

B-77



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Project Specialist
and Project Support Specialist,
Department of Health

CSC Docket No. 2016-5

Administrative Appeal

ISSUED: **JUL 16 2015**

(DASV)

The Department of Health requests approval to make unclassified appointments utilizing various career service titles in order to properly classify positions currently designated as Project Specialists and Project Support Specialists. The Division of Agency Services (Agency Services) requests that these appointments be made interim for a period of up to three years.

By way of background, the Civil Service Commission (Commission) approved the request of the appointing authority¹ to utilize the unclassified titles of Project Specialist and Project Support Specialist for a period of up to two years in order to develop and implement the State's Medical Marijuana Program. The Commission noted that established guidelines provided that appointments to the Project Specialist and Project Support Specialist titles could only be made where a full-time position is needed for a project that is totally funded by grant monies or other specifically identified funds; the project has a clearly defined objective and anticipated duration of less than one year; and it is otherwise not feasible to use another existing title. See *N.J.A.C. 4A:4-1.10(a)*. In this case, the Commission found that funding for the positions had been authorized by the New Jersey Compassionate Use of Medical Marijuana Act, *N.J.S.A. 24:6I-1, et seq.*, and the project was clearly defined by that Act. The Commission also found that no career service title would be appropriate given the uniqueness of the positions, which may change based on the development or modification of the program, and the possibility of termination of the program as a result of federal intervention. Finally, the

¹ The Department of Health was previously known as the Department of Health and Senior Services.

Commission approved the use of these titles for up to two years in light of the anticipated length of time it would take to fully develop and implement a medical marijuana program. The Commission noted that prior to the expiration of the two years, the appointing authority was required to submit a request to this agency to either extend the time period with sufficient reasons for the extension or for a determination as to what appropriate titles may be used. *See In the Matter of Project Specialist and Project Support Specialist* (CSC, decided November 22, 2011).

The appointing authority now seeks to properly classify the positions of the current incumbents.² It indicates that progress has been made to implement the program, which has allowed for specific duties and responsibilities to evolve that compare favorably with the job descriptions for the following career service titles: Agency Services Representative 3 (56360/A14³); Public Health Representative 1 (62926/R24), Investigator 1 (56774/R25), and Database Analyst 2 (53003/P27). Moreover, the appointing authority requests permission to use these career service titles for vacant positions, as well as to utilize the Program Manager, Health/Human Services (61640/M32), Supervising Public Health Representative (62928/S27), and Principal Clerk Typist (23234/R12) titles, which are also allocated to the career service.⁴ However, the appointing authority states that “federal issues related to compliance, enforcement, and regulatory authority of marijuana continue to be a complicating factor in the permanence of state programs.” Thus, under these circumstances, it submits that the use of unclassified appointments for these career service titles by way of rule relaxation would meet the needs of the program. Should the program need to be dissolved due to a change in federal guidelines, the appointing authority maintains that unclassified appointments would provide flexibility in the dissolution of the program. Accordingly, the appointing authority requests that the positions of the following nine individuals be classified as follows:

Name	Current Title	Proposed Title
Daniel Babij	Project Support Specialist	Agency Services Representative 3
James Baracia	Project Specialist	Public Health Representative 1
Michael Fallon	Project Specialist	Investigator 1
Fred Gordon	Project Specialist	Public Health Representative 1
Dave Hodges	Project Specialist	Public Health Representative 1
Evan Kolakowski	Project Support Specialist	Agency Services Representative 3
Jessica Lehr	Project Support Specialist	Agency Services Representative 3
Frederick Loblein	Project Specialist	Investigator 1
Nagalakshmi Selvaraj	Project Specialist	Data Base Analyst 2

² The appointing authority also notes that the conversion of the titles would allow the employees to be covered by any existing collective negotiations agreement.

³ (Title Code/Salary Range)

⁴ The appointing authority indicates that there are a total of 16 vacant positions in the various proposed titles.

Agency Services supports the conversion of the subject titles to the proposed career service titles. However, it requests that, instead of unclassified appointments, the appointments be made on an interim basis pursuant to a rule relaxation of *N.J.A.C. 4A:4-1.6*, which provides in part that:

(b) When an appointing authority makes an appointment to a specific position in State service or a specific title in local service, an interim appointment shall be made where the position/title is held by a permanent employee who:

1. Is on a leave of absence;
2. Is on indefinite suspension;
3. Has been removed or demoted for disciplinary reasons and is awaiting final administrative action by the [Commission] on appeal; or
4. Has accepted an interim appointment.

(c) An interim appointment may be made where the position/title will be abolished at a future date pursuant to a closing or phasedown of a government operation. Such an interim appointment may be made only following official notification to the [Commission] by the applicable department head, in State service, or by the appointing authority, in local service, of the closing or phasedown.

While Agency Services acknowledges that the State's Medical Marijuana Program is not a phasedown of a government operation and the incumbents in the subject titles are not replacing permanent employees, it maintains that interim appointments would be appropriate for this project. It recommends that the appointments be permitted for a period of three years or until the federal statute regarding marijuana is enforced or changed, whichever occurs first. Agency Services notes the possibility that the program will be phased out as there may not be a federal statute which supports the program. Thus, it will closely monitor the situation.

It is noted that Agency Services notified the International Brotherhood of Electrical Workers (IBEW) and the Communications Workers of America (CWA), majority representatives of employees serving in the proposed titles, regarding its rule relaxation request. IBEW and CWA were advised of the need of interim appointments in order to facilitate the operation of the State's Medical Marijuana Program. No comments from the unions have been received.

CONCLUSION

N.J.A.C. 4A:1-1.2(c) provides that the Commission may relax rules for good cause in a particular situation in order to effectuate the purposes of Title 11A, New Jersey Statutes.

In the instant matter, the appointing authority seeks approval to make unclassified appointments in various career service titles. It indicates that the progress of the State's Medical Marijuana Program has allowed for specific duties and responsibilities to evolve and the Project Specialist and Project Support Specialist positions can now be classified by using career service titles. Agency Services supports the conversion of the subject titles to the proposed career service titles. However, it recommends that interim appointments be made.

In State service, *N.J.S.A.* 11A:3-4(l) indicates that the unclassified service shall be limited to those titles specifically designated and all other titles as provided by law or as the Commission may determine in accordance with criteria established by rule. *N.J.A.C.* 4A:3-1.1(a) states that all job titles shall be allocated to the career service, except for those job titles allocated by the Commission to the unclassified service pursuant to *N.J.A.C.* 4A:3-1.3. *N.J.A.C.* 4A:3-1.3(a) indicates that a title shall be allocated to the unclassified service when:

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

In the present case, there is no question that the proposed titles are *not* specifically designated by *N.J.S.A.* 11A:3-4 to be in the unclassified service, nor is there specific statutory authority for unclassified appointments to these titles.⁵ Likewise, there is *no* statutory provision allowing for the appointment of an incumbent in the title to serve for a fixed term or at the pleasure of an appointing authority. Furthermore, the Commission does not find a basis to allocate the

⁵ The New Jersey Compassionate Use of Medical Marijuana Act is silent as to the type of appointments to be made to administer the Act by the Department of Health.

proposed titles to the unclassified service pursuant to *N.J.A.C. 4A:3-1.3(a)5*. Both the appointing authority and Agency Services are in agreement that the proposed titles, which are allocated to the competitive division of the career service, would properly classify the duties and responsibilities of the Project Specialist and Project Support Specialist positions. Thus, merit and fitness for appointment in or promotion to the titles may be determined by examination, and permanent appointments may be made. Our courts have recognized the State's strong public policy, as evinced by the State Constitution, favoring the inclusion of as many titles as possible in the career service. *See, Walsh v. Department of Civil Service*, 32 *N.J. Super.* 39, 43-44 (App. Div. 1954); *Loboda v. Clark Township*, 40 *N.J.* 424, 434 (1983); *State v. Clark*, 15 *N.J.* 334, 341 (1954); *In the Matter of Hudson County Probation Department*, 178 *N.J. Super.* 362, 371 (App. Div. 1981). Therefore, it would not be appropriate to grant the appointing authority's request to use the proposed career service titles in the unclassified service. *Compare, In the Matter of Interim Disaster Recovery Division, Department of Community Affairs* (CSC, decided April 17, 2013); *In the Matter of Interim Public Health Recovery Division, Department of Health* (CSC, July 31, 2013); and *In the Matter of Office of Recovery, Department of Human Services* (CSC, decided August 15, 2013) (The Commission approved short term unclassified appointments to various career service titles in order to allow for the expedited staffing of the various offices and divisions of recovery to assist in the aftermath of Superstorm Sandy, since administering an examination was not practicable for each title given that the programs were temporary and had a definitive end date).

Nonetheless, while permanent appointments may be made in these titles and there is no anticipated end date for the State's Medical Marijuana Program, there is uncertainty in light of federal law⁶ and its impact on the continuation of the program. Therefore, it is prudent at this time to allow interim appointments to be made, notwithstanding that the incumbent employees would not be holding the place of permanent employees nor is the program scheduled for closing or phasedown. This would provide the appointing authority with maximum flexibility needed to address any adverse circumstances⁷ to the program, as well as to provide a foundation as to the appropriate titles to be used once the program is more established. It is emphasized that although the program is not experiencing a

⁶ As the Legislature has found and declared, federal law currently prohibits the use of marijuana. *See N.J.S.A. 24:6I-2c*. States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with the New Jersey Compassionate Use of Medical Marijuana Act does not put this State in violation of federal law. *See N.J.S.A. 24:6I-2d*.

⁷ *N.J.A.C. 4A:4-1(f)* provides that any interim appointment shall remain in effect only during the period of time that the permanent employee is on an approved leave of absence, on indefinite suspension or awaiting final administrative action of the Commission on the appeal of a disciplinary demotion or removal, or during the period leading up to the date on which the closing or phasedown of the government operation is scheduled to conclude.

“closing” or “phasedown” at this time, the abolishment of the program would be an inevitable consequence if federal law regarding marijuana is found to be enforceable in this State.

The Commission, therefore, adopts the recommendation of Agency Services that interim appointments in the specified career service titles are to be used for the current encumbered positions and last no more than a period of three years from the date of this decision or until the federal statute regarding marijuana is enforced or changed, whichever occurs first. Interim appointments may also be made within the three-year period to vacant positions which the appointing authority wishes to fill in the program. If the program is still operational at the end of the three-year period with no significant changes to the law which would affect the proposed titles, Agency Services is directed to petition the Commission with its recommendation as to the appropriateness of effecting regular appointments by designating the proposed titles within the program as noncompetitive on an interim basis in order for the employees to be appointed and achieve permanent status.⁸ Agency Services should also assess whether the noncompetitive appointments should be made with a current effective date or as of the date of the employees' initial appointment to the Project Specialist or Project Support Specialist title or to the interim career service titles. See *N.J.A.C. 4A:4-1.10(c)*.⁹ The Commission is mindful of the history of these positions and the fact that valued and experienced employees could be displaced if subject to an open-competitive examination process. Accordingly, interim appointments are appropriate under these unique circumstances. It is noted that this decision is based on the unique facts of this case and does not set a precedent for any other case.

ORDER

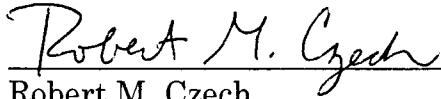
Therefore, it is ordered that the request of the Department of Health be denied, but the request of the Division of Agency Services be granted.

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

⁸ Employees would need to serve current working test periods, since appointments cannot become permanent until successful completion of a working test period pursuant to *N.J.A.C. 4A:4-5.1, et seq.*

⁹ An individual may receive a retroactive date of appointment to correct an administrative error, for administrative delay, or for other good cause.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JULY, 2015



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