, short-term in nature. Moreover, CPM underscores that the positions that DOH needs to fill will vary and, in some cases, require a very specific set of skills. As such, it is imperative that the DOH be given flexibility in the selection process in order to meet its needs. Accordingly, CPM requests that the following career service titles be deemed appropriate to fill through unclassified appointments in the DOH's interim Division of Public Health Recovery:

Administrative Analyst 1
Customer Service Representative 2
Health Data Specialist 1
Health Data Specialist 3
Occupational Health Consultant 3
Occupational Health Consultant 4
Project Manager, DP
Public Health Consultant 1, Health Education
Public Health Consultant 2, Nursing
Public Health Representative 1
Public Health Representative 2

In addition to the titles listed above, CPM also requests authority to approve future unclassified appointments to other career service titles as deemed appropriate for the DOH to assist in the staffing efforts for disaster recovery.

CONCLUSION

In State service, *N.J.S.A. 11A:3-4(l)* provides that the unclassified service shall be limited to those titles specifically designated and all other titles as provided by law or as the Commission may determine in accordance with criteria established by rule. *N.J.A.C. 4A:3-1.1(a)* provides that all job titles shall be allocated to the career service, except for those job titles allocated by the Commission to the

unclassified service pursuant to *N.J.A.C. 4A:3-1.3*. *N.J.A.C. 4A:3-1.3(a)* provides that a title shall be allocated to the unclassified service when:

- 1) In State service, the title is so designated under *N.J.S.A. 11A:3-4*;
- 2) In local service, the title is so designated under *N.J.S.A. 11A:3-5*;
- 3) The title is designated unclassified by another specific statute;
- 4) A specific statute provides that incumbents in the title serve for a fixed term or at the pleasure of the appointing authority;
or
- 5) The Commission determines that it is not practicable to determine merit and fitness for appointment in or promotion to that title by examination and that it is not appropriate to make permanent appointments to the title.

Our courts have recognized the State's strong public policy, as evinced by the State Constitution, favoring the inclusion of as many titles as possible in the career service. See, *Walsh v. Department of Civil Service*, 32 *N.J. Super.* 39, 43-44 (App. Div. 1954); *Loboda v. Clark Township*, 40 *N.J.* 424, 434 (1983); *State v. Clark*, 15 *N.J.* 334, 341 (1954); *In the Matter of Hudson County Probation Department*, 178 *N.J. Super.* 362, 371 (App. Div. 1981).

In the instant matter, there is no question that the titles requested by CPM are not specifically designated by *N.J.S.A. 11A:3-4*, nor is there specific statutory authority for unclassified appointments to these titles. Likewise, there is no statutory provision allowing for the appointment of an incumbent in the title to serve for a fixed term or at the pleasure of an appointing authority. Therefore, it is necessary to evaluate this matter under *N.J.A.C. 4A:3-1.3(a)5*, which specifies that the Commission may allocate a title to the unclassified service if it is not practicable to determine merit and fitness for appointment in or promotion to that title by examination and that it is not appropriate to make permanent appointments to the title.

It has been the established practice of this agency to administer separate examinations for each competitive title within a title series. As such, for each examination, this agency issues either an open competitive or promotional announcement, reviews the resultant applications that are received to determine eligibility to compete in the examination, develops and conducts an examination,

issues eligible lists ranking those candidates who passed the examination, and certifies the eligible list so that an appointing authority can consider interested eligibles for appointment. While this methodology is clearly consistent with the constitutional and statutory mandate to select and advance employees on the basis of merit and fitness, it cannot be ignored that this process can take several months to complete. Additionally, it is anticipated that the interim Public Health Recovery Division will phase down no later than September 30, 2017. Given the immediate need for the DOH to make appointments in order to meet strict timelines mandated for the administration of the federal funds it has been granted and the fact that the Public Health Recovery Division will be phased down by September 30, 2017, the Commission finds that it would not be practicable to determine merit and fitness for appointment nor make permanent appointments to the titles utilized by the interim Public Health Recovery Division.

Additionally, the Commission notes that in accordance with *N.J.S.A. 11A:3-6*, a public hearing is required when moving a title from the career to the unclassified service. However, the titles at issue are *not* to be considered unclassified except for the specific positions utilized in the interim Public Health Recovery Division. In this regard, the positions in the interim Public Health Recovery Division are not yet encumbered. As such, a public hearing is not necessary. Nevertheless, the DOH is directed to ensure that all of the appointees to positions within its interim Public Health Recovery Division are advised that their appointments are in the unclassified service and that they are not entitled to the tenure protections provided under Civil Service law and rules.

ORDER

Therefore, it is ordered that this request be granted and that the titles listed, as well as any other titles needed to staff positions in the Department of Health interim Public Health Recovery Division, be designated as unclassified. The Department of Health is to ensure that all of the appointees to positions within its interim Public Health Recovery Division are advised that their appointments are unclassified and that they will not be entitled to the tenure protections of Civil Service law and rules.

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 31ST DAY OF JULY, 2013

Robert M. Czech

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