



STATE OF NEW JERSEY

In the Matter of Reallocation of	:	
Judiciary Clerk 1, Judiciary Clerk 2,	:	FINAL ADMINISTRATIVE ACTION
Judiciary Account Clerk 1, Court	:	OF THE
Services Representatives, and	:	CIVIL SERVICE COMMISSION
Judiciary Clerk Driver from the	:	
Competitive to the Non-Competitive	:	
Division of the Career Service	:	
	:	
	:	Request for Title Reallocation
CSC Docket No. 2022-1575	:	Court Remand
	:	

ISSUED: FEBRUARY 28, 2022

The Superior Court of New Jersey, Appellate Division, has remanded the Civil Service Commission’s (Commission) decision of to reallocate the Judiciary Clerk 1, Judiciary Clerk 2, Judiciary Account Clerk 1, Court Services Representatives, and their associated bilingual variants, and Judiciary Clerk Driver titles to the non-competitive division of the career service on an interim basis instead of a permanent basis for reconsideration. *See In the Matter of Reallocation of Judiciary Clerk 1, Judiciary Clerk 2, Judiciary Account Clerk 1, Court Services Representatives, and Judiciary Clerk Driver from the Competitive to the Non-Competitive Division of the Career Service*, Docket No. A-5248-18 (App. Div. January 11, 2022). The Court did not retain jurisdiction. Copies of the Appellate Division’s decision and the Commission’s May 22, 2019 decision are attached.

The background of this matter is thoroughly discussed in the attached Commission decision (*Judiciary Titles Reallocation*). In that matter, the Administrative Office of the Courts (AOC) requested that the subject titles be permanently reallocated to the non-competitive division of the career service due to the length of the certifications, the lists becoming stale, and the lists quickly exhausting, resulting in the Judiciary either going without staff for long periods or making provisional appointments. The Division of Agency Services (Agency Services) reviewed the request and noted that the titles are entry-level titles and do not have any minimum requirements for education and experience, and that the duties of the titles are basic and elementary requiring skills best assessed by direct observation during the working test period. Agency Services also found that the ranked eligible lists that have been issued for these titles have not or are not likely to meet the needs of the appointing authority due to such factors as salary, geographic locations, recruitment problems, and working conditions. Therefore,

Agency Services recommended reallocation of the subject titles to the non-competitive division. Upon its review, the Commission observed this agency has been able to consistently test for the possession of these basic skills in competitive situations and acknowledged that ranked eligible lists and certifications, on some occasions, may not have met the needs the appointing authority. However, the Commission was reluctant to permanently reallocate these titles to the noncompetitive division without first attempting to administratively address the issues raised by AOC to ensure that the State constitutional mandate to competitively test to fill positions in the public service have been exhausted. Accordingly, the Commission reallocated the subject titles to the noncompetitive division on an interim basis from May 25, 2019 to the date when new eligible lists were promulgated for these titles, but until no later than May 24, 2020. Due to inconsistencies between the subject appeal and three other Commission decisions regarding permanent reallocation of lower-level job titles to the noncompetitive division, the Court remanded the matter to the Commission to issue a final agency decision explaining why the factors and principles it applied in its other decisions allowing for reallocation did not apply in this case, or, in its discretion, to reach a different conclusion on remand.

The AOC and the Judiciary Council of Affiliated Unions (JCAU)¹ were provided the opportunity to submit additional arguments for the Commission to consider in this remand.

The AOC, represented Edwin F. Chociey, Jr., Esq, presents the interim designation of the subject titles was inconsistent with prior decisions where the Commission routinely granted requests to permanently reallocate various titles to the noncompetitive division that require no experience or license, or that may require a license. In *In the Matter of Payroll Clerk* (CSC, decided September 1, 2021), the AOC emphasizes that the Commission determined that since Payroll Clerk was an entry-level title that does not have any experience requirements, there was no skill set to be tested and incumbents would gain the required skill set during on-the-job training were the bases when it permanently reallocated the Payroll Clerk to the noncompetitive division. Similarly, in *In the Matter of Reallocation of Local Government Titles from the Competitive to the Non-Competitive Division of the Career Service* (CSC decided July 30, 2014), the Commission reallocated multiple entry-level titles to the noncompetitive division that had no specific experience requirements but required education and/or appropriate certifications. In *In the Matter of Reallocation of Security Guard and Security Guard Bilingual in Spanish and English* (CSC, decided December 3, 2014) the Commission reallocated those titles based on the lack of education, experience and license requirement which rendered competitive testing impractical. The AOC

¹ The JCAU is comprised of five unions, sharing representation responsibilities of Support Staff unit employees based on their appointing authority and title. The five unions making up the JCAU are: AFSCME, CWA, IFPTE, OPEIU, and Teamsters.

further submits that in *In the Matter of Reallocation of State, Local, and Common Titles from the Competitive to the Non-Competitive Division of the Career Service, Phase 3* (CSC decided February 6, 2013), the Commission observed that competitive testing was not practicable for a number of titles without education or experience requirement or that they posed significant recruitment issues due to high turnover rates. The AOC posits that the Commission essentially relied on two criteria in making its determinations to reallocate these titles: 1) an education requirement of a high school diploma or less, with no experience and no license requirement, and 2) positions that did not have an education or experience requirement that may require a specific government issued license. Accordingly, the AOC states that to be consistent with the above noted determinations, the Commission should reallocate the subject titles in this matter as none have an education or experience requirement.

The AOC also presents that since it submitted the original reallocation request in November 2016, candidate pools for the Judiciary Clerk 2 (JC2) titles have been shrinking in both number and quality. As a result, in January 2022, it conducted a survey of its vicinages for vacancies in the JC2 titles which found that a number of “lists”² for certain vicinages had been exhausted. It also provides a listing by county of the number of eligibles certified for appointment consideration, the number who responded by mail as interested, the number who failed the appointing authority administered typing test, the number who were appointed from the list by other vicinages, and an indication if vacancies still existed or are anticipated and if the remaining number of eligibles would result in an incomplete certification. The AOC also notes that some vicinages, such as Bergen and Hudson, have had to put filling JC2 positions on hold from mid-summer 2021 due to their inability to fill them via eligible lists. Further, it states that the number of JC2 eligibles on certifications are essentially a moving target, as some eligibles from the list choose multiple geographic areas to which their names can be certified. The AOC recognizes that eligibles may be able to be certified to some vicinages, but average fewer than 10 candidates. Additionally, the AOC underscores that the vicinages that have returned certifications still have additional JC2 positions to fill. Given that the next open competitive examination for JC2 is tentatively planned for April or May 2022, and the time it will take to score the test and issue eligible lists, there is still no ability in the near term for vicinages with vacancies to permanently

² It should be noted that there is only a single eligible list for JC2 and that is utilized statewide to fill positions in all the vicinages. The AOC appears to be equating certification of names issued from the single eligible list as individual eligible lists specific to each vicinage. This is incorrect. Rather, the certifications issued to the vicinages contain the names of only those eligibles from the list who indicated on their application to take the test that they would like to have their name certified to specific geographic areas. Thus, for example, if only 10 individuals on a list of 50 eligibles indicate that they want their name certified to positions in Cumberland County, the other 40 eligibles on the list will not be certified to Cumberland County for the life of the list. Stated differently, the AOC appears to mean that no more names are on the eligible list of individuals whose names could be certified to certain vicinages, but that does not mean the eligible list is exhausted. It only means it is exhausted of individuals whose names could be certified to a specific vicinage.

fill those positions. Therefore, the AOC maintains that the subject titles should be permanently reallocated to the noncompetitive division.

The JCAU, represented by David Beckett, Esq., and Adam Liebttag, President, CWA Local 1036, present that the Commission's decision to reallocate the subject titles on an interim basis was reasonable and consistent with the record it was presented. In this regard, the determination was the product of an administrative review of the titles at issue under the procedures described in *N.J.A.C.* 4A:3-1.2 and should be afforded deference. Moreover, while the Commission recognized possible issues with the certification of eligible list, it does not require that it permanently reallocate the titles. The JCAU notes that the AOC did not submit any proof about delays in the certification process or how the alleged delays hurt its recruitment efforts. Rather, the AOC states that it believes the length of time creates a recruitment problem. The JCAU maintains that the Commission properly concluded that competitive testing for the subject titles was practicable and has produced eligible lists for the titles that test the competencies set forth in the job specifications. Significantly, the JCAU observes that this agency, *not* any appointing authority, initiated the reallocations of the titles noted by the decisions cited by the AOC. Therefore, the JCAU maintains that the AOC's submissions fail to meet any of the criteria established in *N.J.A.C.* 4A:3-1.2 to reallocate the subject titles and in other cases any concerns regarding delayed eligible lists have been cured by the Commission granting short-term interim noncompetitive status.

CONCLUSION

N.J.A.C. 4A:3-1.2 provides, in part, that the Commission may reallocate titles from the competitive to the non-competitive division when competitive testing is not practicable due to the nature of the knowledge, skills, and abilities associated with the job or when certification procedures based on ranked eligible lists have not or are not likely to meet the needs of appointing authorities due to such factors as salary, geographic location, recruitment problems and working conditions.

N.J.A.C. 4A:3-1.2(c) provides that a job title may be placed in the noncompetitive division on an ongoing or interim basis when it is determined that it is appropriate to make permanent appointments to the title, and that one or more of the following criteria are met:

1. Competitive testing is not practicable due to the nature of the knowledge, skills and abilities associated with the job;
2. Certification procedures based on ranked eligible lists have not or are not likely to meet the needs of appointing authorities due to such factors as salary, geographic location, recruitment problems and

working conditions; or

3. There is a need for immediate appointments arising from a new legislative program or major agency reorganization.

Initially, the Court cited the Commission's decisions *Local Government Titles, supra,* and *Payroll Clerk and Security Guard & Security Guard, Bilingual, supra,* and requested an explanation as to why the factors and principles it applied in those decisions allowing for reallocation did not apply in this case. In order to do this, it is necessary to understand the basic framework of the State Classification Plan. As the Court emphasized in *Reallocation of Judiciary Clerk 1, Judiciary Clerk 2, Judiciary Account Clerk 1, Court Services Representatives, and Judiciary Clerk Driver from the Competitive to the Non-Competitive Division of the Career Service, supra,* regarding how subject titles are grouped in bands on the single job specification, "the closest in-use term is 'title series,' meaning 'titles involving the same kind of work and ranked according to level of difficulty and responsibility.'" Generally, the nomenclature used by the Commission to describe the title at the lowest level of difficulty and responsibility in the series is "entry-level title." The higher titles in the series are referred to as "the next above entry-level" or the "above entry-level" titles in the series. Additionally, there are single, standalone titles in the State Classification Plan that do not have higher levels, and thus, they are not part of a title series. However, just because an entry level title exists that does not have any minimum experience requirements, it does not necessarily mean it should not be tested and thus, be allocated to the competitive division. Additionally, titles are categorized as either professional (requiring a Bachelor's degree), para-professional (requiring completion of 60 college credits or 12 or more specific credits) or non-professional (which require less than 60 college credits or less than 12 specific college credits). Further, some titles in the State Classification Plan can only be used by State executive branch agencies under the jurisdiction of the Commission or only for the use by the Judiciary. *See N.J.S.A. 2B:11-5(a).* Significantly, some titles can only be used by local government entities that are under the jurisdiction of the Commission. In this regard, there are 20 of the State's 21 counties and more than 350 municipalities utilizing these "local" titles.

The distinction between the Commission's decision in *Local Government Titles, supra,* and the instant matter are significant. Initially, the 22 titles that were reallocated were exclusively structured for use by local government entities whereas the titles at issue in the instant matter are for the exclusive use by the State's Judiciary branch. Moreover, the Judiciary titles at issue are all non-professional titles, as they all require possession of less than 60 college credits or less than 12 specific college credits. Conversely, all of the titles that were reallocated in *Local Government Titles, supra,* are professional titles, which require possession of a Bachelor's degree, a Bachelor's degree in a specific major, and/or possession of specialized license or certificate.

For example, one of the local use titles reallocated in *Local Government Titles, supra*, was Architectural Assistant. The local service Architectural title series consists of two titles, the entry-level Architectural Assistant title and the Architect title. The minimum requirements are a Bachelor's degree in Architecture.³ The title is essentially the local service equivalent of a State trainee title because it is the entry-level title to the series that can provide the incumbent with the necessary experience needed ultimately to be able to obtain the required license as an Architect which is needed to establish eligibility for the higher-level title in the series, Architect. Moreover, competitive testing was not practicable for Architectural Assistant for a number of reasons. First, prior to its reallocation to the non-competitive division, as this is an entry-level title, in accordance with established testing principles, any test developed for Architectural Assistant could only test knowledge, skills, and abilities (KSAs) that potential candidates can bring to the job. Additionally, prior to its reallocation in August 2014, out of more than 350 local jurisdictions who could use the title, this agency had only announced three examinations for Architectural Assistant since 2006. Two of those examinations, ironically for the same county, were conducted as qualifying unassembled examinations since only one applicant had applied for the test. A qualifying unassembled examination is generally utilized when all candidates meet the requirements for the title but, based on the size of the pool of eligibles, any resultant list would be incomplete. An incomplete eligible list means the examination situation was not competitive because this agency cannot provide an appointing authority with an eligible list of at least three names for permanent appointment consideration as required by *N.J.S.A. 11A:4-8*. When a qualifying unassembled examination is utilized as the test mode, the admitted candidates are simply assigned a base passing score because they meet the open competitive requirements. Therefore, testing was not practicable for Architectural Assistant because possession of the required Bachelor's degree demonstrates that those possessing the degree have already successfully demonstrated proficiency in the required KSAs for the entry level position, the minimal use of the title across all Civil Service local jurisdictions, and this agency's inability to provide those appointing authorities that wanted to utilize the title a complete list essentially results in a non-competitive situation.

Conversely, in accordance with *N.J.A.C. 4A:1-1.3*, the Judiciary Clerk title series (and its bilingual variant) consists of four titles: Judiciary Clerk 1, Judiciary Clerk 2, Judiciary Clerk 3, and Judiciary Clerk 4. The title that has the lowest level of difficulty and responsibility in the series, as evidenced by the job specification, is

³ Many professional titles have substitution clauses for the required education. The Architectural Assistant title permits possession of a valid license or certificate as a Registered Architect issued by the New Jersey Board of Registered Architects as a substitute for the Bachelor's degree in Architecture. This is not intended to transform the duties and responsibilities of the title to a higher level in the series. Rather, it is the recognition of the equivalency of certain licensures or certifications to the minimum education requirements and it makes little sense to exclude those who possess this credential with the opportunity for entry into public service.

Judiciary Clerk 1. The Judiciary Clerk title series is non-professional as it requires less than 60 college credits or less than 12 specialized college credits. Moreover, the job specification lists a number of required competencies for each level of the title series, specifically noting that the competencies are cumulative in nature and “lower level competencies are prerequisite to higher levels.” As such, Judiciary Clerk 1 is the entry level title into the Judiciary Clerk title series. Significantly, in the Minimum Requirement section of the job specification, the only requirement for Judiciary Clerk 1 is the ability to use a keyboard with no minimum speed. However, for Judiciary Clerk 2, Judiciary Clerk 3, and Judiciary Clerk 4, each of those titles require an ability to type a minimum of 25 net words per minute. Additionally, the Judiciary Clerk 3 and the Judiciary Clerk 4 titles require either one or three years of specific experience. Stated differently, ***Judiciary Clerk 2 is not an entry-level title because it does not have the lowest level of difficulty and responsibility in the title series, and it has specific minimum requirements to establish eligibility, i.e. the ability to type a minimum of 25 net words per minute.*** Rather, it is the next above entry-level title in the Judiciary Clerk series. As noted earlier, all of the titles reallocated in *Local Government Titles, supra*, were entry level professional titles that were not practicable to test because the required education demonstrated successful testing of the required KSAs to bring to the position and the eligible lists provided by this agency were often non-competitive as evidenced by the inability of this agency to consistently provide complete eligible lists for the reallocated titles to local appointing authorities. Moreover, this agency has consistently provided complete eligible lists for the above entry-level title of Judiciary Clerk 2 as indicated by the below chart.

SYMBOL	TITLE	# OF ELIGIBLES	EXPIRATION DATE	# ELIGIBLES REMAINING ON LIST
S0387A	JUDICIARY CLERK 2	253	AUGUST 21, 2022	25
S0591A	JUDICIARY CLERK 2	84	JANUARY 29, 2023	14
S0978A	JUDICIARY CLERK 2	75	AUGUST 4, 2024	23
S0116B	JUDICIARY CLERK 2	72	AUGUST 4, 2024	37

Moreover, an open competitive examination for Judiciary Clerk 2 was announced with a closing date of October 21, 2021, and 176 applicants applied for the examination that is anticipated to be conducted in the spring of 2022. When announced, all of the professional titles reallocated in *Local Government Titles, supra.*, resulted in minimal applicants filing for the examination that often resulted

in eligible lists that were not competitive. The above entry-level Judiciary Clerk 2 announcements, as noted above, result in numerous interested applicants applying for the test. Further, there are eligibles remaining on each of the existing lists and a pending examination to address the needs of vicinages that have exhausted candidates interested in the specific geographic area. Therefore, the issue concerning Judiciary Clerk 2 is significantly different than those titles reallocated in *Local Government, supra*.

The Court also requested an explanation of why the factors and principles applied *Payroll Clerk, supra*, did not apply in this case. The State service Payroll Clerk title series consists of four titles: The entry-level title Payroll Clerk, Senior Payroll Clerk, Principal Payroll Clerk, and Supervising Payroll Clerk. There are no minimum requirements for Payroll Clerk as it is an entry-level non-professional title. Prior to the Commission's reallocation of Payroll Clerk in 2021, this agency had announced three examinations for the title since July 2014. Only one applicant applied for one of the examinations and the other two announcements only had two individuals apply for each test. As the pool of eligibles could not result in a complete list, the test mode utilized was a qualifying unassembled examination and each candidate received the same passing score. The examination process is not practicable for this title because requiring an individual to file for an examination with this agency when it has historically been unable to produce a complete list for the title will result in all admitted candidates who meet the requirements, being equally reachable for appointment consideration in accordance with the Rule of Three. In other words, testing would **not** usefully differentiate the candidates for merit or fitness since all would be eligible for appointment consideration. As noted earlier, the above entry-level title Judiciary Clerk 2 has consistently resulted in numerous applicants and complete lists.

With respect to *Security Guard & Security Guard, Bilingual, supra*, the Security Guard title series consists of three titles and their bilingual variant: the entry-level Security Guard title, Senior Security Guard, Supervising Security Guard, and Chief Security Guard. The entry-level Security Guard title has no minimum requirements. Based on its review of the job specification and the title's KSAs, Agency Services determined that it was not practicable to test the KSAs that potential candidates bring to the job. Conversely, in accordance with the minimum requirements stated on the job specification, Judiciary Clerk 2 requires the ability to type a minimum of 25 net words a minute. However, the Judiciary Clerk 1 title is the lowest in the Judiciary Clerk title series, and is thus, the entry level title. Moreover, Court Services Representative and Judiciary Clerk Driver are standalone titles not in a series. Additionally, as entry-level non-professional titles there is essentially no appreciable requirements for these titles. Further, the Judiciary Clerk Driver only requires an appointee to have a valid New Jersey Driver's license. Therefore, consistent with other entry-level non-professional clerical titles used in

State service, Judiciary Clerk 1, Court Services Representative, and Judiciary Clerk Driver should be reallocated to the non-competitive division.

With respect to Judiciary Account Clerk 1, the comparable title series used in State Executive branch service is Audit Account Clerk. While Agency Services recommended that the local service entry-level Account Clerk title should be reallocated, it did not recommend that the entry-level State Audit Account Clerk title be reallocated as it was practicable to test the KSAs. Therefore, consistent with other State Account Clerk titles, this title shall remain in the competitive division. Regarding Judiciary Clerk 2, as exhaustively explained, this is not the entry-level title to the non-professional Judiciary Clerk title series. Further, a review of the State Classification Plan finds all “next above entry-level” non-professional clerical titles are allocated to the competitive division. Moreover, competitive testing has been practicable as evidenced by the numerous complete eligible lists that have been promulgated by this agency. Additionally, announcements are issued for Judiciary Clerk 2 on a schedule to ensure complete lists are available to those vicinages that exhaust the names of those candidates who indicated interest to be certified to a particular area. Accordingly, Judiciary Clerk 2 does not meet the criteria to be reallocated to the non-competitive division.

Based on all the foregoing, there is a sufficient basis on which to reallocate Judiciary Clerk 1, Court Services Representative, Judiciary Clerk Driver, and their bilingual variants to the non-competitive division of the career service on a permanent basis. However, there is not a sufficient basis on which to reallocate the Judiciary Account Clerk 1 and the Judiciary Clerk 2 titles and their bilingual variants to the non-competitive division. Nevertheless, the Judiciary is not precluded from promoting any individual it appoints from the non-competitive titles of Judiciary Clerk 1, Court Services Representative, and Judiciary Clerk Driver to the higher in-series or out of series titles under its normal promotional procedures.

ORDER

Therefore, it is ordered that the Judiciary Clerk 1, Court Services Representative, Judiciary Clerk Driver, and their bilingual variants be reallocated to the non-competitive division of the career service on a permanent basis. It is further ordered that such action be effective the first pay period after the date of the Commission’s decision. However, there is not a sufficient basis on which to reallocate the Judiciary Account Clerk 1 and the Judiciary Clerk 2 titles and their bilingual variants to the non-competitive division.

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 FEBRUARY, 2022

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
PO Box 312
Trenton, New Jersey 08625-0312

Attachments

c: Edwin F. Chociey, Jr., Esq.
David Beckett, Esq.
Adam Liebttag
Division of Agency Services
Records Center



STATE OF NEW JERSEY

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

In the Matter of Reallocation of
Judiciary Clerk 1, Judiciary Clerk 2,
Judiciary Account Clerk 1, Court
Services Representatives, and
Judiciary Clerk Driver from the
Competitive to the Non-Competitive
Division of the Career Service

Request for Title Reallocation
(Corrected Decision)

CSC Docket No. 2018-1508

ISSUED: June 19, 2019 (CSM)

The Division of Agency Services (Agency Services) recommends reallocation of the Judiciary Clerk 1, Judiciary Clerk 2, Judiciary Account Clerk 1, Court Services Representatives, and their associated bilingual variants, and Judiciary Clerk Driver titles to the non-competitive division of the career service in accordance with *N.J.A.C. 4A:3-1.2*.

By way of background, the Judiciary, via the Administrative Office of the Courts (AOC), requested reallocating the subject titles to the non-competitive division. In support of its request, the AOC indicated that competitive testing is not practicable due to the nature of the knowledge, skills and abilities associated with the jobs. Specifically, it indicated that the subject titles are at the entry level for the Support Staff Band Specification and do not have any minimum requirements for education or experience. Although the Judiciary Clerk 2 and Judiciary Account Clerk 1 titles require an incumbent to have the ability to type 25 words per minute, the AOC noted that it assesses candidates' typing proficiency through appointing authority administered examinations or typing proficiency certifications issued by the Civil Service Commission (Commission). Additionally, the AOC indicated that certification procedures based on ranked eligible lists have not met its needs due to factors such as salary, geographic locations, recruitment problems, and working conditions. Specifically, AOC presented that due to the length of certifications, in some counties, the lists become stale while in other counties, the lists exhaust more quickly, and often, bilingual lists exhaust due to the number of candidates who apply. Thus, when the lists become exhausted, the Judiciary is required to request

another announcement from the Commission, resulting in it either going without staff for long periods or making provisional appointments. The AOC states the reallocating these titles to the non-competitive division will allow for a more flexible process for recruitment and selection.

In response, the Council of Affiliated Unions (JCAU), represented by Kevin P. McGovern, Esq., presents that the AOC has failed to make an adequate showing that any of the criteria set forth in *N.J.A.C. 4A:3-1.2(c)* have been satisfied that would warrant reallocation of these titles. In this regard, it states that fact that the titles in question do not have any minimum requirements, except for the two titles that require typing proficiency, is not a sufficient reason to justify reallocation. JCAU contends that reallocation based on the nature of the knowledge, skills and abilities associated with the job has generally been reserved for two distinct situations, where the title is in a highly specialized field in which a State-issued license or certification is required or where the title is found to be a trainee or apprentice position. JCAU also argues that the AOC has not demonstrated that existing certification procedures for appointments do not meet their needs. In this regard, it presents that the AOC fails to state which titles and counties tend to exhaust the list quickly and which counties do not. Additionally, it states that the Commission has reallocated titles due to failure of the certification process to meet the employer's needs when there is a broad and pervasive need to fill titles in an expedited fashion. Therefore, the JCAU contends that granting the request based on a claimed inconvenience of having to remove provisional appointees who are not reachable on a resulting eligible list is inconsistent with the Commission's mandate.

In reply, the AOC states that the Commission has reallocated titles such as Account Clerk, Cashier, Court Aide, Court Attendant, Payroll Clerk, Security Guard, Receptionist, Mail Clerk, and Planning Aide, all titles that do not require education or experience, to the non-competitive division. Further, it notes that as far back as the early 1980's, the Commission reallocated the Clerk Typist and Clerk Transcriber titles to the non-competitive division and these titles do not have any minimum education and experience requirements. Additionally, AOC underscores that data it has collected over the past years reflect that the Judiciary Clerk 2, base and bilingual and Judiciary Account Clerk 1, base and bilingual, titles have been high turnover positions, which has in fact have increased substantially over the last four years. For example, in 2013, the total number of vacancies created due to advancement or separations in these titles was 79. However, this number increased to 119 in 2014, 152 in 2015, and 173 in 2016. Moreover, similar to Judiciary Clerk Driver, other titles that have no education or experience requirement, but may require a government issued license, such as Clerk Driver, Delivery Worker, Library Clerk Driver, Truck Driver, Single Axle, have been reallocated by the Commission as the applicant's qualifications have already been established and verification of the license, certification, or specialization can be accomplished through a post audit.

With respect to certification procedures, the AOC maintains that the length of time to hire through certification procedures creates recruitment problems. Since 2012, AOC states that the Judiciary has submitted vacancy announcement requests for Judiciary Clerk 1, Judiciary Clerk 2, Judiciary Account Clerk, and Court Services Representative, and the average period from the request to promulgation of the list is 6.5 months and the list has a duration of three years. The AOC explains that this is too long and has found that as the lists become older, more applicants do respond to position notifications or advise that they are not interested in the position. This lack of response by applicants or applicants advising that they are no longer interested in positions from an older list becomes problematic; even if it appears that there are a sufficient number of eligibles, if there are multiple openings to fill. In this regard, the AOC underscores that the need to replenish lists has increased between 2012 and 2017. Specifically, it states it has requested announcements for the Judiciary Clerk 2 and Judiciary Account Clerk 1 on five occasions. Conversely, if the title titles were reallocated to the non-competitive division, AOC states that it would have a viable pool of eligibles in two or three months.

As part of a survey conducted by the AOC of all its appointing authorities by county, it found that in 2017, five counties (Cape May, Hunterdon, Ocean, Somerset and Warrant) exhausted their lists of available eligibles and 15 counties (Atlantic, Bergen, Burlington, Camden, Cumberland, Essex, Gloucester, Hudson, Mercer, Monmouth, Morris, Passaic, Salem, Sussex, and Union) are close to exhausting their Judiciary Clerk 2, bilingual title lists. In 2017, three counties, (Cape May, Hunterdon, and Warren) have less than 30 eligible applicants on the Judiciary Clerk 2 lists. In 2017, 13 counties (Atlantic, Burlington, Cumberland, Cape May, Gloucester, Hunterdon, Mercer, Monmouth, Morris, Salem Somerset, Sussex, and Warren) have or less eligible applicants and five counties (Bergen, Essex, Hudson, Passaic, and Union) have between 11 and 20 eligible applicants on the Judiciary Account Clerk 1, bilingual list. In 2017, three counties, (Hunterdon, Somerset and Warren) exhausted the Judiciary Account Clerk 1 lists. Further, in 2016, 15 counties exhausted and five counties had less than five eligibles on the Judiciary Clerk 2 bilingual lists. AOC also notes that in 2016, 8 counties had 10 or less eligibles and another eight counties had between 11 and 30 eligibles on the Judiciary Clerk 2 list.

Agency Services reviewed the request and noted that these are entry-level titles and do not have any minimum requirements for education and experience. In this regard, it found that the duties of the titles are basic and elementary requiring skills best assessed by direct observation during the working test period. Moreover, it notes that placement of these titles in the non-competitive division is consistent with treatment of similar Executive branch titles. *See In the Matter of Clerk Typist, Clerk Stenographer, Clerk Transcriber, Graduate Nurse, and Practical Nurse* (CSC, decided June 21, 1983) and *In the Matter of Library Assistant Titles* (MSB, decided

May 23, 2000). Agency Services also found that additional support is found to reallocate these titles because ranked eligible lists have not or are not likely to meet the needs of the appointing authority due to such factors as salary, geographic locations, recruitment problems, and working conditions. In this regard, it determined that despite almost annual open competitive announcements for some of the subject titles, the Judiciary continued to exhaust these lists, particularly in certain Vicinages. For example, the Judiciary Clerk 2, Bilingual in Spanish and English (S0110U) eligible list promulgated in May 2016 with 123 names for consideration. However, there are now only 14 names remaining on that list. Similarly, the Judiciary Clerk 2 (S0642Z) eligible list promulgated in August 2016 with 488 names for consideration. However, there are only 150 names remaining on this list and several certifications are currently outstanding. Therefore, it is likely that upon disposal of these certifications, the remaining candidate pool will be depleted further. Under these circumstances, recommends reallocating the subject titles to the non-competitive division.

CONCLUSION

N.J.A.C. 4A:3-1.2 provides, in part, that the Commission may reallocate titles from the competitive to the non-competitive division when competitive testing is not practicable due to the nature of the knowledge, skills, and abilities associated with the job or when certification procedures based on ranked eligible lists have not or are not likely to meet the needs of appointing authorities due to such factors as salary, geographic location, recruitment problems and working conditions.

N.J.A.C. 4A:3-1.2(c) provides that a job title may be placed in the noncompetitive division on an ongoing or interim basis when it is determined that it is appropriate to make permanent appointments to the title, and that one or more of the following criteria are met:

1. Competitive testing is not practicable due to the nature of the knowledge, skills and abilities associated with the job;
2. Certification procedures based on ranked eligible lists have not or are not likely to meet the needs of appointing authorities due to such factors as salary, geographic location, recruitment problems and working conditions; or
3. There is a need for immediate appointments arising from a new legislative program or major agency reorganization.

Based on all of the foregoing, there is not a sufficient basis on which to reallocate the proposed titles to the noncompetitive division on a permanent basis at this time. Although the duties of the titles are basic and elementary, this agency has been able to consistently test for the possession of these basic skills in competitive situations. Further, while the ranked eligible lists may have, on some occasions, been unable to meet the needs of the appointing authority due to such factors as salary, geographic locations, recruitment problems, and working conditions, the Commission is reluctant at this time to permanently reallocate these titles to the noncompetitive division without first attempting to administratively address these issues through other means to ensure that the State constitutional mandate to competitively test to fill positions in the public service have been exhausted. In this regard, the Commission notes that it is anticipated that an open competitive examination for Judiciary Clerk 2 is currently being processed and, after the examination, an eligible list is expected to be promulgated by September 2019.

However, in the interim, in order to meet the Judiciary's current critical staffing needs, certification procedures based on the existing ranked eligible list are not likely to meet the needs of the appointing authority. Under these circumstances, interim noncompetitive status for the subject titles is appropriate in this matter. Additionally, *N.J.A.C. 4A:3-1.2(g)* provides that, if a title is designated noncompetitive on an interim basis, at the end of the interim noncompetitive period, which shall be no greater than one year, the job title shall be redesignated as competitive. Individuals appointed during the interim noncompetitive period shall, upon successful completion of their working test periods, attain permanent status in the competitive division.

ORDER

Therefore, it is ordered that this request be granted, and interim noncompetitive designations for the subject titles be effected. This designation will be effective from May 25, 2019 to the date when new eligible lists are promulgated for these titles, but until no later than May 24, 2020. At the end of this period, the subject titles will be returned to the competitive division of the career service.

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 DAY OF MAY 22, 2019

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Keith Aversa
Kevin P. McGovern, Esq.
Kelly Glenn

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5248-18

IN THE MATTER OF
REALLOCATION OF JUDICIARY
CLERK 1, JUDICIARY CLERK 2,
JUDICIARY ACCOUNT CLERK 1,
COURT SERVICES REPRESENTATIVES,
AND JUDICIARY CLERK DRIVER
FROM THE COMPETITIVE TO
THE NON-COMPETITIVE DIVISION
OF THE CAREER SERVICE.

Argued September 27, 2021 – Decided January 11, 2022

Before Judges Summers, Vernoia and Firko.

On appeal from the New Jersey Civil Service Commission, Docket No. 2018-1508.

Edwin F. Chociey, Jr. argued the cause for appellant Administrative Office of the Courts (Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys; Edwin F. Chociey, Jr., of counsel and on the briefs; Siobhan A. Nolan, on the briefs).

David Beckett argued the cause for respondent Judicial Council of Affiliated Unions (Beckett & Paris, LLC, attorneys; David Beckett, of counsel and on the brief).

Andrew J. Bruck, Acting Attorney General, attorney for respondent New Jersey Civil Service Commission, (Pamela N. Ullman, Deputy Attorney General, on the statement in lieu brief.)

PER CURIAM

The June 19, 2019 final agency decision of the Civil Service Commission (Commission) allowed the Judiciary, via the Administrative Office of the Courts (AOC or "agency"), a one-year interim reallocation of several entry-level support staff titles from the competitive to the noncompetitive division of the career service—exempting the titles from competitive examination hiring procedures—but denied the request for permanent reallocation of the titles. The AOC appeals, contending the decision was arbitrary, capricious, or unreasonable, arguing the Commission ignored substantial evidence, as well as its own prior decisions allowing for reallocation of entry-level job titles. Based upon the record on appeal, we remand so the Commission can explain why its June 19 decision differed from its decisions before and after that ruling. The Commission shall issue its remand decision within sixty days. We do not retain jurisdiction.

I

We briefly summarize the facts that bring this dispute before us. On November 17, 2016, the AOC, pursuant to N.J.A.C. 4A:3-1.2(c)(1) and (2),

submitted a letter to the Commission's Division of Agency Services (Agency Services) requesting the reallocation of several job titles from the Commission's competitive division to the non-competitive division. The request included the Judiciary "Support Staff Band Specification," a Commission-promulgated document grouping similar titles ("job band" or "title series"),¹ and a description of their duties and qualifications ("specifications"). The document covers the "Clerical, Administrative and Courtroom Support Track" of the support staff band, consisting of four levels: basic non-keyboarding titles, including Judiciary Clerk 1 and Court Services Representative; basic keyboarding titles, including Judiciary Clerk 2 and Judiciary Account Clerk 1; "Journey" titles; and "Mastery/Paraprofessional" titles. The designated support staff band includes "the base and bilingual titles."

¹ A "job band" is "a grouping of titles or title series into a single broad band consisting of title levels with similar duties, responsibilities, and qualifications." Commc'ns Workers of Am., AFL-CIO v. N.J. Civ. Serv. Comm'n, 234 N.J. 483, 551 (2018). The term "job band" was made defunct by the Court's decision in Communication Workers of America, AFL-CIO, which invalidated the program for which the term was adopted, and by the Commission's subsequent deletion of the term from most Civil Service regulations. 51 N.J.R. 191(b) (Feb. 19, 2019). The closest currently in-use term is "title series," meaning "titles involving the same kind of work and ranked according to level of difficulty and responsibility[,]" N.J.A.C. 4A:1-1.3, for which "[a] single specification may be used," N.J.A.C. 4A:3-3.2(c).

The titles included were "Judiciary Clerk 1, Court Services Representative, Judiciary Clerk Driver, Judiciary Clerk 2 and Judiciary Account Clerk 1, including the base and bilingual titles." Duties of level 1 titles include, among other things:

- sorting, searching, and filing documents;
- answering routines questions;
- computing simple numerical data;
- operating photocopy machines and video or audio recording equipment;
- storing, inventorying, and distributing materials, parts, or supplies;
- recording applications, transactions, and requests; and
- performing physical tasks as necessary to reach or move job-related materials.²

There are no minimal education or experience requirements for level 1 titles. The job specifications require "competencies," such as: listen well, adequately communicate ideas and information in writing using correct grammar, perform basic arithmetic, understand written material, and manage and organize information.

Duties of level 2 titles include, among other things:

- operating computers;

² "Any one position may not include all of the tasks listed, nor do [these] examples cover all" possible duties.

- providing information to the public;
- requesting needed information from the appropriate parties;
- recording information into record-keeping or accounting systems;
- typing narrative statements, reports, correspondences, memoranda, warrants, contracts, or other legal documents;
- typing statistical or technical documents;
- calculating attorneys' fees or court costs;
- scheduling and participating in team meetings;
- composing routine correspondence; recording complaints;
- informing judges on the status of case-related matters; and
- communicating with counsel.

There are no minimal education or experience requirements for level 2 titles. The job specifications require "competencies," such as: type twenty-five words per minute; "identif[y] or solve[] problems in machines, computers, or other technologies as they are related to performing tasks"; interact well and tactfully with "different people from varied backgrounds and different situations[,]" including team participation; "solve[] practical problems by choosing appropriately from a variety of mathematical techniques such as formulas and percentages." Level 2 also requires knowledge of how "social, political, organizational, and technological systems work and" the ability to

"operate[] effectively within them." Additionally, positions involving the operation of a vehicle require a valid driver's license.

The AOC asserted that competitive testing for the titles was not practicable due to their minimal requirements. It further claimed the "[c]ertification procedures based on ranked eligible lists³ have not or are not likely to meet" the Judiciary's hiring needs, because:

[D]ue to the length of certifications, in some counties the lists become stale while in other counties[] the lists exhaust more quickly, and often bilingual lists exhaust due to the number of candidates who apply. When lists become exhausted, the Judiciary is required to request another announcement through the Commission, which has required the Judiciary to go without staff for long periods of time, or to hire provisionally. Many of the appointing authorities within the Judiciary are reluctant to hire provisionally due to the potential issues with provisionally appointed candidates not being reachable through the exam process. Resources are needlessly wasted when provisionals are appointed and ultimately must be removed because they have not had the

³ "'Eligible list' means a roster compiled or approved by the [Commission] of persons who are qualified for employment or reemployment[,] while '[c]ertification' means a list of names presented to an appointing authority for regular appointment." N.J.A.C. 4A:1-1.3. Generally, eligible persons are ranked "in order of their scores" from competitive testing. N.J.A.C. 4A:4-3.2(a)(2). "When a vacancy is to be filled in the competitive division of the career service from an eligible list, the appointing authority shall request [from the Commission] a certification of names for regular appointment." N.J.A.C. 4A:4-4.1(a). A certification "contain[s] the names and addresses of the eligibles with the highest rankings on the appropriate [eligible] list." N.J.A.C. 4A:4-4.2(a).

opportunity to compete in a testing situation or they do not pass or are not reachable on the resulting list. A non-competitive hiring status will allow a more flexible process for recruitment and selection than the traditional civil service testing process provides.

As an alternative, the agency proposed that the Judiciary appointing authorities would post vacancy notices as needed, human resources would work with hiring managers and/or interview panels to develop hiring criteria, and "[c]andidates would go through a structured interview process that [would] allow appointing authorities to target candidates with the competencies needed" and candidates would "be required to successfully pass a keyboarding assessment." Additionally, the vacancy notices would be posted with language informing applicants that "[s]hould another position become available within the next five months . . . the applicant pool from this posting may be used to fill additional positions." The AOC reasoned this process would "provide the appointing authorities the flexibility to utilize applicant pools for a short duration to ensure there is a sufficient applicant pool" or post a new notice of vacancy "in the event that a pool is insufficient."

The Judiciary Council of Affiliated Unions (JCAU) opposed the application. It argued, in part, that the AOC's request was unsupported by data or evidence and failed to address the titles with specificity.

To support its petition, the AOC subsequently submitted a chart of survey results, which did not indicate when it was conducted, listing 128 vacancies by county for the base and bilingual Judiciary Clerk 2 titles.⁴ The AOC also asserted "the length of time to hire through the certification process creates recruitment problems." It claimed the time for requesting an announcement of open competitive exams to promulgating new eligible lists took an average six-and-half-months, which "is much too long if an appointing authority has depleted or is close to depleting a list for a particular title."

Additionally, the AOC indicated that it had requested such announcements with regard to the base and bilingual Judiciary Clerk 2 and Judiciary Account Clerk 1 titles most years between 2012 and 2017. The AOC claimed the three-year duration of eligible lists was "too long . . . [in] that as the lists become older, more applicants do not respond to the position notification or advise the Judiciary that they are not interested in the position[,]" explaining that the "lack of response by applicants or applicants advising that they are no longer interested in the position from an older list may become problematic even

⁴ A chart note states "that many vicinages elect to fill their vacancies using the bilingual list, even if their vacancies are not specifically designated as bilingual vacancies."

for lists that appear to have sufficient numbers of eligible, for example [forty] or [fifty] names, especially if there are multiple openings to fill."

The AOC also submitted a summary of a survey it conducted of all appointing authorities, by county, to determine the status of the current job title lists. The summary evidenced the paucity of eligible applicants from 2016 and 2017 for some counties but did not include any information on the base or bilingual Judiciary Clerk 1, Court Services Representative, or Judiciary Clerk Driver titles. The AOC argued the Commission had previously reallocated similar titles "based on their not having any minimum education and/or experience requirements or based on their only requiring a valid license."

On June 19, 2019, the Commission issued its final agency decision reallocating the titles, but only on an interim basis. In making its decision, the Commission rejected the recommendation of Agency Services that reallocation be granted. Agency Services supported the AOC's reallocation request because: (1) it was for entry-level titles "requiring skills best assessed by direct observation during the working test period[,]"⁵ similar to executive branch titles

⁵ "'Working test period' means a part of the examination process after regular appointment, during which time the work performance and conduct of the employee is evaluated to determine if permanent status is merited." N.J.A.C. 4A:1-1.3.

that have been reallocated to the noncompetitive division; and (2) the "ranked eligible lists have not or are not likely to meet the needs of the appointing authority due to such factors as salary, geographic locations, recruitment problems, and working conditions." Agency Services "determined that despite almost annual open competitive announcements for some of the subject titles, the Judiciary continued to exhaust these lists, particularly in certain [v]icinations."⁶

The Commission determined there was "not a sufficient basis on which to reallocate the proposed titles to the noncompetitive division on a permanent basis at this time." It explained:

Although the duties of the titles are basic and elementary, this agency has been able to consistently test for the possession of these basic skills in competitive situations. Further, while the ranked eligible lists may have, on some occasions, been unable to meet the needs of the appointing authority due to such factors as salary, geographic locations, recruitment problems, and working conditions, the Commission is reluctant at this time to permanently reallocate these titles to the noncompetitive division without first attempting to administratively address these issues through other means to ensure that the State constitutional mandate to competitively test to fill

⁶ Notably, the copy of the Agency Services memorandum in the record appears to be incomplete. It is only a single page, and only discusses the first basis for reallocation.

positions in the public services has been exhausted. In this regard, the Commission notes that it is anticipated that an open competitive examination for Judiciary Clerk 2 is currently being processed and, after the examination, an eligible list is expected to be promulgated by September 2019.

However, in the interim, in order to meet the Judiciary's current critical staffing needs, certification procedures based on the existing ranked eligible list are not likely to meet the needs of the appointing authority. Under these circumstances, interim noncompetitive status for the subject titles is appropriate in this matter.

The Commission did not affirmatively find that competitive examination would be practicable after the interim reallocation ended. Rather, it found that there was "not a sufficient basis" in the record for permanent reallocation, finding "the ranked eligible lists may have, on some occasions, been unable to meet" the Judiciary's needs, resulting in "current" staffing issues. The only support that determination requires is a lack of evidence that permanent reallocation is necessary. Thus, the Commission did not need substantial evidence that permanent reallocation was unnecessary to justify its findings.

II

Before us, the AOC contends the Commission's decision to only grant reallocation on an interim basis was arbitrary and unsupported by substantial evidence. It argues the record established: (1) that certification procedures are

inadequate to meet the Judiciary's needs; and (2) that competitive testing for these positions is not practicable because they have minimal requirements.

Appellate review of an administrative agency decision is limited. In re Herrmann, 192 N.J. 19, 27 (2007). A "strong presumption of reasonableness attaches" to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993)). Thus, we generally defer to final agency actions, only "reversing those actions if they are 'arbitrary, capricious or unreasonable or [if the action] is not supported by substantial credible evidence in the record as a whole.'" N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 384-85 (2008) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)).

We must defer even if we would have reached a different result. In re Carter, 191 N.J. 474, 483 (2007) (citing Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). It is not our role to second-guess or substitute our judgment for that of the agency and, therefore, we do not "engage in an independent assessment of the evidence as if [we] were the court of first instance." In re Taylor, 158 N.J. 644, 656 (1999) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). Despite that general deference to the agency's

interpretations, this court is not bound by them. In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super 100, 114 (App. Div. 2013); N.J. Chapter of Nat'l Ass'n of Indus. and Office Parks v. N.J. Dep't of Env't'l Prot., 241 N.J. Super. 145, 165 (App. Div. 1990) ("While we must defer to the agency's expertise, we need not surrender to it.").

Our Supreme Court has recognized:

Although administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review. Administrative agencies must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Van Holten Group v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990). When the absence of particular findings hinders or detracts from effective appellate review, the court may remand the matter to the agency for a clearer statement of findings and later reconsideration. Application of Howard Sav. Inst., 32 N.J. 29, 53 (1960).

[In re Vey, 124 N.J. 534, 543-44 (1991).]

"Unexplained inconsistency is . . . a reason for holding an [agency's] interpretation to be an arbitrary and capricious change from agency practice" Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005). Thus, "when an agency changes its course, it must provide a 'reasoned analysis.'" Glukowsky v. Equity One, Inc., 180 N.J. 49, 66 (2004)

(quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983)).

The Commission is guided by Article VII, Section 1, Paragraph 2 of the New Jersey Constitution, which provides:

Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.

Nevertheless, the Constitution "does not require that merit and fitness be determined by competitive examination in every case, but only 'as far as practicable.'" Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 232 (1985) (quoting N.J. Const. art. VII, § 1, ¶ 2).

Our Constitution "recognize[s] that although competitive examination would be the general rule . . . , there would be situations where [it] would not be practicable." Falcey v. Civ. Serv. Comm'n, 16 N.J. 117, 122-23 (1954). Thus, "any waiver of traditional competitive examinations must, as a constitutional matter, be based on their impracticality[,]" and on a title-by-title basis. In re Reallocation of Prob. Officer, 441 N.J. Super. 434, 445 (App. Div. 2015). The

constitutional competitive-examination mandate governs the outcome "over and above [any] statutory and regulatory requirements." Id. at 450. Thus here, on a title-by-title basis, "consideration must be given to whether the AOC has demonstrated that it is impracticable for it to continue filling" these positions "through open, competitive examinations." Ibid.

The Commission is also guided by statute and regulation. Passed in 1986, the Civil Service Act Title established Title 11A of our state statutes, id. at 444, and "governs civil service employment in New Jersey, which includes all positions within state government and those within the political subdivisions that choose to adopt it and be governed by its terms," Commc'ns Workers of Am., AFL-CIO v. N.J. Civ. Serv. Comm'n, 234 N.J. at 522. It grants the Commission the authority to:

- a. Establish, administer, amend and continuously review a State classification plan governing all positions in State service and similar plans for political subdivisions;
- b. Establish, consolidate and abolish titles;
- c. Ensure the grouping in a single title of positions with similar qualifications, authority and responsibility;
- d. Assign and reassign titles to appropriate positions;
and
- e. Provide a specification for each title.

[N.J.S.A. 11A:3-1.]

The Commission is thus authorized to "[a]dopt and enforce rules to carry out [the act] and to effectively implement a comprehensive personnel management system." N.J.S.A. 11A:2-6(d).

Under N.J.A.C. 4A:3-1.2(c), "[a] job title may be placed in the noncompetitive division on an ongoing or interim basis" when the Commission determines "one or more" of three criteria are met. A finding that any or all of these criteria are met allows either "ongoing or interim" reallocation, and, as indicated by the use of the permissive phrase "may be placed . . . on an ongoing or interim basis[,]" the regulation leaves this determination to the Commission's discretion. Ibid. See also Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000) ("Under the 'plain meaning' rule of statutory construction, the word 'may' ordinarily is permissive and the word 'shall' generally is mandatory.").

Examining the three criteria permitting reallocation, it appears that each might be read as stating different reasons why competitive examination is impracticable. N.J.A.C. 4A:3-1.2(c)(2) and (3) both recognize that the competitive examination and certification process is not practicable when it is insufficient to meet an appointing authority's hiring needs. Subsection (c)(3) applies where that insufficiency is due to "a need for immediate appointments

arising from a new legislative program or major agency reorganization[,]" which would justify "limited, interim" reallocation. In re Reallocation of Prob. Officer, 441 N.J. at 447, 449. Subsection (c)(2) applies where that insufficiency is due to "such factors as salary, geographic location, recruitment problems, and working conditions[,]" which might justify "interim" reallocation to fill vacancies where the certification procedures "have not" met the appointing authority's needs, and "ongoing" reallocation where they "are not likely to meet" those needs moving forward.

The criteria in subsection (c)(1) is less self-explanatory: "Competitive testing is not practicable due to the nature of the knowledge, skills, and abilities associated with the job" Considering the Legislature's intention in creating the noncompetitive division to provide for noncompetitive appointment to "lower-level jobs" that "cannot properly be tested for," N.J.S.A. 11A:3-2.1(d), this criterion was likely meant to cover such titles. But the question remains, what is it about any particular "lower-level" title that justifies it "cannot properly be tested for."

A few weeks prior to argument on this appeal, the Commission reallocated the payroll clerk title to the non-competitive division on a permanent basis. In Re Reallocation of Payroll Clerk, No. 2022-312, 2021 N.J. CSC LEXIS 375

(Sept. 7, 2021).⁷ The Commission explained that "[t]he subject title is an entry-level position in which incumbents would receive on-the-job training while performing activities related to routine clerical work including the review, verification, and preparation of payroll or personnel records, keeping time and work records and performing related duties." Ibid. It also referenced, but did not detail, "urgent staffing needs" in the Department of Human Services, which submitted the reallocation request. Ibid.

Akin to the final decision here, Agency Services recommended reallocation on an ongoing basis, reasoning that "competitive testing is not

⁷ On September 29, 2021, the AOC filed a Rule 2:6-11(d) motion seeking reconsideration of our clerk's office September 24, 2021 decision rejecting its submission of In Re Reallocation of Payroll Clerk as an additional case citation under Rule 1:36-3. We denied the motion because the decision was not a court opinion and, thus, did not qualify as an unpublished opinion under Rule 1:36-3. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 1:36 (2022) ("Administrative law opinions so published are not subject to the non-citation ban of this rule because they are not court opinions.").

We also rejected the AOC's alternative argument that we accept its citation to In Re Reallocation of Payroll Clerk pursuant to Rule 2:5-5(a). The argument was not presented to the clerk's office but was set forth in its motion. Rule 2:5-5(a) is a mechanism for "an alternative method for settling the record when the issue is whether the transcript of sound or video recorded proceedings accurately represents what was said." Pressler & Verniero, cmt. 1 on R. 2:5-5(a). Thus, Rule 2:5-5(a) is inapplicable here.

Although we denied the motion, we reserved the right to consider any administrative decision cited or not cited by the parties, or issued before or after oral argument, that we determine is relevant to this appeal.

practicable for the subject title as it has no education and experience requirements, and the job specifications for the related titles have been updated." Ibid. Specifically, "the experience requirement for Supervising Payroll Clerk has been updated and the supervisory experience requirement has been removed as none of the lower level titles, including Payroll Clerk, provide the opportunity to gain the supervisory experience for advancement to that title." Id. at *1-2. The reallocation request was unopposed. Id. at *2.

The Commission ruled:

Based upon the foregoing, ample reasons exist for the reallocation of the proposed title to the non-competitive division of the career service. This is an entry-level title that does not have any experience requirements. Consequently, there is no skill set to be tested. Incumbents will gain the required skill set during on-the-job training. Therefore, competitive testing and certification procedures are not necessary.

[Id. at *2-3.]

From our reading, In re Reallocation of Payroll Clerk is consistent with two relevant prior Commission decisions, which suggest permanent reallocation of the subject titles here should have been granted. In In re Reallocation of Security Guard & Security Guard (Bilingual in Spanish & English) from the Competitive to the Non-Competitive Division of the Career Service, CSC Docket No. 2015-1402 (Dec. 5, 2014), the Commission's reasoning for

permanently reallocating the subject titles was that because they had "no education, experience or license requirement[. . .] competitive testing [was] impracticable." In In re Reallocation of Local Government Titles from the Competitive to the Non-Competitive Division of the Career Service, the Commission explained that it was permanently reallocating the subject titles because "[t]here [were] no specific experience requirements for the titles at issue and the only requirement [was] possession of education and/or certification. Therefore, competitive testing [was] impracticable for these titles." No. 2015-251, 2014 N.J. CSC LEXIS 572, at *4 (Aug. 4, 2014),

All three decisions are inconsistent with the Commission's decision in this case. As in In re Reallocation of Payroll Clerk: (1) the titles at issue here do not have any education or experience requirements; (2) Agency Services recommended reallocation; and (3) the appointing authority was experiencing "critical staffing needs." Seemingly, the only distinction between this case and In re Reallocation of Payroll Clerk is that here the reallocation request was opposed, while there it was not. Opposition to a reallocation application is not a determinative factor, especially considering the state constitutional requirement of competitive testing where "practicable," N.J. Const. art. VII, § 1, ¶ 2, and the legislative policy of exempting titles from competitive testing

where it is in fact impracticable, N.J.S.A. 11A:3-2.1(d). Significantly, the Commission's decisions do not acknowledge or offer any explanation for the apparent inconsistency between its reallocation decisions.⁸

We do not conclude that In re Reallocation of Payroll Clerk by itself provides a basis for reversal and requires an order providing for permanent reallocation of the subject titles in this appeal. The lack of education or experience requirements, as argued by the AOC, does not necessarily demonstrate that competitive testing is impracticable because "[e]valuation of education, training or experience" is only one of several types of exams; others include written tests, oral tests, physical performance tests, and "other appropriate measures of knowledge, skills, and abilities." N.J.A.C. 4A:4-2.2. On the other hand, competitive testing for lower-level positions without education or experience requirements may be practicable. The noncompetitive division was established "to provide for positions which cannot properly be tested for, such as lower-level jobs which do not require significant education


⁸ In its reply to the AOC's motion for reconsideration, the Commission merely asserts that In re Reallocation of Payroll Clerk, the application was decided "two years after the decision on appeal" and does not pertain to the same facts or involve the same parties.

or experience, to be filled without the need of competitive examination."
N.J.S.A. 11A:3-2.1(d).

Because of inconsistencies between the decision on appeal and the other noted Commission decisions regarding permanent reallocation of lower-level job titles to the non-competitive division, a remand is necessary. Within sixty days, the Commission shall issue a final agency decision explaining why the factors and principles it applied in its other decisions allowing for reallocation did not apply to the present situation. Of course, the Commission has the discretion to reach a different conclusion on remand.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION