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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Ebony Hill and  
Shannon Donahue, Administrative  
Assistant 2 (PS1516H),  
Department of Health

Administrative Appeals

CSC Docket Nos. 2015-1028 and  
2015-1171

ISSUED: JUN 05 2015 (DASV)

Ebony Hill and Shannon Donahue, represented by Daniel A. Smith, Staff Representative, CWA Local 1036, appeal the disposition of the February 28, 2014 certification of the Administrative Assistant 2 (PS1516H), Department of Health, eligible list. Additionally, Hill appeals the termination of her provisional appointment as an Administrative Assistant 2 and her return to her prior held permanent title of Head Clerk. It is noted that since these matters have similar issues, the appeals have been consolidated.

By way of background, the Administrative Assistant 2 (PS1516H), Department of Health, eligible list promulgated on February 27, 2014 with three eligibles: the appellants and Margaret LaPage. The eligible list does not expire until February 26, 2017. The examination had been based on qualifying education and experience. Thus, the appellants and LaPage had tied rankings of one. Thereafter, on February 28, 2014, a certification was issued, listing the eligibles in alphabetical order: Donahue, Hill, and LaPage. In disposing of the certification, the appointing authority removed Donahue since she was no longer interested in the position and did not appoint either Hill or LaPage.<sup>1</sup> It is noted that the certification was issued against Hill's provisional position. In that regard, as a result of a classification determination, Hill had been appointed provisionally pending promotional examination procedures as an Administrative Assistant 2 effective May 7, 2011. However, upon disposing of the subject certification, the

<sup>1</sup> The appointing authority initially returned the certification, indicating that Donahue had been appointed on August 23, 2014, but it later amended the certification to reflect Donahue's removal.

appointing authority returned Hill to her prior permanent title of Head Clerk effective August 23, 2014.

On appeal to the Civil Service Commission (Commission), Hill challenges the termination of her provisional appointment and her return to her permanent title of Head Clerk. She sets forth her employment history, stating that in 2011, she was appointed provisionally to the subject title as a result of performing the duties of a co-worker who had been on leave and eventually retired. Hill indicates that her classification appeal was supported by management. Moreover, Hill states that she has received satisfactory ratings on all her performance evaluations, including her ratings as a provisional Administrative Assistant 2. However, she notes that she was not afforded the opportunity to jointly develop her job performance plan for the 2013-2014 rating cycle with her supervisor and address any performance concerns that may have been raised. Nonetheless, since she was verbally told that she received satisfactory ratings and did not receive contrary documentation, she worked under the assumption that her job performance was not at issue and continued to perform the duties listed in her last performance evaluation. Moreover, Hill indicates that she has not received any disciplinary action with regard to her job performance. Additionally, she describes the duties of her provisional position, including being trained in various systems and policies. Hill also explains that she was on medical leave from March 18, 2014 through June 29, 2014.

On July 11, 2014, Hill was contacted for an interview regarding the Administrative Assistant 2 position and was requested to submit an employment application and a copy of her performance evaluations for the last two years. On July 17, 2014, Hill indicates that she had a meeting with her supervisor regarding her performance rating, which was the first time she was "officially reviewed since April 1, 2011." On the same day, she interviewed for the Administrative Assistant 2 position with her supervisor and two other representatives of the agency. Hill submits that she is a human resource liaison for her division and this was the first time that an employee from another division also conducted the interview. Thereafter, on August 20, 2014, Hill met with her supervisor and the appointing authority and was advised that she was not selected for the position and was being returned to her prior title. Hill asserts that the appointing authority deviated from past practice since it "has always been" that if the provisional employee was among the top three candidates, the provisional would be appointed pursuant to the "Rule of Three." Hill reiterates that she has received satisfactory performance ratings and no discipline. Thus, she should have retained the subject title, even if she is placed in another location. Furthermore, Hill argues that she did not receive 45 days' notice of her "demotion." She was only given a day's notice and has not received anything in writing as to why she was not selected for the position or given information as to her new salary or job location. In addition, Hill claims that she is still performing the duties of an Administrative Assistant 2 and her "demotion" has

caused a huge financial impact on her family. She states that she is the sole provider of her family and her household budget is based on the salary she received since 2011.

In response, the appointing authority indicates that all three candidates on the subject certification were interviewed by a panel of three Department employees. It explains that it requested an extension of the disposition due date of the certification since Hill was on leave. Upon Hill's return to work, the interviews were scheduled. The appointing authority states that the other candidates, Donahue and LaPage, were also considered satisfactory employees and did not have disciplinary histories. The appointing authority selected Donahue for the position, but she declined the position. As a result, the appointing authority contends that the certification became incomplete and it decided to vacate the Administrative Assistant 2 position. It returned Hill to her previous permanent title of Head Clerk effective August 23, 2014.

On appeal, Donahue challenges that the subject certification was incomplete. She claims that the appointing authority "used improper discretion" to remove her name, thus affecting the other eligibles on the list. Donahue further asserts that since three names were certified, the appointing authority was required to appoint from the eligible list. While Donahue acknowledged that she declined "the specific job position" and sent correspondence to that effect, she claims that the appointing authority requested that she include a request for removal of her name from the subject eligible list. Donahue cites *N.J.A.C. 4A:4-4.7(a)3*, for the proposition that an applicant may request the removal of his or her name if the request is made in writing. In that regard, Donahue's initial memorandum to the appointing authority, dated August 19, 2014, states that she "will not be accepting this offer due to a recent development in [her] personal life in which [she is] considering the early retirement option by the end of this year." Her revised memorandum of the same date includes a statement that she was "no longer interested and request to have [her] name removed from the list." Donahue maintains that her initial declining of the position does not disqualify her from a latter certification should she wish to apply for a future position. Therefore, Donahue requests that her name be "added" to the subject certification "to correct an administrative error;" the order and rank of the three eligibles remain the same; the disposition of the certification be in accordance with *N.J.A.C. 4A:4-4.8*; and the appointing authority be required to make an appointment from the subject certification pursuant to *N.J.A.C. 4A:4-4.8(a)*.

In response, the appointing authority maintains that, on August 19, 2014, it met with Donahue and her supervisor, who was also the supervisor of Hill, and advised that Donahue was selected for the Administrative Assistant 2 position. Donahue "could not believe that she was the candidate of choice." However, Donahue then informed the appointing authority that she would have to decline the

position after recent discussions she had with a financial planner. She planned to retire by the end of the year. In reply, the appointing authority informed Donahue to submit her response in writing. After it received Donahue's initial response, the appointing authority indicates that it contacted Donahue and asked her to clarify and revise her memorandum to reflect that she was no longer interested in the position due to her decision to retire and that "this would remove her name from the list." The appointing authority contends that Donahue did not have "a problem with the wording." If she had an issue, the appointing authority would have discussed it with her. Moreover, it submits that since Donahue was not interested in the position because she was planning to retire by the end of 2014, there was no reason to retain her name on the subject eligible list for future certifications. As such, the appointing authority admits that it requested that Donahue's statement be revised. Based on the foregoing circumstances, the appointing authority emphasizes that the eligible list became incomplete due to the lack of three interested eligibles. Accordingly, it maintains that it properly disposed of the certification and vacated the Administrative Assistant 2 position, in which Hill was the incumbent.

It is noted that agency records do not indicate that Donahue retired. She continues to serve as a Secretarial Assistant 1, Non-stenographic.

### CONCLUSION

*N.J.A.C.* 4A:4-6.3(b) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his or her name from an eligible list was in error. Additionally, *N.J.A.C.* 4A:4-4.7(a)1 and *N.J.A.C.* 4A:4-4.7(a)11, in conjunction with *N.J.A.C.* 4A:4-6.1(a)9, allows the Commission to remove an eligible's name from an eligible list for other valid or sufficient reasons.

*N.J.A.C.* 4A:4-4.2(c)2 provides in pertinent part that an appointing authority shall be entitled to a complete certification for consideration in making a permanent appointment, which means that from promotional and open competitive lists, the names of three interested eligibles for the first permanent appointment, and the name of one additional interested eligible for each additional permanent appointment. Eligibles who receive the same score shall have the same rank. Moreover, *N.J.A.C.* 4A:4-4.2(c)2ii states that when fewer than three interested eligibles are certified and a provisional who is currently serving in the title is listed on the certification, the appointing authority may either: make a permanent appointment; or vacate the position/title.

In the instant matter, the Commission must first address Donahue's claim. Donahue contends that although she declined the offer for the Administrative Assistant 2 position, she should not have been removed from the subject eligible list.

She asserts that she was removed after the appointing authority directed her to revise her memorandum to specifically note that she was not interested in the position and request that she be removed from the list. As such, Donahue argues that there was a complete certification of three eligibles, and the appointing authority was required to make an appointment. Initially, the Commission finds that the original memorandum was sufficient to have removed Donahue from the subject eligible list since she declined the offer "due to a recent development in [her] personal life in which [she is] considering the early retirement option by the end of this year." Her statement clearly demonstrated that she was not interested in the position. However, the appointing authority requested that Donahue clarify her statement. Donahue's specific request to remove her name from the subject eligible list essentially confirms her understanding that she would be removed. Therefore, it cannot be found that the appointing authority "used improper discretion" when it asked Donahue to revise her memorandum.

Moreover, Donahue's argument regarding *N.J.A.C. 4A:4-4.7(a)3* is unclear. This rule provides that the name of an eligible may be removed from an eligible list for any of the following reasons, including inability, unavailability or refusal of eligible to accept appointment. An eligible who has declined appointment may, upon written request, have his or her name withheld from future certifications until available for appointment. An appropriate representative of the Commission must be notified when the eligible wishes to be considered for certification. Although Donahue declined her appointment and was asked to revise her memorandum, she makes no mention, in either of her memoranda, that she wished to be considered for a position when she is available for appointment. It was clear that she planned to retire. Thus, although Donahue did not retire, it was within the appointing authority's discretion to remove her from the subject eligible list at that time based on her lack of interest. There was no administrative error in that regard. Accordingly, Donahue's request to have her name "added" to the subject certification is denied.

Therefore, because Donahue was properly removed, there was an incomplete certification of two eligibles. However, even assuming, *arguendo*, that Donahue's appeal were granted and she was not removed from the subject eligible list and considered only interested in future certifications as she now argues, there still would not have been a complete certification. In that regard, *N.J.A.C. 4A:4-4.2(c)2* defines a complete certification as a list of three *interested* eligibles for the first permanent appointment. Donahue was clearly not interested in the position. As such, the appointing authority proceeded in disposing of the subject certification pursuant to *N.J.A.C. 4A:4-4.2(c)2ii*. Since there were fewer than three interested eligibles and the provisional, Hill, was currently serving in the title, the appointing authority chose to vacate the position and Hill was returned to her prior permanent title. Thus, the Commission does not find a violation of any Civil Service law or rules with regard to the disposition of the subject certification.

Based on the foregoing, Hill's appeal is also denied. Although Hill contends that the appointing authority deviated from past practice by not appointing her, pursuant to *N.J.A.C. 4A:4-4.2c(2)ii*, the appointing authority was within its authority to vacate Hill's provisional position and not make a permanent appointment. It is noted that there is no legal obligation to fill a vacant position. See *In the Matter of Paul Philipps* (CSC, December 2, 2009) (Appointing authority not required to appoint eligible from an incomplete Deputy Police Chief certification even though a genuine vacancy existed); see also, *In the Matter of Institutional Fire Chief* (MSB, decided January 12, 2005). Moreover, Hill does not allege or present any substantive evidence that would lead the Commission to conclude that the appointing authority abused its discretion under the "Rule of Three" when it initially offered Donahue the position. Donahue was also ranked number one on the subject eligible list. Compare, *In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union animus); *Kiss v. Department of Community Affairs*, 171 *N.J. Super.* 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing). As noted more fully below, Hill does not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990).

Furthermore, the Commission does not have jurisdiction to review the termination of a provisional appointment. See *N.J.S.A. 11A:2-6* and *N.J.A.C. 4A:2-2.1*. Nonetheless, a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. In other words, a provisional employee has no automatic right or expectation of achieving permanent appointment to the position which he or she is occupying. See *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987) (Appointing authority was not equitably estopped from removing a provisional employee even when the provisional employee occupied the position longer than the statutory one-year limit). No Civil Service law or rule affords a provisional employee permanent status for good work performance or lack of a disciplinary history. Rather, the method by which an individual can achieve a permanent appointment in a competitive title is if the individual applies for and passes an examination, is appointed from an eligible list, and satisfactorily completes a working test period. The steps necessary to perfect a regular appointment, include, but are not limited to, this agency's review and approval of a certification disposition proposed by an appointing authority and the employee's completion of a mandatory working test period.

In addition, Hill argues that she did not receive 45 days' notice of her "demotion." However, Hill was not demoted in lieu of layoff, which would require 45 days' notice to the employee. In that regard, *N.J.A.C. 4A:8-1.6(a)* provides that the written notice of the layoff action must be served by the appointing authority "at

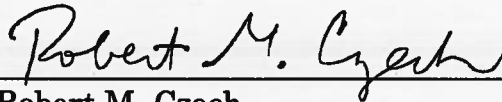
least 45 days prior to the action." *See also N.J.S.A. 11A:8-1(a)*. Finally, Hill claims that she is still performing the duties of an Administrative Assistant 2. In that regard, her recourse would be to request a classification review of her position pursuant to *N.J.A.C. 4A:3-3.9*.

### ORDER

Therefore, it is ordered that these appeals 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 3<sup>RD</sup> DAY OF JUNE, 2015



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