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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

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

Request for Reconsideration

CSC Docket No. 2014-1495

ISSUED: JUL 16 2014

(SLD)

Harry Tisch, represented by Steven W. Griegel, Esq., requests reconsideration of the attached final administrative decision, rendered on October 16, 2013, which denied his appeal of his non-appointment and granted the Department of Human Services' (DHS) request for a waiver of the appointment requirement for the Program Support Specialist 1, Assistance Programs (S2408N), eligible list.

By way of background, 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. 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 argued that its request should be granted due to fiscal constraints and since no one was serving provisionally in the subject title. In this

regard, it noted that Morante was appointed to the more appropriate non-competitive title of Information Technology Specialist, effective June 29, 2013. Additionally, it maintained that it intended to utilize the eligible list, when a vacancy occurs, and a hiring freeze exemption has been approved.

On appeal to the Civil Service Commission (Commission), Tisch argued 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 claimed that he appeared for the interview and "in the interim" on June 6, 2013, he claimed 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 maintained 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 submitted the June 6, 2013 e-mail, with his hand written comment, which indicated in part, that he was "Looking forward to an interview, hopefully next week." Tisch claimed that this e-mail was proof that he was initially offered the position; however, without a start date. He argued 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 maintained 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 argued that due to his veteran's preference, the appointing authority's request for an appointment waiver should be denied. In this regard, he asserted that he passed the test and if an appointment waiver was granted, then the entire purpose of the Civil Service system was moot. Moreover, Tisch maintained that he was told that the position had been eliminated, not that the appointing authority was requesting an appointment waiver.

Based on the foregoing, the Commission initially noted 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, the Commission determined that Tisch's veteran's preference was irrelevant in determining whether an appointment waiver should be granted. In granting the appointment waiver, the Commission noted Morante had been appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2013, which the appointing authority had determined to be a more appropriate title for the duties Morante performed in her position. The Commission also noted that the job specifications revealed that an individual in the title of Information Technology Specialist performed different

duties than an individual in the title of Program Support Specialist 1, Assistance Programs. Furthermore, the Commission found that given the disparity in job duties and salary level, there was 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.¹

In the instant matter, the petitioner argues that the Commission erred in finding that he was not entitled to the position and granting the appointing authority's appointment waiver request. In this regard, he asserts that he was not "treated fairly" as required by the Appellate Division's decision in *In the Matter of Code Enforcement Officer (M00410), Jersey City, et al.*, 349 N.J. Super. 426 (App. Div. 2002), because a provisional employee was kept in the position he was entitled to for three years. Moreover, he maintains that Morante's provisional appointment violated N.J.S.A. 11A:4-13(b), which provides that a provisional appointment may not exceed 12 months. The petitioner asserts that if this agency had moved with "any sort of proper speed," his rights would not have been violated. Moreover, the petitioner reiterates that the request for an appointment waiver was made immediately after his interview, wherein he was asked if he would accept a certain salary, at which point it became impossible to delay his appointment any longer. He maintains that the Commission ignored this obvious fact and accepted at face value that there were "fiscal" reasons for the appointment waiver request. The petitioner also claims that after he had requested an extension to file the instant request for reconsideration, he received a notice that the position was cancelled. Therefore, he maintains that this "coincidence" is more evidence that he was treated unfairly. Furthermore, the petitioner maintains that since the "position" was "cancelled," he wants "proof" that the costs of the selection process have been paid.

Additionally, the petitioner notes that the Appellate Division, in *Code Enforcement Officer, supra*, stated that it was a violation to "rotat[e] [provisional employees] through similar positions in circumvention of [civil service] appointment requirements." Therefore, he asserts that since the Commission noted that Morante was moved to a title that was "more appropriate for the duties performed" by her, the Commission should have found that the appointing authority had circumvented the civil service system. Moreover, the petitioner argues that the titles of Program Support Specialist 1, Assistance Programs and Information Technology Specialist are completely different titles, and therefore, he does not understand how the appointing authority can claim that Morante was appointed to a title more appropriate to her duties. Furthermore, the petitioner argues that the fact that the Information Technology Specialist title is a non-competitive title, is more evidence that her appointment was inappropriate.

¹ The Commission also determined that it was not appropriate, at that time, to assess costs since the appointing authority indicated that it hoped to utilize the subject eligible list, and that the eligible list was a Statewide list, thereby finding that utilization by DHS or another appointing authority was probable.

The petitioner also argues that the Commission made an error in interpreting the facts. Specifically, he asserts that although the Commission noted that Morante was appointed to the non-competitive title of Information Technology Specialist, effective June 29, 2013, it later noted that she was appointed to that title on June 29, 2012. He maintains that the Commission then used the incorrect 2012 date to make the finding that "there are no employees serving provisionally in the subject title." The petitioner argues that if the Commission had realized that the title was not vacated until after the certification, the Commission's determination would have been different, since the appointing authority's actions would have been much more obvious. The petitioner also argues that Morante had failed to meet the requirements to be appointed to the subject title, which she had held provisionally, in violation of *N.J.S.A. 11A:4-13(b)* which requires that provisional appointees meet the requirements for the position.

Finally, the petitioner argues that the Commission erred in accepting the "fiscal" excuse for granting the appointment waiver request since it was "obviously" pretextual. In this regard, the petitioner asserts that based on his foregoing arguments, it is obvious that the appointing authority manipulated the system and there were no "fiscal" reasons for the request. Specifically, he notes that Morante's salary in the subject position was \$72,097, however, her salary as an Information Technology Specialist was only \$400 less, or \$71,698.74. Therefore, it is clear that Morante "was not moved and [the petitioner's] job was not cancelled for financial reasons." Accordingly, the petitioner requests a hearing, his immediate appointment to the subject position, and any other relief that is available.

In response, the appointing authority relies on the Commission's previous decision.

CONCLUSION

Initially, the petitioner requests a hearing in this matter. Requests for reconsideration are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

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. The instant request for reconsideration appears to be based on the assertion that the

Commission made an error by denying the petitioner's appeal of his non-appointment. However, a review of the record in the instant matter reveals that reconsideration is not justified. In this regard, the petitioner has failed to provide any documentation which establishes that the Commission's decision was contrary to the evidence presented. Instead, the petitioner merely reiterates his prior arguments and claims that the Commission made an error in noting Morante's appointment date to the title of Information Technology Specialist in the conclusion. However, the Commission does not agree that a typographical error as to Morante's appointment date in its conclusion warrants reconsideration. In this regard, the petitioner acknowledges that Morante's appointment date was correctly noted earlier in the decision. The petitioner appears to disregard this fact and claims that without this error, the Commission would have not stated that no provisional was serving in the subject title and would have denied the appointment waiver request. However, the Commission did not base its conclusion that there were no provisionals serving in the subject title with the appointing authority on Morante's appointment date to Information Technology Specialist. Rather, it was based on the fact that agency records indicated that, at the time of the Commission's decision, there were no provisionals serving in the subject title with the appointing authority.

Additionally, the Commission does not agree that the Appellate Division's decision in *Code Enforcement Officer (M00410)*, *supra*, requires reconsideration. In this regard, the facts in this matter are not analogous. Specifically, in that matter Jersey City had appointed over 40 individuals provisionally to the dual title of Code Enforcement Officer/Program Monitor shortly before the M00410 eligible list promulgated, with at least one appointment occurring after the promulgation of that eligible list. Jersey City then changed the provisionals' titles to Code Enforcement Officer and sometime later Jersey City changed the provisionals' titles back to Code Enforcement Officer/Program Monitor. Moreover, the former Merit System Board (Board) did not act until after the eligible list had expired, although provisionals continued to serve in the title. The Appellate Division noted that although the Board found that Jersey City had circumvented its rules, by changing the provisionals' titles to a title that was substantially similar and provisionals were still serving at the time of Jersey City's request for an appointment waiver, the Board approved the request for an appointment waiver. However, in the instant matter, the Commission did not find that the appointing authority was attempting to circumvent its rules. In this regard, although Morante was appointed to a non-competitive title of Information Technology Specialist, the appointing authority asserts that that title was more appropriate to the duties she performed and, as noted by the petitioner, individuals in the two titles perform significantly different duties, whereas in *Code Enforcement Officer (M00410)*, the individuals in the titles of Code Enforcement Officer/Program Monitor and Code Enforcement Officer performed substantially the *same* duties. Therefore, there is no evidence that the appointing authority in the instant matter was attempting to circumvent

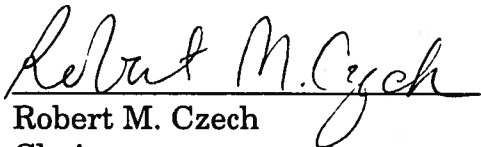
Civil Service law or rules. Accordingly, the petitioner has failed to present a sufficient basis for reconsideration of the Commission's prior decision.

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 15TH DAY OF JULY, 2014**



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Attachment

c: Harry Tisch
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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

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

Appointment Waiver Request
Administrative Appeal

CSC Docket No. 2014-188 and
2014-345

ISSUED: **OCI 17 2013** (SLD)

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 granted. 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, Assistant Systems Administrator. Moreover, personnel records reveal that there are no employees currently employed 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 as 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

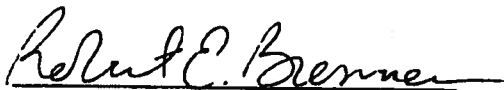
of this matter, it would not be appropriate to assess the appointing authority for the costs of the selection process at this time. *See e.g., In the Matter of Supervising Administrative Analyst (PS1837I), Department of Corrections (MSB, decided March 22, 2006)* (Not appropriate to assess the Department 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 (PS1837I), 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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16TH DAY OF OCTOBER, 2013



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Presiding Member

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