



STATE OF NEW JERSEY

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

In the Matter of Management
Assistant (C1052A),
Cape May County

CSC Docket No. 2021-368

Appointment Waiver

ISSUED: JANUARY 22, 2021 (AMR)

Cape May County requests permission not to make an appointment from the June 8, 2020 certification for Management Assistant (C1052A), Cape May County.

By way of background, Cape May County provisionally appointed Kevin McLaughlin, pending open competitive examination procedures, to the title of Management Assistant effective September 27, 2019. This provisional appointment generated an examination announcement (C1052A) for the subject title with a closing date of November 21, 2019, which resulted in a list of five eligibles that promulgated on June 4, 2020 and expires on June 3, 2023. A certification (OL200522) was issued on June 8, 2020 and consisted of the names of the five eligibles. It is noted that McLaughlin filed for the examination, but he was deemed ineligible.¹ McLaughlin was returned to his permanent title of Security Guard, effective August 7, 2020, and was then appointed on September 4, 2020 to the unclassified title of County Division Head.

The appointing authority requested that the subject certification be cancelled, indicating that a permanent appointment would not be made from the subject eligible list. Specifically, it explained that it no longer had a need for the position due to the provisional being returned to his permanent title.

¹ McLaughlin filed an appeal of his ineligibility. However, the Commission found that he did not meet the experience requirements for the position and denied his appeal. See *In the Matter of Kevin McLaughlin* (CSC, decided January 20, 2021).

The appointing authority's request for an appointment waiver was acknowledged, and it was advised that if such request were granted, it could be assessed for the costs of the selection process in the amount of \$2,048.

In response, the appointing authority indicates that it has been negatively impacted by the COVID-19 pandemic, was forced to reduce its budget by 10%, and is undergoing a restructuring that would deem the Management Assistant position irrelevant. It states that "this was not and could not have been anticipated at the time the position was provisionally filled." It also claims that the Division of Agency Services (Agency Services) recommended that it utilize the Management Assistant title after it advised Agency Services of its needs and the job functions that would be performed by the appointee. However, none of the individuals who were certified, and therefore eligible for appointment, possessed the experience and job skills that were required for the position. In addition, the appointing authority notes that it is the first time since at least 2012 that the Cape May County Office of Emergency Management, where the subject position is located, has requested a certification list cancellation. Accordingly, the appointing authority maintains that the foregoing circumstances warrant no costs to be assessed.

CONCLUSION

Initially, in examining the legislative history of *N.J.S.A. 11A:4-5*, in *Local 198 of I.A.F.F. v. Atlantic City*, Docket No. A-855-88T1F (App. Div. June 14, 1989), the court stated that this agency is required to issue a certification automatically where there is a provisional appointee or a vacancy. Moreover, the court concluded that *N.J.S.A. 11A:4-5* unambiguously stated that once the examination process has been initiated due to the appointment of a provisional employee, the appointing authority must make an appointment from the eligible list if there is a complete certification. Additionally, the Court found that the this agency was correct in interpreting *N.J.S.A. 11A:4-5* to find that it was a clear legislative response to pervasive violations of Title 11A, and that non-compliance with this statute is not a mere technical violation, rather it undermined the purpose and intent of the constitutionally-based merit selection system. The Court found that in circumstances such as these, it was appropriate to order the appointing authority to make an appointment. Thus, there is no doubt that the appointing authority must make an appointment from this list if there is a complete certification, that is, one containing the names of at least three interested and eligible candidates. Moreover, the Civil Service Commission (Commission) is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A. 11A:10-3*; *N.J.A.C. 4A:10-2.1(a)2*. See *In the Matter of Fiscal Analyst (M1351H)*, *Jersey City*, Docket No. A-4347-87T3 (App. Div. February 2, 1989).

Therefore, in accordance with *N.J.S.A.* 11A:4-5, once the examination process has been initiated due to the appointment of a provisional employee or due to an appointing authority's request to fill a vacancy, the appointing authority must make an appointment from the resulting eligible list if there are three or more interested and eligible candidates. The only exception to this mandate may be made for a valid reason such as fiscal constraints.

In the instant matter, the examination for the subject title was generated as a result of the provisional appointment of McLaughlin, who is no longer serving in the title. After a complete certification was issued, the appointing authority requested an appointment waiver, explaining that due to McLaughlin's return to his permanent title and its current restructuring of its staffing needs in the wake of the COVID-19 pandemic, the Management Assistant position would no longer be relevant. Therefore, considering the foregoing and in conjunction with the fact that there is no provisional currently serving in the subject title, there is a sufficient justification for an appointment waiver.

However, although an appointment waiver is granted in this matter, both *N.J.S.A.* 11A:4-5 and *N.J.A.C.* 4A:10-2.2(a)2 state that if an appointing authority receives permission not to make an appointment, it can be ordered to reimburse for the costs of the selection process. While administering examinations and providing the names of eligible job candidates to the jurisdictions under the Civil Service system are two of the primary activities of this agency, these costly efforts are thwarted when appointing authorities fail to utilize the resulting eligible lists to make appointments and candidates have needlessly expended their time, efforts and money to take these examinations in hopes of being considered for a permanent appointment. In this case, while the Commission recognizes that Cape May County may be experiencing budgetary issues due to the COVID-19 pandemic, as is many jurisdictions in the Civil Service system, the appointing authority did not take any action to obviate the need for the examination at the time of the announcement or prior to its processing. Furthermore, McLaughlin's provisional appointment as a Management Assistant was not terminated until August 7, 2020, after the June 8, 2020 certification was issued. Cape May County also later appointed McLaughlin to the unclassified title of County Division Head, which makes its claim of fiscal constraints somewhat disingenuous. While the appointing authority also asserts that it was erroneously advised to use the Management Assistant title, the appointing authority made no attempt to challenge the recommendation, appointed McLaughlin to that title, and proceeded with the generation of the eligible list. Additionally, the fact that it has not requested a certification list cancellation since at least 2012 is not a sufficient basis on which to waive the costs of the selection process in the present case. Thus, notwithstanding that the appointing authority has shown sufficient reason for not making an appointment from the subject eligible list, under these circumstances, it has failed to present a sufficient basis for not being charged for the costs of the selection process which produced it. Therefore,

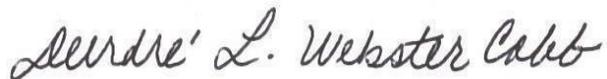
although a waiver is granted, it is appropriate that the appointing authority be assessed \$2,048 for the costs of the selection process.

ORDER

Therefore, it is ordered that a waiver of the appointment requirement be granted. Additionally, the Commission orders that the appointing authority be assessed for the costs of the selection process in the amount of \$2,048 to be paid within 30 days of the issuance of this order.

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 20^H DAY OF JANUARY 2021



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