



STATE OF NEW JERSEY

In the Matter of the Reallocation of	:	FINAL ADMINISTRATIVE ACTION
the Probation Officer and Probation	:	OF THE
Officer, Bilingual in Spanish and	:	CIVIL SERVICE COMMISSION
English, Titles from the Competitive	:	
to the Noncompetitive Division of the	:	
Career Service	:	
	:	
	:	Court Remand
	:	
CSC Docket No. 2016-600	:	
	:	

ISSUED: **OCT 20 2016** (DASV)

The Superior Court of New Jersey, Appellate Division, has reversed and remanded the July 17, 2013 decision of the Civil Service Commission (Commission), which had approved the request of the Administrative Office of the Courts (AOC) to reallocate the Probation Officer and Probation Officer, Bilingual in Spanish and English, titles from the competitive to the noncompetitive division of the career service, for further consideration. See *In the Matter of the Reallocation of the Probation Officer and Probation Officer, Bilingual in Spanish and English Titles from the Competitive to the Noncompetitive Division of the Career Service*, 441 N.J. Super. 434 (App. Div. 2015). The Court did not retain jurisdiction. A copy of the Appellate Division's decision and the Commission's decision, *In the Matter of the Reallocation of the Probation Officer and Probation Officer, Bilingual in Spanish and English, Titles from the Competitive to the Noncompetitive Division of the Career Service* (CSC, decided July 17, 2013), are attached.

By way of background, at its meeting on July 17, 2013, the Commission granted the request of the AOC to permanently reallocate the Probation Officer and Probation Officer, Bilingual in Spanish and English, titles from the competitive to the noncompetitive division of the career service pursuant to N.J.A.C. 4A:3-1.2. The Commission had previously established a one-year pilot program, which originally was to commence on July 1, 2012 and end on June 30, 2013, whereby the subject titles would be reallocated to the noncompetitive division of the career service utilizing a selection process administered by the AOC. The AOC requested the establishment of the pilot program due to difficulties encountered in maintaining adequate candidate pools for all geographic locations under the current system of competitive testing at set intervals. See *In the Matter of Probation Officer and*

Probation Officer, Bilingual in Spanish and English, Judiciary (CSC, decided June 20, 2012). Subsequently, the AOC requested a change in the effective date of the pilot program and requested that the eligible lists for Probation Officer (S4444L) and Probation Officer, Bilingual in Spanish and English (S4445L), be revived. In that request, the AOC presented that preliminary actions were needed to implement the pilot program, which delayed the commencement of the pilot program. In the meantime, several vicinages made appointments to the subject titles after the original commencement date of July 1, 2012 due to an immediate need for staff. Therefore, the Commission determined that it was appropriate to modify the effective start date of the pilot program to November 1, 2012. Further, the Commission found good cause to revive and extend the eligible lists for Probation Officer (S4444L) and Probation Officer, Bilingual in Spanish and English (S4445L), to October 31, 2012, to allow for regular appointments to be made from the lists.¹ See *In the Matter of In the Matter of Probation Officer and Probation Officer, Bilingual in Spanish and English, Judiciary* (CSC, decided October 3, 2012). Thereafter, the AOC requested permanent reallocation. In granting the request and accepting the recommendation of the Division of Classification and Personnel Management (CPM)² to approve the request, the Commission indicated that the reallocation would provide the AOC with the flexibility needed to more efficiently and quickly meet hiring responsibilities. Although there would not be *per se* competitive testing, the AOC's procedures demonstrated a comparable method which would ensure fairness and equity in the recruitment and selection process and would preserve the rights of veterans.

Subsequently, the Probation Association of New Jersey (PANJ) pursued an appeal with the Appellate Division, which reversed and remanded the July 17, 2013 decision of the Commission. Noting the requirements of *N.J.A.C. 4A:3-1.2*, the Appellate Division found "very few pieces of objective evidence, such as the '[d]ata, reports, analyses, and other information' contemplated" by the rule which demonstrated that the AOC was experiencing significant recruitment problems for the titles. *Id.* at 448. The AOC had cited a problem in only four vicinages which had exhausted their current pool of eligibles and several others vicinages which were close to exhaustion for the bilingual title. The Appellate Division also indicated that the record did not contain more specific information, such as how often the recruitment problem occurred and whether court operations were adversely affected. Further, it noted that a shortage in the eligible pool for Probation Officer, Bilingual in Spanish and English, would not by itself necessitate

¹ The Probation Officer (S4444L) eligible list promulgated on July 30, 2009 and had an extended expiration date of July 29, 2012. The Probation Officer, Bilingual in Spanish and English (S4445L), eligible list also promulgated on July 30, 2009 and had an extended expiration date of July 22, 2012. As noted, the Commission further extended the expiration dates to October 31, 2012.

² CPM is now known as the Division of Agency Services. The Division's responsibilities include issuing examination announcements, determining eligibility, conducting position classification review, administering reductions in force, maintaining State and local government Civil Service employee personnel records, and issuing certifications of eligible lists.

a reallocation of the non-bilingual Probation Officer title to the noncompetitive division. Moreover, the Appellate Division questioned CPM's indication that there were no eligible lists for the subject tile. It stated that the absence of an eligible list was not explained. It could have been related to an operational problem at the agency or merely a cessation of developing eligible lists in light of the pilot program and in anticipation of the permanent reallocation of the subject titles to the noncompetitive division. The Appellate Division further commented that it was doubtful that the competitive process suddenly failed to produce an eligible list, as it had done so for more than 50 years. It also indicated that the fact that this agency was not ready to resume the examination process at the end of the pilot program is not an acceptable reason for reallocating the subject titles to the noncompetitive division on a permanent basis.³ Additionally, the Appellate Division determined that flexibility in hiring is not listed as one of the criteria for reallocation to the noncompetitive division. In addition, while a public hearing was not mandated by *N.J.A.C. 4A:3-1.2*, the Appellate Division directed the Commission, on remand, to consider granting a hearing at the Office of Administrative Law (OAL) given the fact-sensitive nature of the case. Finally, the Appellate Division indicated that the State Constitution requires a demonstration that it is impracticable to fill these positions through competitive testing. The Commission must consider the impracticability of competitive testing for each title separately. The Appellate Division emphasized that flexibility in using a noncompetitive process does not mean that the competitive process is impracticable within the meaning of the State Constitution. It noted that the Commission did not appear to have considered the constitutional issue raised by PANJ. Therefore, the matter was remanded to the Commission to consider a more developed factual record required for a meaningful evaluation of the AOC's request for reallocation under the applicable constitutional, statutory and regulatory provisions.

On remand to the Commission, the parties were given the opportunity to provide additional argument and documentation. In response, the AOC states that the facts in this case demonstrate that open competitive examinations are "unworkable" for the Judiciary to fill positions in the subject titles. It explains that all levels of Probation Officers account for the largest group of employees in the Judiciary and require a diverse set of skills. Depending on their assignments in the Criminal or Probation Divisions, Probation Officers conduct a variety of tasks, which include drafting pre-sentence and pre-trial investigative reports, drug testing, and enforcing child support orders. The AOC notes that the child support duties involve the utilization of NJKiDS (New Jersey Kids Deserve Support), a real time web-based tracking system. When there is an insufficient candidate pool with the appropriate skill set, the AOC indicates that the work of the courts slows down and increases the caseload of the existing employees, which potentially endangers the public. Furthermore, given the time to specially train new employees, the AOC

³ The eligible lists expired during the pendency of the pilot program and no new announcements were issued in anticipation of the reallocation.

contends that it does not prefer to appoint provisional employees in light of the possibility that the employees are not reachable on an eligible list and must be separated.

In addition, the AOC asserts that it has had “longstanding issues” of eligible lists “going stale and/or depleting” and incidents where certain vicinages exhaust their applicant pool more quickly than other vicinages. It notes that specific information does not exist for these eligible lists due to its document retention schedule. However, the AOC maintains that the problems have been documented through various requests to the Commission and its predecessor, the Merit System Board (Board),⁴ to allow for interim noncompetitive appointments for the subject titles or for alternate recruitment mechanisms. For example, the AOC submits that the Board granted its request for noncompetitive appointments in 2000 due to its immediate need to fill positions. In that case, two vicinages had already exhausted their Probation Officer eligible lists and five vicinages had exhausted their bilingual lists. Several other vicinages were projected to exhaust their lists by the end of January 2001. It was found that the Division of Selection Services⁵ was “unable to run another high volume examination due to workload until February 2001 when the new test for Probation Officer will be announced.” Moreover, the Supplemental Appropriation for the Judiciary was signed into law, which allowed for funding for approximately 200 positions. Thus, considering the criteria set forth in *N.J.A.C. 4A:3-1.2*, the Board permitted the noncompetitive appointments on an interim basis for two pay periods to vicinages whose eligible lists no longer existed. *See In the Matter of Probation Officer, et al.* (MSB, decided November 21, 2000). Similarly in 2002, interim noncompetitive appointments were again requested to fill new vacancies for those vicinages that had exhausted their respective lists and included permission to make noncompetitive appointments for current provisional employees in those vicinages. Based on the fact that certain jurisdictions had quickly depleted their eligible list, a hiring freeze had been in effect for a period of time and vacancies could not be filled, and the Early Retirement Incentive Program contributed to the number of vacancies available, a sufficient basis was found pursuant to *N.J.A.C. 4A:3-1.2* to grant the AOC’s request to appoint employees on an interim noncompetitive basis. *See In the Matter of Probation Officer, et al.* (MSB, decided December 4, 2002). The AOC maintains that PANJ consented to the 2000 and 2002 requests, which belies its current claim that such noncompetitive appointments violate constitutional mandates.

⁴ On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission. Any reference to “agency” in this decision refers to the various operating divisions of the Commission.

⁵ The Division of Selection Services was reorganized into the Division of Agency Services and the Division of Test Development and Analytics. The latter’s responsibilities include developing examinations and generating open competitive and promotional eligible lists for certification by appointing authorities. This Division also provides the necessary support to successfully manage positions that are banded.

Additionally, the AOC indicates that in 2005 its request to make noncompetitive appointments was not granted since it was assured that an eligible list would be available before the request could be reviewed by the Board. In that regard, the AOC contacted the Department of Personnel and asked, among other things, for an "immediate" announcement and expedited list issuance for the Probation Officer, Bilingual in Spanish and English, title and the establishment of an interim noncompetitive appointment window for the six to 12 months it would normally take to produce the bilingual eligible list. In a letter dated April 25, 2005, the former Deputy Commissioner of the Department of Personnel responded that more information was needed (such as the number of vacancies per vicinage) and research conducted to have the AOC's request considered by the Board in light of an existing eligible list at the time. Further, the Deputy Commissioner noted that PANJ had objected to the interim noncompetitive process and had requested a meeting. Thus, by the time that the foregoing information was obtained and discussion with PANJ concluded, the eligible list would have been produced since the Division of Selection Services agreed to expedite the testing and list issuance process. Moreover, the Division of Selection Services was willing, upon the AOC's request, to announce the examination for the bilingual title twice a year to accommodate the AOC's needs.

Moreover, in 2009, the AOC states that it was again faced with not having an eligible list. In a letter dated February 11, 2009 from the former Chair/Chief Executive Officer to the Director of the AOC, recruitment issues facing the AOC were discussed. However, the issues were found not to have been based on a high attrition rate, but rather, the ability of the AOC to hire staff quickly and be presented with a diverse applicant pool. The Chair/Chief Executive Officer proposed that this agency would conduct an expedited examination process, which included a structured interview after the written test had been completed. The AOC asked for an oral component to assess a candidate's communication skills, interpersonal skills, and other skills that are better determined through a structured interview. However, the AOC states that this agency was unable to administer the oral portion of the examination without delaying the issuance of the eligible list. It was also anticipated that the results of the oral portion of the examination would not have changed the ranking of the eligible list since the oral portion accounted for only 20% of the total score. Thus, the eligible list promulgated without consideration of an oral component. The AOC states that it recognizes that an accelerated approach with an oral examination is not feasible due to staffing needs. It indicates that this agency has experienced a large reduction of staffing to produce eligible lists in a timeframe suitable for the AOC's needs.

Furthermore, the AOC acknowledges that continually requesting permission to make interim noncompetitive appointments is not a solution to the problem. It notes that such requests also take months before they are approved by the Commission. The 2002 request took three months. Moreover, the AOC maintains

that the examination process is lengthy and time consuming. In that regard, it cites that in 2004, it took seven months from the time an announcement was requested to the promulgation of the eligible list. In 2005 to 2006, it took five months. By contrast, the AOC asserts that in a noncompetitive process, it can post vacancy notices as soon as hiring needs are identified. Immediate appointments can be made after the posting closes and individuals are screened and rated during the recruitment events. Additionally, the AOC indicates that the timing of the examination "is not optimal for recruiting the best qualified candidates." For instance, in 2008, it states that this agency was planning to offer an examination in January, which would not have been the best time to recruit recent college graduates. By contrast, the AOC states that it is able to aggressively advertise the noncompetitive positions to various universities, agencies, and outreach programs, including minority sources to ensure a diverse applicant pool. The AOC notes that the Commission has allocated various titles in State and local government to the noncompetitive division, finding that competitive testing is impractical for such titles that only require education and/or certification without any specific experience. Similarly, a Probation Officer applicant must possess a Bachelor's degree in the behavioral or social sciences or in any area with a minimum of 24 credits in the behavioral or social sciences and no experience is required. The AOC further notes that the noncompetitive program for Probation Officers was modeled after the Department of Children and Families' noncompetitive process for the Family Service Specialist titles, which has been successful and longstanding. The AOC's process also utilizes a very structured screening process, which clearly does not violate merit and fitness principles and has resulted in appointing very qualified candidates. In conclusion, the AOC maintains that given the historical problem of recruiting for the subject titles, it is impracticable to utilize the competitive process to fill vacancies.

PANJ, represented by Lynsey A. Stehling, Esq., replies that the noncompetitive process for Probation Officer appointments violates the State Constitution and Civil Service rules, since merit and fitness can be determined through the open competitive process. It argues that there is not a legitimate basis to grant permanent reallocation of the subject titles to the noncompetitive division of the career service where the open competitive examination process has been successful for more than 50 years, and the AOC has failed to show that the process is no longer practical. In that regard, PANJ asserts that the AOC's contention that it is having difficulty in maintaining a pool of qualified and interested candidates does not meet the criteria for noncompetitive appointments as set forth in *N.J.A.C. 4A:3-1.2(c)*. Moreover, PANJ indicates that the open competitive examination process has resulted in appointments of qualified Probation Officers, who have since been promoted to higher levels in the Judiciary. The reallocation replaces the process with subjective selection methods, such as the evaluation of the "appearance of an applicant" and his or her "timeliness for an interview," and gives the 15 vicinages "unbridled authority" in the hiring process. PANJ notes that although the

AOC had requested an oral examination, it has not shown how such a component is necessary.

PANJ also indicates that prior noncompetitive procedures have resulted in a high percentage of applicants who were disciplined or terminated, which makes the method of appointment unreliable. For instance, it states that of the 30 mental health Probation Officers who were appointed on a noncompetitive basis, five were "discharged or suspended for disciplinary reasons." Furthermore, PANJ indicates that public policy mandates competitive testing for career service positions, and the noncompetitive process is an exception to the rule. It cites the "Rule of Ten" pilot program and the "Rule of Three," *N.J.A.C. 4:4-4.8(a)3*, as examples where competitive testing is still required to ascertain merit and fitness notwithstanding an appointing authority's discretion to make appointments from an eligible list. In addition, PANJ submits that the AOC's assertion that there are issues in the hiring process is unfounded. No actual issue exists. It states that where there was a need for special hiring situations or special programs, it agreed to noncompetitive appointments for a limited time. However, PANJ contends that the AOC has not demonstrated any basis to overcome the strong presumption for open competitive testing. PANJ notes that it was not given the opportunity for oral argument or full participation in the Commission's consideration of the pilot program or during the permanent reallocation of the subject titles. It asserts that the Commission should transmit this matter to the OAL for a hearing due to the alleged significant constitutional and statutory violations that have occurred, the fact-sensitive nature of the case, and the AOC's "sparse submission in this matter," as well as to ensure that competitive testing is not abolished for all titles.

In response, the AOC disputes that a high percentage of applicants were disciplined among mental health Probation Officers. It submits its prior response on the issue during the establishment of the pilot program, which stated that only three out of 40 employees⁶ were served discipline in 2011, two resigned and one had remained suspended pending her removal. It maintained that the fact that a few employees were disciplined does not invalidate the noncompetitive process. By comparison, the AOC stated that 67 employees, who were appointed through open competitive examination procedures, had been served discipline in 2011. Moreover, the AOC emphasizes that Probation Officers hired through the noncompetitive process will become permanent after successfully passing the working test period, and thus, they will receive the same protections as the Probation Officers appointed through the open competitive examination process.

PANJ responds that the AOC lists the various job duties of Probation Officers to argue that there is an insufficient pool of candidates with the requisite skill set. However, although technology and programs may have changed, PANJ asserts that those duties are the same duties that have been performed by Probation Officers for

⁶ There were actually 40 employees according to the AOC.

the last 50 years. Moreover, it indicates that the AOC has not produced any empirical data supporting its assertion that provisional employees are often separated because they are not reachable on an eligible list. Similarly, it contends that the AOC's failure to maintain specific evidence regarding eligible lists belies its claim that testing procedures are insufficient. PANJ also argues that the fact that the AOC had to request interim noncompetitive appointments on three occasions fails to support its contention that it is unable to appoint qualified individuals through open competitive examination procedures. It emphasizes that the circumstances which led to the approval of the noncompetitive appointments, such as additional funding in 2000 and the 2002 hiring freeze and Early Retirement Incentive Program, were "certainly atypical" and did not occur on a regular and consistent basis. Additionally, it underscores that in 2005, the AOC's request was denied because this agency was able to expedite the testing process. PANJ points out that in 2009, the former Chair/Chief Executive Officer found that the Judiciary did not have an extremely high attrition rate, which clearly demonstrates that the open competitive examination process remains successful. Additionally, PANJ states that although it previously agreed to a limited period of interim noncompetitive appointments based on the circumstances, it would have objected to the AOC's requests on constitutional grounds if it attempted to eliminate competitive testing entirely at that time. It also contends that the AOC cited only one instance in 2008 where the timing of the examination was not optimal for recent college graduates. However, the AOC has not shown that recent college graduates are necessarily the best candidates for the positions. Furthermore, PANJ argues that the placement of other titles in the noncompetitive division is irrelevant, as the AOC has not clearly established that those titles are similar to the subject titles. Lastly, PANJ submits that the AOC did not address any of the issues raised by the Appellate Division. Since the AOC has allegedly failed to produce the necessary information, PANJ urges the Commission to reverse its prior decision, or alternatively, as asserted above, grant a hearing at the OAL to develop a full factual record.

CONCLUSION

The Appellate Division has remanded this matter for the Commission to consider a more developed factual record in order to properly evaluate the AOC's request for reallocation of the Probation Officer and Probation Officer, Bilingual in Spanish and English, titles from the competitive to the noncompetitive division of the career service. In doing so, the Court directed the Commission to consider granting a hearing at the OAL given the fact-sensitive nature of the case. PANJ also requests that the Commission grant a hearing as an alternative preliminary determination. It is noted that although *N.J.A.C.* 4A:3-1.2 allows for a public hearing, the rule does not require a hearing to develop a factual record. Rather, requests for reallocation are based on an administrative review of the record, which shall include any data, reports, or other information utilized in the determination, as well as any comment received and the implementation procedures. *See N.J.A.C.*

4A:3-1.2(e). Accordingly, such requests are treated as reviews of the written record. *See N.J.S.A. 11A:2-6(b)*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. While the instant matter presents a dispute as to the constitutional, statutory, and regulatory grounds for reallocation, the Commission does not find that a material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978). The parties in this matter have been given the opportunity to supplement the record with additional argument and documentation. The Commission does not find that a hearing at the OAL would produce any more facts than what has already been presented.

N.J.S.A. 11A:3-2 provides that the career service shall have two divisions, the competitive division and the noncompetitive division. The Commission shall assign and reassign such titles to each division and may provide for movement, including promotion, of employees from one division to the other. Moreover, as set forth in *N.J.S.A. 11A:3-2.1a*, the Legislature has declared the importance of fairness and impartiality in State employment and has recognized the constitutional mandate that appointments shall be made according to merit and fitness, and as far as practicable, by examination. Specifically, the State Constitution, Article VII, section 1, paragraph 2 states that:

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.

However, the Legislature also recognized that appointments to certain titles are not readily made through the competitive process, and, in implementing the constitutional provision, enacted *N.J.S.A. 11A:3-2* which as noted above established the competitive and noncompetitive divisions of the career service. *See N.J.S.A. 11A:3-2.1(b)* and (c). The Legislature indicated that its purpose in making the distinction between the two divisions is to provide for positions in the noncompetitive division which cannot properly be tested for, such as lower-level jobs that do not require significant education or experience. *See N.J.S.A. 11A:3-2.1(d)*. However, as recognized by the Appellate Division, there may be other positions, which are not necessarily low-level, where allocation to the noncompetitive division could be appropriate. *Supra*, at 446.

Pursuant to the constitutional and legislative provisions, *N.J.A.C. 4A:3-1.2* was adopted, setting forth the criteria to be considered by the Commission in

allocating and reallocating career service titles to the competitive and noncompetitive division. The rule provides in relevant part that:

(a) The [Commission] shall allocate and reallocate career service titles between the competitive and noncompetitive divisions.

(b) A career service job title in the competitive division is subject to the competitive examination procedures of *N.J.A.C. 4A:4-2*, except as provided in *N.J.A.C. 4A:3-3.2A*.

(c) A job title may be placed in the noncompetitive division on an ongoing or interim basis when it is determined by the [Commission] that it is appropriate to make permanent appointments to the title and 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.

(d) All appointees to noncompetitive titles shall meet the minimum requirements set forth in the job specification and satisfactorily complete a working test period.

(e) Prior to any reallocation from the competitive to noncompetitive divisions, whether on an ongoing or interim basis, an administrative review shall be conducted and notice of the proposed reallocation shall be sent to affected appointing authorities and negotiations representatives. The notice shall designate the period of time, which in no event shall be less than 20 days, during which written comment may be submitted, and may provide for a public hearing.

1. Data, reports, analyses, and other information utilized in the determination shall constitute the administrative record, and shall be available for review by affected employees, appointing authorities, and negotiations representatives.

2. After the comment period and the public hearing, if any, the [Commission] shall issue a final administrative decision containing

findings and conclusions with respect to the proposed reallocation, based upon the administrative record and any comment received, and implementation procedures.

Based on a review of the record, including the supplemental information provided by the parties, and careful evaluation of the AOC's request pursuant to the constitutional, statutory, and regulatory provisions of this State and the directives of the Appellate Division in this matter, the Commission upholds its prior determination to place the subject titles permanently in the noncompetitive division of the career service.

The State Constitution provides that appointments shall be competitive and "as far as practicable" by examination. Only when there is a showing of impracticability should a title be placed in the noncompetitive division. As set forth above, the statutory provisions, and more specifically the rules promulgated thereunder, implement the State Constitution and have defined the meaning of impracticability. Thus, an evaluation of these provisions shall provide the basis by which a competitive title may be reallocated to the noncompetitive division of the career service. It is noted that, while the Commission acknowledges that flexibility is not the standard for reallocation, the term "flexibility" was meant to describe how the noncompetitive process needed to be put in place in this matter because of the impracticability of appointments by examination and certification procedures. Undisputed evidence has been presented that certain vicinages deplete their sublists more quickly than other vicinages prior to the Statewide eligible list expiring, thus causing unfilled vacancies and inevitable disruption of court operations. As set forth more fully below, the competitive selection process, which includes the examination announcement, testing, establishment of a Statewide eligible list, and certification of eligibles, is no longer practicable for the subject titles pursuant to *N.J.A.C. 4A:3-1.2(c)2*.

Criterion one states that placement of a title in the noncompetitive division may be appropriate when "[c]ompetitive testing is not practicable due to the nature of the knowledge, skills, and abilities [KSAs] associated with the job." See *N.J.A.C. 4A:3-1.2(c)1*. It is noted that the subject titles are designated in the Judiciary Case Processing Band (Probation Services Track). The required KSAs are listed as competencies.⁷ The AOC describes the various tasks of Probations Officers and argues that when there is an insufficient candidate pool with the appropriate skill set, the work of the courts slows down and increases the caseload of existing employees. However, the AOC has not established that competitive testing is no

⁷ Investigator titles are at Level 1, followed by the Probation Officer (Level 2), Senior Probation Officer (Level 3), and Master Probation Officer titles (Level 4) and their bilingual counterparts. The Probation Officer and Probation Officer, Bilingual in Spanish and English, titles are entry-level titles or at the "Basic" level within their title series. Therefore, the exception for competitive testing of job banded titles indicated in *N.J.A.C. 4A:3-1.2(b)* is not applicable despite that the subject titles are at Level 2.

longer practicable to test the KSAs associated with the job when prior examinations have indisputably tested those KSAs and produced eligible candidates and successful employees.⁸ As cited by the Appellate Division, there may be situations where the dynamic nature of an industry makes an examination obsolete before the completion of the competitive process. *Supra*, at 446. This is not the case with the Probation Officer titles. PANJ contends that, although technology and programs may have changed, the duties of Probation Officers have remained the same for the last 50 years. That may be an exaggeration, nevertheless, the current job specification for the titles has been effective since June 30, 2001. Therefore, criterion one for reallocation has not been met.

Similarly, the facts in this matter do not support criterion three. The record does not evidence "a need for immediate appointments arising from a new legislative program or major agency reorganization." *See N.J.A.C. 4A:3-1.2(c)3*. Thus, criterion three has not been satisfied for the permanent reallocation of the subject titles to the noncompetitive division.

The Commission's prior decision was mainly centered on criterion two, which authorizes noncompetitive appointments 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." *See N.J.A.C. 4A:3-1.2(c)2*. In approving the AOC's request, the Commission noted that certification procedures based on a ranked eligible list would not meet the AOC's need for immediate recruitment. In the instant matter, sufficient evidence has been presented that AOC has had "longstanding issues" of eligible lists "going stale and/or depleting" and incidents where certain vicinages have exhausted their applicant pool more quickly than other vicinages. Indeed, with PANJ's consent, the Board previously approved the use of interim noncompetitive appointments in 2000 and 2002 due to the immediate need to fill positions. Moreover, in 2005 and 2009 the AOC again had hiring issues in the face of depleted eligible lists. Notably, in 2009, this agency conducted an expedited examination in response to the AOC's hiring issues and agreed to include a structured interview after the written test. However, the oral component was not administered, as it would have delayed issuance of the eligible list. Thus, in that instance the examination process failed to incorporate the needs of the appointing authority. The AOC has expressed a legitimate basis for an oral component to identify other characteristics of a candidate not readily assessable in a written test. In its screening process, the AOC conducts structured interviews and is better able to assess the candidate's qualification.

⁸ The parties argue the disciplinary history of employees appointed via the noncompetitive and competitive process. However, the Commission does not find the argument relevant to the inquiry as to whether to place the Probation Officer titles in the noncompetitive division. It is far too speculative to project that either process would produce more or less employees prone to discipline.

Furthermore, while the AOC had cited to only four vicinages prior to the reallocation request which had exhausted their current pool of eligibles, considering the information presented on remand of serious issues facing the AOC in the last 16 years, there is sufficient information to conclude that there is a recruitment problem in the subject titles which would otherwise adversely affect court operations if not addressed through noncompetitive appointments. It is noted that although the Appellate Division found “very few pieces of objective evidence, such as the [d]ata, reports, analyses, and other information’ contemplated” by the rule, *N.J.A.C.* 4A:3-1.2(e)1 does not necessarily require numerical data to support reallocation. As written in the rule, other information may be presented. In this case, the AOC has supplemented the record with detailed information concerning its recruitment problems, failure of the examination and certification procedures to meet its immediate hiring needs, and prior Board decisions allowing for noncompetitive appointments to temporarily address the problem. Such information supports the AOC’s permanent reallocation request. The Appellate Division also questioned the absence of eligible lists at the time of the permanent reallocation. The Probation Officer eligible lists expired during the pendency of the pilot program and no new announcements were issued in anticipation of the reallocation. The absence of eligible lists was not due to the failure of the competitive process to produce an eligible list, nor was it due to operational problems at this agency. Regardless, the lengthy process of competitive testing is no longer feasible for the AOC’s needs in light of recruitment problems and the depletion of eligible lists in certain geographical locations which the AOC has encountered and are factors listed in *N.J.A.C.* 4A:3-1.2(c)2.⁹ Therefore, based on the Commission’s reconsideration of the AOC’s request, it concludes that the subject titles should be reallocated to the noncompetitive division of the career service.

It is noted that since the Appellate Division’s reversal and remand of this matter, the AOC has appointed individuals in the subject titles on a provisional basis. Given that the Commission has upheld its prior determination and in accordance with *N.J.A.C.* 4A:3-1.2(f), the provisional employees shall receive retroactive dates of appointment (RAN – regular appointments noncompetitive) to the date of their provisional appointments and serve current working test periods.

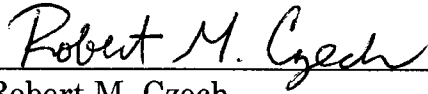
ORDER

Therefore, it is ordered that the request of the AOC be granted and the titles of Probation Officer and Probation Officer, Bilingual in Spanish and English, be reallocated to the noncompetitive division of the career service effective July 27, 2013.

⁹ Salary and working conditions have not been presented as considerations for the reallocation of the subject titles to the noncompetitive 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 19TH DAY OF OCTOBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

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and
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Attachments

c: Lynsey A. Stehling, Esq.
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Todd A. Wigder, DAG
Kelly Glenn
Michael Johnson
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Joseph Gambino



1 of 100 DOCUMENTS

**IN THE MATTER OF THE REALLOCATION OF THE PROBATION OFFICER
AND PROBATION OFFICER, BILINGUAL IN SPANISH AND ENGLISH
TITLES FROM THE COMPETITIVE TO THE NON-COMPETITIVE DIVISION
OF THE CAREER SERVICE.**

DOCKET NO. A-0056-13T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

441 N.J. Super. 434; 119 A.3d 921; 2015 N.J. Super. LEXIS 119

April 22, 2015, Argued

July 22, 2015, Decided

SUBSEQUENT HISTORY: [***1] Approved for
Publication July 22, 2015.

PRIOR HISTORY: On appeal from the New Jersey
Civil Service Commission, Docket No. 2013-3251.

COUNSEL: *Lynsey A. Stehling* argued the cause for
appellant Probation Association of New Jersey (*Law
Offices of Daniel J. Zirrieth LLC*, attorneys; *Daniel J.
Zirrieth*, of counsel; *Ms. Stehling*, on the brief).

Todd A. Wigder, Deputy Attorney General, argued the
cause for respondent New Jersey Civil Service
Commission (*John J. Hoffman*, Acting Attorney General,
attorney; *Lewis A. Scheindlin*, Assistant Attorney
General, of counsel; *Mr. Wigder*, on the brief).

JUDGES: Before Judges ALVAREZ, WAUGH, and
CARROLL. The opinion of the court was delivered by
WAUGH, J.A.D.

OPINION BY: WAUGH

OPINION

[**922] [*436] The opinion of the court was
delivered by

WAUGH, J.A.D.

The Probation Association of New Jersey
(Association) appeals the final administrative agency
decision of the New Jersey Civil Service Commission
(Commission) concerning the manner in [*437] which
the Administrative Office of the Courts (AOC) selects
and appoints candidates for the titles of Probation Officer
and Probation Officer, Bilingual in Spanish and English
(Bilingual Probation Officer). We reverse and remand for
further consideration consistent with this opinion.

I.

We discern the [***2] following facts and
procedural history from the record on appeal.

On December 5, 2011, pursuant to *N.J.A.C.
4A:1-4.3*, the AOC requested the Commission to
establish a one-year pilot program to replace competitive
testing for the Probation Officer and Bilingual Probation
Officer titles with an evaluation system.¹ The AOC
explained that the pilot program was necessary because
"at least four vicinages [had] exhausted [their] current
pool and several others [were] close to exhausting their
pools" for the Bilingual Probation Officer title. The AOC
made no [**923] such factual assertion with respect to
the Probation Officer title.

441 N.J. Super. 434, *437; 119 A.3d 921, **923;
2015 N.J. Super. LEXIS 119, ***2

1 The AOC also sought to replace the four-month working test period provided by *N.J.A.C. 4A:4-5.2(b)(2)* with a Probation Officer Trainee title that would provide a full year of training and evaluation, but subsequently withdrew that request.

The proposed program would replace the traditional system of competitive testing that is generally used throughout the State government with an evaluation program designed to focus on a candidate's communication skills, personal motivation, interpersonal skills, analytical skills, reasoning ability, personal development, and time management skills. Candidates' credentials [***3] would be reviewed and scored based on education and work experience. The cover letters and resumes would be evaluated and rated based on the number of errors in spelling, grammar, and punctuation. Candidates with the highest scoring resumes would be selected for a structured panel interview, be required to complete a timed writing sample, and be evaluated for promptness and neatness. Successful candidates would return for a second structured interview, [*438] after which selected finalists would receive offers of employment. The program would be administered by vicinage or a regional group of vicinages, as appropriate. The AOC's Division of Equal Employment Opportunity/Affirmative Action would review the candidate pools for diversity, and preference for veterans would be taken into consideration.

The purpose of the proposed system was to allow for "a more flexible process for recruitment and selection than the traditional civil service testing process provides." The AOC was particularly interested in oral examinations, which it believed to be "a critical element of the selection process" and which the Commission would not be able to administer because of the large number of candidates. In [***4] addition, the AOC explained that "the flexibility of the proposed pilot program would allow vicinages the opportunity to proactively recruit before their candidate pool is empty," whereas the Commission only administers its examinations at set intervals.

The proposal was opposed by the Association, which submitted opposition to the Commission. The Association argued that the proposal violated *article VII, section 1, paragraph 2 of the New Jersey Constitution*, which requires public employees to be selected on the

basis of "merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive." It further argued that the AOC had not established sufficient need for the change and that past instances of noncompetitive hiring had not been successful. Finally, the Association called for a fact-finding hearing in the Office of Administrative Law (OAL). The Association subsequently argued that any problem caused when hiring pools run low could be solved by interim, noncompetitive appointments pursuant to *N.J.A.C. 4A:3-1.2*.

On June 21, following further submissions by the parties and the AOC's acceptance of modifications suggested by the Commission's staff, the Commission issued a final [***5] administrative order approving the pilot program.² The year-long pilot program was [*439] originally to have been implemented on July 1, 2012, but the Commission subsequently delayed the implementation date to November 1 at the AOC's request.

2 The Association appealed that decision. That appeal was dismissed as moot after the Commission approved use of the noncompetitive process on an ongoing basis.

In its decision, the Commission concluded that the program was consistent with *N.J.A.C. 4A:3-1.2(c)(2)*, which allows a job title to be placed "in the noncompetitive division on an ongoing or interim basis" if the Commission determines "that it is appropriate [**924] to make permanent appointments to the title and . . . [c]ertification 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." It explained:

In this regard, the AOC has indicated that it has experienced problems maintaining a sufficient pool of qualified and interested candidates in all geographic locations during the duration of eligible lists resulting from competitive testing. Indeed, one of the primary goals of the pilot [***6] program is to address this difficulty by providing the [AOC] with a way in which to continuously recruit qualified applicants . . . with announcements directed to particular

regions of the State on an as-needed basis.

The Commission found that the program would involve "structured recruitment and selection," which would focus on "six broad-based competencies for successful performance in the . . . titles," namely, communication, personal motivation, interpersonal skills, analysis and reasoning, self-development, and time management. "The competencies and assigned weights [were] consistent with a job analysis performed by the Division of Selection Services in 2009 for the affected titles."

The program's success was to be evaluated by comparing the previous years' and the pilot program's appointment demographics, termination demographics, and discipline demographics. The timeliness of appointments would also be compared, "considering average recruitment time, average time prior to appointment, average turnaround time for bilingual test results, and average turnaround time for appointments." Lastly, managers and supervisors would be surveyed "regarding [the] quality, success, and commitment [***7] of [the] employees hired."

[*440] The Commission explained that the major benefits of the program would be

the provision of greater flexibility in the recruitment and selection process for both the applicants and the AOC. In this regard, the process will allow a consistently refreshed pool of applicants to be considered for positions in specific geographic locations. This will provide more opportunities for individuals interested in pursuing a career in this field as their application opportunities will not be limited to the set time frames within which the Commission announces and administers open competitive examinations for the titles, which may not necessarily coincide with time period of peak interest, such as college graduation. The AOC will likewise benefit from a fresh pool of applicants and less likelihood of the exhaustion of the candidate pool with interest in less populated or popular geographic areas of the State.

On May 21, 2013, less than seven months into the pilot program, the AOC applied for permanent reallocation of the Probation Officer and Bilingual Probation Officer titles from the Commission's competitive division to its noncompetitive division. In support of its application, [***8] the AOC reported on the implementation of the pilot program.

According to its report, the AOC developed, posted, and distributed a statewide notice of vacancy permitting candidates to apply for positions in up to four vicinages. Resumes were assigned to appropriate vicinages for review and ranking under the uniform scoring system developed by the AOC with assistance from the Commission's staff. Candidate information was entered into a centralized database.

The AOC then scheduled regional recruitment events. Candidates scoring five [**925] or better on their resume and all veterans were invited to attend. The candidates were scheduled in groups of ten at hourly intervals. After check-in and an informational presentation, each candidate participated in a structured interview, completed an essay, and was then free to leave.

During the structured interview, candidates were asked the same series of questions at each event. Panelists were provided with a response guide to ensure uniform, statewide scoring. The writing sample topic was the same at each event. There was also a scoring guide for the essays.

[*441] Candidates were assigned a final score based on their performance at the recruitment event. Seventy-five [***9] percent of the score was based on the structured interview, ten percent on the writing sample, five percent on promptness, and ten percent on attention to detail. Candidates scoring 60 or below were no longer considered for appointment. The remaining candidates were then banded into five numerical categories³ for the purpose of creating candidate pools of three or more candidates. If there were fewer than three candidates in a band, candidates from the next lower band could be included to bring the pool up to three. Veterans scoring 61 or above received preference regardless of score.

3 The categories were 91 to 100, 81 to 90, 71 to 80, 61 to 70, and below 60.

441 N.J. Super. 434, *441; 119 A.3d 921, **925;
2015 N.J. Super. LEXIS 119, ***9

The AOC provided the Commission with the results of the pilot program, based on the evaluation criteria established in its June 21, 2012 decision. Of 2401 applicants, 523 were selected to attend one of the recruitment events, which were held in Burlington, Camden, Ocean, Passaic, and Somerset counties. The process resulted in forty-six appointments over a six-month period, in contrast to eighty-three, fifty, and forty-six appointments in the previous three years respectively.

There was one termination of an appointee during the six-month [***10] period. In the previous three years, there had been four, one, and six terminations respectively. Appointees were disciplined twenty-eight times during the six-month evaluation period, while new appointees in the previous three years had been disciplined seventy-two, fifty, and fifty times respectively.

During the pilot program, the AOC averaged 123 days, or approximately three months, from recruitment event to appointment. Over two-thirds of the managers and supervisors surveyed reported that the appointees were of high quality, with highly satisfactory performance and demonstrated commitment to succeed. No comparable surveys were provided for the prior three years during which appointments were made through the traditional competitive process.

[*442] The Association continued to express opposition to the program and requested the Commission to defer its decision regarding the AOC's request that the program be made permanent pending resolution of its July 2012 appeal of the pilot program. Nevertheless, on July 18, the Commission issued a final administrative decision granting the AOC's request and implementing the noncompetitive program on a permanent basis.

In explaining its decision, the [***11] Commission summarized the positions of the parties and noted that the Division of Classification and Personnel Management (Division) had recommended approval. The Division had concluded that adoption of the program on a permanent basis would

provide the AOC with the flexibility needed to more efficiently and quickly [**926] meet hiring responsibilities. Further, it [found] that the documentation presented by the AOC demonstrates a

well-planned, fair, and equitable recruitment and selection process. Additionally, as set forth in *N.J.A.C. 4A:3-1.2(c)*, certification procedures will not likely meet the needs of the AOC. [The Division] also note[d] that no eligible lists exist for the subject titles.

Citing *N.J.A.C. 4A:3-1.2*, the Commission concluded that ample reasons exist for the reallocation of the proposed titles to the noncompetitive division of the career service. It is clear that reallocation will provide the AOC with the flexibility needed to more efficiently and quickly meet hiring responsibilities. Certification procedures based on ranked eligible lists will not meet the AOC's needs for immediate recruitment. Further, the AOC submits sufficient documentation showing the success of the pilot program, which justifies [***12] its request to reallocate the subject titles to the noncompetitive division of the career service.

This appeal followed.

II.

On appeal, the Association makes the following substantive arguments:

POINT II: THE COMMISSION'S RULING APPROVING THE PILOT PROGRAM WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE IT ALLOWS THE VIOLATION OF THE NEW JERSEY CONSTITUTION AND TITLE 4A AND 11A

*POINT III: THE COMMISSION'S RULING APPROVING THE PILOT PROGRAM WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE IT ALLOWS THE REPLACEMENT OF THE CURRENT TESTING PROCESS FOR PROBATION OFFICERS THROUGH OPEN COMPETITIVE PROCESS, [*443]*

441 N.J. Super. 434, *443; 119 A.3d 921, **926;
2015 N.J. Super. LEXIS 119, ***12

WHICH HAS BEEN ENTIRELY SUCCESSFUL, WITHOUT PROPER GROUNDS FOR DOING SO

POINT IV: THE COMMISSION'S RULING APPROVING THE PILOT PROGRAM WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE IT IGNORES THE FACT THAT PRIOR INSTANCES OF NON-COMPETITIVE TESTING, SUCH AS SELECTION FOR MENTAL HEALTH PROBATION OFFICERS, HAVE RESULTED IN A HIGH PERCENTAGE OF SELECTED CANDIDATES WHO WERE DISCIPLINED OR TERMINATE[D]

POINT V: THE COMMISSION'S RULING APPROVING THE PILOT PROGRAM WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE BECAUSE THIS MATTER SHOULD HAVE BEEN PROPERLY HEARD BEFORE THE OFFICE OF ADMINISTRATIVE LAW DUE [***13] TO THE SIGNIFICANT CONSTITUTIONAL AND STATUTORY VIOLATIONS, AS WELL AS TO ENSURE THAT THE COMPETITIVE CIVIL SERVICE TESTING IS NOT ABOLISHED FOR ALL TITLES

Our scope of review of an administrative agency's final determination is limited. *In re Carter*, 191 N.J. 474, 482, 924 A.2d 525 (2007). We accord a "strong presumption of reasonableness" to the agency's exercise of its statutorily delegated responsibilities. *City of Newark v. Natural Res. Council*, 82 N.J. 530, 539, 414 A.2d 1304, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). The burden of showing that the agency's action was arbitrary, unreasonable, or capricious rests upon the appellant. *Barone v. Dep't* [**927] *of Human Servs.*, 210 N.J. Super. 276, 285, 509 A.2d 786 (App. Div. 1986), *aff'd*, 107 N.J. 355, 526 A.2d 1055 (1987).

The reviewing court "should not disturb an administrative agency's determinations or findings unless

there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." *In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need*, 194 N.J. 413, 422, 945 A.2d 692 (2008); see also *Circus Liquors, Inc. v. Governing Body of Middletown Twp.*, 199 N.J. 1, 9-10, 970 A.2d 347 (2009).

Absent arbitrary, unreasonable, or capricious action, or a lack of support in the record, "[a]n administrative agency's final quasi-judicial decision will be sustained." *In re Herrmann*, 192 N.J. 19, 27-28, 926 A.2d 350 (2007) (citing *Campbell v. Dep't of Civil Serv.*, 39 N.J. 556, 562, 189 A.2d 712 (1963)). The court [*444] "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with [***14] the responsibility of implementing legislative programs." *In re N.J. Pinelands Comm'n Resolution PC4-00-89*, 356 N.J. Super. 363, 372, 812 A.2d 1113 (App. Div.) (citing *Brady v. Bd. of Review*, 152 N.J. 197, 210, 704 A.2d 547 (1997)), certif. denied, 176 N.J. 281, 822 A.2d 610 (2003). Nevertheless, we may not simply rubber-stamp an agency's decision. *In re Taylor*, 158 N.J. 644, 657, 731 A.2d 35 (1999).

Although an appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," *Mayflower Sec. Co. v. Bureau of Sec.*, 64 N.J. 85, 93, 312 A.2d 497 (1973), if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result," *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 513, 606 A.2d 336 (1992) (citing *Clowes v. Terminix Int'l*, 109 N.J. 575, 587, 538 A.2d 794 (1988)).

In 1986, the Legislature passed the current Civil Service Act, repealing Title 11 and establishing Title 11A of the New Jersey Statutes. L. 1986, c. 112; *Senate Revenue, Finance and Appropriations Committee, Statement to S. 1567, A. 2194, and S. 1829*, (Sept. 8, 1986). In doing so, the Legislature made the following findings and declarations:

a. It is the public policy of this State to select and advance employees on the basis of their relative knowledge, skills and

441 N.J. Super. 434, *444; 119 A.3d 921, **927;
2015 N.J. Super. LEXIS 119, ***14

abilities;

b. It is the public policy of this State to provide public officials with appropriate appointment, supervisory and other personnel authority to execute properly their constitutional and [***15] statutory responsibilities;

c. It is the public policy of this State to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance;

d. It is the public policy of this State to ensure equal employment opportunity at all levels of the public service; and

[*445] e. It is the public policy of this State to protect career public employees from political coercion and to ensure the recognition of such bargaining and other rights as are secured pursuant to other statutes and the collective negotiations law.

[L. 1986, c. 112, § 11A:1-2.]

[**928] Title 11A gives the Commission the power 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)*.

It is important to note for the purposes of this appeal that any waiver of traditional competitive examinations must, as a constitutional matter, be based on their impracticality. In *In re Foglio*, 207 N.J. 38, 40, 22 A.3d 958 (2011), the Supreme Court observed that

[t]he New Jersey Constitution prescribes that Civil Service appointments "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, [***16] shall be competitive." *N.J. Const. art. VII, § 1, P 2*. The Civil Service Act, *N.J.S.A. 11A:1-1 to 12-6*, and the regulations promulgated thereunder, *N.J.A.C. 4:4-1.1 to 7.12*, in turn,

implement those merit and fitness principles.

As we explained in *Bayonne v. Dougherty*, 59 N.J. Super. 288, 295-96, 157 A.2d 533 (App. Div. 1960) (citations omitted), *appeal dismissed*, 34 N.J. 240, 168 A.2d 37 (1961),

[t]he Constitutional Convention of 1947 merely wrote into the state charter what had for years been the keystone of New Jersey's personnel system. The Legislature has through the years, by the careful process of amendment and supplementation of the Civil Service Act, adopted such provisions as policy and experience indicated were necessary, all to the end of strengthening the merit system. We will not read the cited section of the Constitution to mean any more than it says, nor carry the legislative intention beyond what is expressly or by clear implication called for by the statutes.

N.J.S.A. 11A:3-2 provides that "[t]he career service shall have two divisions, the competitive division and the noncompetitive division." In establishing the noncompetitive division, the Legislature made the following findings:

a. the importance of fairness and impartiality in State employment is recognized in *Article VII, Section 1, paragraph 2 of the New Jersey Constitution* which provides that, "Appointments and promotions in the civil service [***17] of the State 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";

[*446] b. nevertheless, the framers recognized that appointments to certain types of employment are not readily made through a competitive examination process;

c. accordingly, in implementing the constitutional provision, the Legislature

441 N.J. Super. 434, *446; 119 A.3d 921, **928;
2015 N.J. Super. LEXIS 119, ***17

has provided in *N.J.S. 11A:3-2* that the career service shall have a competitive division and a noncompetitive division;

d. *it was the purpose of the Legislature, in making this distinction, to provide for positions which cannot properly be tested for, such as lower-level jobs which do not require significant education or experience, to be filled without the need of competitive examination but with civil service protection for the employee;*

e. however, recent published reports suggest that the purpose of the noncompetitive division has been subverted by the transfer into that division of titles which properly belong in the unclassified service or in the competitive division of the career service, and the making of appointments thereto;

f. the apparent reason for this misuse of the noncompetitive division [***18] is to protect political appointees prior to the beginning of a new administration; and

[**929] g. in order to prevent this abuse of the civil service system, there is need for a statutory prohibition on the movement of job titles and political appointees to the noncompetitive division of the career service during the final six months of the Governor's term in office.

[*N.J.S.A. 11A:3-2.1* (emphasis added).]

See also Senate State Government Committee, Statement to S. 2234 (Dec. 6, 1993) ("The purpose of the noncompetitive division is to enable the State to fill lower-level jobs which do not require significant education or training and for which a competitive examination cannot easily be designed.").

We do not hold that only low-level positions may be assigned to the noncompetitive division, but it is instructive to note the purpose for which the noncompetitive division was created and the Legislature's concern that it not be abused. There may well be

positions that require knowledge that is not readily evaluated through competitive testing. *See Benson v. McCaul*, 268 A.D.2d 756, 702 N.Y.S.2d 164, 166-67 (App. Div. 2000) (finding competitive examination for Risk Management positions to be impracticable "due to the dynamic nature of the [financial] industry which rendered an [***19] examination virtually obsolete before completion of the competitive process"). And we can envision other circumstances, not involving low-level positions, in which a transfer to the noncompetitive division could be appropriate.

[*447] *N.J.S.A. 11A:3-2* authorizes the Commission to "assign and reassign such titles to each division and [to] provide for movement, including promotion, of employees from one division to the other." *N.J.S.A. 11A:3-1* authorizes the Commission to "assign and reassign titles among the career service." The Commission's regulations outline the parameters of how it exercises that authority.

N.J.A.C. 4A:3-1.2, the regulation at issue in this case, provides as follows:

(a) The Civil Service Commission shall allocate and reallocate career service titles between the competitive and noncompetitive divisions.

(b) A career service job title in the competitive division is subject to the competitive examination procedures of *N.J.A.C. 4A:4-2*, except as provided in *N.J.A.C. 4A:3-3.2A*.

(c) A job title may be placed in the noncompetitive division on an ongoing or interim basis when it is determined by the Civil Service Commission that it is appropriate to make permanent appointments to the title and one or more of the following [***20] 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.

(d) All appointees to noncompetitive titles shall meet the minimum requirements set forth in the job specification and satisfactorily complete a working test period.

(e) Prior to any reallocation from the competitive to noncompetitive divisions, whether on an ongoing or interim basis, an administrative review shall be conducted and notice of the proposed reallocation shall be sent to affected appointing authorities and negotiations [**930] representatives. The notice shall designate the period of time, which in no event shall be less than 20 days, during which written comment may be submitted, and may provide for a public hearing.

1. Data, reports, analyses, and other information utilized in the determination shall [***21] constitute the administrative record, and shall be available for review by affected employees, appointing authorities, and negotiations representatives.

2. After the comment period and the public hearing, if any, the Civil

Service Commission shall issue a final administrative decision containing findings and conclusions with respect to the proposed reallocation, based upon the administrative record and any comment received, and implementation procedures.

(f) When a job title is reallocated from the competitive to noncompetitive divisions, the Commission's decision shall specify an effective date for reallocation.

[*448] 1. Permanent employees in that title as of the effective date shall retain their permanent status in the noncompetitive division.

2. Probationary employees in that title as of the effective date shall continue serving their working test periods and, upon successful completion, attain permanent status in the noncompetitive division.

3. Provisional employees who remain in that title as of the effective date shall receive regular appointments and begin serving their working test periods on the effective date.

(g) If a title is designated noncompetitive on an interim basis, at the end [***22] 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

441 N.J. Super. 434, *448; 119 A.3d 921, **930;
2015 N.J. Super. LEXIS 119, ***22

noncompetitive period shall, upon successful completion of their working test periods, attain permanent status in the competitive division.

That regulation was adopted in July 1988. 20 *N.J.R.* 2255(b) (Sept. 6, 1988). We note that, in response to concerns about the nature of the administrative process preceding a reallocation from the competitive to the noncompetitive division, the agency responded that *N.J.A.C. 4A:3-1.2(e)* is supposed to "provide[] for a thorough administrative review process." 20 *N.J.R.* 2256(b) (Sept. 6, 1988).

In reaching its decision in this case, the Commission relied on *N.J.A.C. 4A:3-1.2(c)(2)*, which allows transfers to the noncompetitive division when "[c]ertification procedures based on ranked eligible lists [would] not or are not likely to meet the needs of appointing authorities." Having reviewed the record before us, we conclude that it contains very few pieces of objective evidence, such as the "[d]ata, reports, analyses, and other information" contemplated by *N.J.A.C. 4A:3-1.2(e)(1)*, demonstrating that the AOC was experiencing significant recruitment problems for the Probation [***23] Officer and Bilingual Probation Officer titles at the time it appealed. In support of its application, the AOC cited only one, not overly specific problem, which was that "at least four vicinages [had] exhausted [their] current pool and several others [were] close to exhausting their pools for the Probation Officer Bilingual title." The record does not contain more specific factual information concerning the parameters of that problem, such as how often it occurs and whether court operations had been adversely affected. In addition, a shortage in the pool for the Bilingual Probation Officers would not, by itself, necessitate a reallocation of the Probation [*449] Officer title to the noncompetitive division, even if it [**931] were to justify the reallocation of Bilingual Probation Officers.

The Commission's decision quotes the Division's comment that there were "no eligible lists for the subject titles" at the time the decision to make the program permanent was made. It is silent, however, as to whether the lack of lists was related to an operational problem at the Commission, or merely the cessation of developing such lists while the pilot program was taking place and in anticipation that it would [***24] be made permanent. Certainly, the AOC was able to identify many candidates

for the positions during the pilot project. We find it unlikely that the competitive process suddenly failed to produce eligible lists, inasmuch as the AOC has been relying on it for more than fifty years. The fact that the Commission was simply not ready to resume the usual procedure at the end of the pilot program is not an acceptable reason for making the program permanent.

The Commission points to the fact that the reallocation "[would] provide the AOC with the flexibility needed to more efficiently and quickly meet hiring responsibilities." However, the need for flexibility in hiring is not listed as one of the circumstances that would permit the Commission to place a job title in the noncompetitive division. *N.J.A.C. 4A:3-1.2(c)(1)* to -(3). Instead, *N.J.A.C. 4A:3-1.2* allows for limited, interim noncompetitive appointments in the event that there is an immediate need for additional personnel.

The Association argues that the Commission should have held a hearing. *N.J.S.A. 11A:3-6* only requires the Commission to hold a public hearing prior to transferring a title from the career service to the unclassified service. *N.J.A.C. 4A:3-1.2(e)*, however, vests [***25] the Commission with the discretion to conduct a public hearing "[p]rior to any reallocation from the competitive to noncompetitive divisions." Because it does not mandate such a hearing, we cannot conclude that one is required. Nevertheless, in a fact-sensitive case such as this one appears to be, the [*450] Commission should seriously consider a transfer to the OAL for a hearing. See *Commc'ns Workers of Am. v. N.J. Dep't of Pers.*, 154 *N.J. 121, 131-32, 711 A.2d 890 (1998)*.

Finally, we return to the constitutional dimension of this case, which governs its outcome over and above the statutory and regulatory requirements discussed above. Because our Constitution requires that public service appointments be made by competitive examination "as far as practicable," *Foglio, supra*, 207 *N.J. at 40, 22 A.3d 958*, consideration must be given to whether the AOC has demonstrated that it is *impracticable* for it to continue filling Probation Officer and Bilingual Probation Officer positions through open, competitive examinations. That is a question that must be considered separately as to each title. That the noncompetitive process is more flexible does not, in our view, mean that the competitive process is not practicable within the meaning of the constitutional requirement. We see nothing in the Commission's decision to suggest that it considered [***26] the

441 N.J. Super. 434, *450; 119 A.3d 921, **931;
2015 N.J. Super. LEXIS 119, ***26

constitutional issue, which was raised by the Association in its opposition.

Because the factual record underlying the Commission's decision is overly sparse, we conclude that there are insufficient facts to support the decision to grant the transfer of the Probation Officer and Bilingual Probation Officer titles to the noncompetitive division, rendering it arbitrary and capricious. In addition, and more importantly, the Commission's failure even to consider the issue of whether it is impracticable for the AOC to continue filling Probation Officer and Bilingual Probation Officer positions through open, competitive [**932] examinations renders the decision legally

defective.

Consequently, we reverse the order on appeal and remand for further consideration by the Commission, consistent with this opinion. The Commission's reconsideration must include the development of the type of factual record required for a meaningful evaluation of the AOC's proposal under the applicable statutory and regulatory provisions and, again most importantly, the provisions [*451] of *article VII, section 1, paragraph 2 of the New Jersey Constitution*.

Reversed and remanded.



STATE OF NEW JERSEY

In the Matter of the Reallocation of
the Probation Officer and Probation
Officer, Bilingual in Spanish and
English, Titles from the Competitive
to the Noncompetitive Division of the
Career Service

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for Title Reallocation

CSC Docket No. 2013-3251

ISSUED: **JUL 18 2013** (DASV)

The Administrative Office of the Courts (AOC) requests the reallocation of the Probation Officer and Probation Officer, Bilingual in Spanish and English, titles from the competitive to the noncompetitive division of the career service in accordance with *N.J.A.C.* 4A:3-1.2.

By way of background, the Civil Service Commission (Commission) established a one-year pilot program, commencing on July 1, 2012 and ending June 30, 2013, whereby the titles of Probation Officer and Probation Officer, Bilingual in Spanish and English, would be reallocated to the noncompetitive division of the career service utilizing a selection process administered by the AOC. The AOC requested establishment of the pilot program due to difficulties encountered in maintaining adequate candidate pools for all geographic locations under the current system of competitive testing at set intervals. In conjunction with the former Division of Selection Services (Selection Services),¹ the AOC developed a self-administered structured recruitment process, which would assess and weigh candidates' performance in six broad-based competency areas via a structured panel interview and writing exercise. Emphasizing that the proposed selection process was consistent with a job analysis conducted of the affected titles and the active oversight of the program by Selection Services, the Commission approved the pilot program. See *In the Matter of Probation Officer and Probation Officer, Bilingual in Spanish and English, Judiciary* (CSC, decided June 20, 2012). Subsequently, the AOC requested a change in the effective date of the pilot program and requested

¹ The Division of Selection Services is now the Division of Selection Services and Recruitment.

that the eligible lists for Probation Officer (S4444L) and Probation Officer, Bilingual in Spanish and English (S4445L), be revived. In that request, the AOC presented that preliminary actions were needed to implement the pilot program. These actions had delayed the actual commencement of the pilot program. In the meantime, several vicinages made appointments to the subject titles after the original commencement date of July 1, 2012 through the open competitive process due to an immediate need for staff. Moreover, there was no indication that noncompetitive appointments were made under the pilot program. Therefore, the Commission determined that it was appropriate to modify the effective start date of the pilot program to November 1, 2012, without modifying the termination date of June 30, 2013. Further, the Commission found good cause to revive and extend the eligible lists for Probation Officer (S4444L) and Probation Officer, Bilingual in Spanish and English (S4445L), to October 31, 2012, to allow for regular appointments to be made. *See In the Matter of In the Matter of Probation Officer and Probation Officer, Bilingual in Spanish and English, Judiciary* (CSC, decided October 3, 2012).

In the instant matter, the AOC maintains that the pilot program was successful and requests that the Commission grant approval to implement the pilot program on a permanent basis. In other words, the AOC requests that the subject titles be permanently reallocated to the noncompetitive division of the career service. It submits that the pilot program was developed to afford the Judiciary flexibility in the recruitment and selection of Probation Officers and Probation Officers, Bilingual in Spanish and English. Additionally, the AOC provides a detailed description of its selection criteria for the noncompetitive appointments, which includes a structured interview and a writing exercise. It emphasizes that there were 266 court executives and team leaders who successfully completed a panel interview training program. Thirty-two individuals also successfully completed training on the scoring of the writing sample. All of the participants in the pilot program signed a confidentiality agreement to ensure the security of the interview questions and writing sample topics. The AOC also took into consideration the diversity of staff participating in the recruitment process in terms of gender and race. Thereafter, notices of vacancies were distributed through various media, such as newspapers, websites, and colleges. Interested eligibles were to submit resumes. Candidates were then invited to a regional recruitment event based on resume review scores. Veterans were invited regardless of their resume review scores. The recruitment event was structured into five sections: check-in, informational presentation, interview, writing sample, and check-out. The AOC states that 523 candidates were selected to attend the event, and 46 appointments were made from November 2012 through May 2013. Additionally, it indicates that in an effort to ensure that the process will be functioning consistently and efficiently, it has established a working group to evaluate and modify processes as needed. The AOC contends that it will continue to seek this agency's guidance to ensure any modification of its selection process meets the Commission's standards.

In support of its request, the AOC submits statistical data on its recruitment efforts, as well as spreadsheets and charts regarding the process, interview questions, and the persons involved.

In response, the Probation Association of New Jersey (PANJ), represented by David I. Fox, Esq., presents its continued opposition to the noncompetitive process proposed by the AOC as an “unconstitutional and improper attempt to permanently circumvent the Civil Service process.” It reiterates its prior sentiments during the change of the pilot program’s effective date “that there was actually no intent by the Judiciary to do this for the one-year period but that it was an effort to permanently and at great expense to the Judiciary, replace the appropriate Civil Service process as well as constitutional statutory requirements.” PANJ is very concerned that the AOC’s request, as well as an unrelated pilot program of another jurisdiction, will result in the end of Civil Service. Moreover, PANJ maintains that the AOC’s proposal is in violation of Civil Service law and rules since it effectively eliminates competitive testing. It believes that the best method for the selection and appointment of employees is competitive testing. It claims that prior noncompetitive procedures resulted in a high percentage of applicants who were disciplined or terminated. Therefore, PANJ contends that the AOC’s proposal should be denied, or alternatively, it should not be considered by the Commission until PANJ’s July 2012 appeal of the pilot program with the Superior Court of New Jersey, Appellate Division, is decided. In support of its opposition, PANJ presents prior correspondence regarding its objections to the pilot program and a newspaper article regarding a probation violator.

The AOC replies that it has responded to PANJ’s concerns, noting that it has satisfied all of the requirements directed by the Commission. It reiterates that the pilot program was successful and members of PANJ’s professional supervisor unit assisted in the development of the pilot program and provided favorable reviews. Moreover, it contends that PANJ has provided no support for its claim that the noncompetitive appointment process violates the State Constitution or other laws or rules. Further the AOC maintains that if the instant matter is held in abeyance pending PANJ’s appeal to the Appellate Division, the appointment of Probation Officers will be unnecessarily delayed and will negatively affect its ability to properly serve the public. It notes that if PANJ’s appeal is successful, the process can be modified or rescinded.

The Division of Classification and Personnel Management (CPM) recommends granting the AOC’s request for reallocation of the subject titles to the noncompetitive division. CPM indicates that the movement will provide the AOC with the flexibility needed to more efficiently and quickly meet hiring responsibilities. Further, it finds that the documentation presented by the AOC demonstrates a well-planned, fair, and equitable recruitment and selection process. Additionally, as set forth in *N.J.A.C. 4A:3-1.2(c)*, certification procedures will not

likely meet the needs of the AOC. CPM also notes that no eligible lists exist for the subject titles.

Moreover, CPM indicates that appointment types for existing employees in these titles as of the effective date will be handled in accordance with *N.J.A.C. 4A:3-1.2(f)*:

1. Permanent employees in that title as of the effective date shall have their appointment types changed to regular appointment, noncompetitive division (RAN), and shall retain their permanent status in the noncompetitive division.
2. Probationary employees in that title as of the effective date shall continue serving their working test periods and, upon successful completion, attain permanent RAN status in the noncompetitive division.
3. Provisional employees who remain in that title as of the effective date shall receive RAN appointments and begin serving their working test periods on the effective date.

Further, it has been established that where it is found that an employee's movement from a noncompetitive title to a competitive title could have been effectuated via promotional examination procedures before any title reallocation impacting the employee's title, Selection Services will announce a promotional examination, regardless of whether or not the movement after the reallocation constitutes a promotional movement. Similarly, where an employee was previously classified in a competitive title, but, as a result of the title reallocation, is cross-walked into a noncompetitive title, Selection Services will process any future promotional movements based on the employee's competitive title before the title reallocation without regard to whether or not the employee's present noncompetitive title is approved to promote to a competitive title. *See e.g., In the Matter of Felicia Taylor* (CSC, decided February 8, 2012).

Moreover, CPM states that the appropriate negotiations representatives have been notified of the reallocation. It is noted that since the subject titles are only used in the judicial branch, no other appointing authorities need to be advised of these plans. Finally, CPM requests that the changes specified in this title reallocation become effective beginning on the first pay period following Commission approval of these actions.

CONCLUSION

N.J.A.C. 4A:3-1.2 provides, in part, that the Commission may reallocate titles from the competitive to the noncompetitive 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.

Based on all of the foregoing, ample reasons exist for the reallocation of the proposed titles to the noncompetitive division of the career service. It is clear that reallocation will provide the AOC with the flexibility needed to more efficiently and quickly meet hiring responsibilities. Certification procedures based on ranked eligible lists will not meet the AOC's needs for immediate recruitment. Further, the AOC submits sufficient documentation showing the success of the pilot program, which justifies its request to reallocate the subject titles to the noncompetitive division of the career service. Although there will not be *per se* competitive testing by this agency, the AOC's procedures demonstrate a comparable method which will ensure fairness and equity in the recruitment and selection process. Additionally, the rights of veterans will be preserved, as they will be invited to the recruitment event. The Commission emphasizes that staff members with diverse backgrounds have been extensively trained in the interview and writing portions of the AOC's selection process, which should certainly result in an impartial appointment process. Thus, contrary to PANJ's assertions, the Commission does not find a circumvention of the State Constitution or the Civil Service Act or the rules promulgated thereunder. As set forth above, candidates will be screened by a well-planned process, which will ensure that the ideals of the State Constitution that appointments are to be based on merit and fitness shall be maintained. Therefore, the Commission accepts CPM's recommendation and approves the reallocation of the subject titles to the noncompetitive division of the career service. Furthermore, the Commission denies PANJ's request to hold this matter in abeyance pending the outcome of its appeal with the Appellate Division. As the AOC underscored, a stay of this movement will result in unnecessary delays and will negatively affect its ability to properly serve the public.

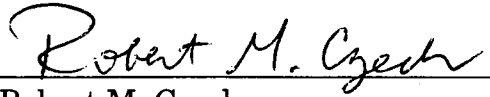
It is noted that, under current Civil Service rules, reallocation of the subject titles will result in the granting of permanent status and all attendant Civil Service rights and privileges currently accorded employees in the noncompetitive division of the career service. Seniority for any affected permanent employee would be continuous and include all permanent service in the reallocated title. As of the effective date of reallocation, all employees serving provisionally in these affected titles are to be recorded as permanent, pending completion of the required working test period.

ORDER

Therefore, it is ordered that the titles of Probation Officer and Probation Officer, Bilingual in Spanish and English, be reallocated to the noncompetitive division. It is further ordered that such action be effective July 27, 2013.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF JULY, 2013



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