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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2417-21**

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

Argued April 18, 2023 – Decided May 16, 2023

Before Judges Sumners, Geiger and Fisher.

On appeal from the New Jersey Civil Service Commission, Docket No. 2022-1575.

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

Levi Klinger-Christiansen, Deputy Attorney General, argued the cause for respondent New Jersey Civil Service Commission (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant

Attorney General, of counsel; Levi Klinger-Christiansen, on the brief).

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

PER CURIAM

This appeal returns to us following our remand to the Civil Service Commission directing it to explain "why the factors and principles it applied in its other decisions allowing for reallocation [of competitive titles to non-competitive titles] did not apply to" its denial of the request by the Administrative Office of the Courts (AOC) to permanently reallocate the titles of Court Services Representative, Judiciary Clerk Driver, Judiciary Clerk 1, Judiciary Clerk 2, and Judiciary Account Clerk 1, including the base and bilingual titles, to the non-competitive division of the civil service. In re Reallocation of Judiciary Clerk 1, Judiciary Clerk 2, Judiciary Account Clerk 1, Court Servs. Representatives, & Judiciary Clerk Driver from the Competitive to the Non-Competitive Div.of the Career Serv., No. A-5248-18 (Jan. 11, 2022) (slip op. at 22). In remanding, we acknowledged "the Commission has the discretion to reach a different conclusion." Ibid.

On remand, the Commission considered those other decisions, specifically, In re Reallocation of Payroll Clerk, No. 2022-312, 2021 N.J. CSC LEXIS 375 (Sept. 7, 2021); In re Reallocation of Security Guard & Security Guard (Bilingual in Spanish & English) from the Competitive to the Non-Competitive Div. of the Career Serv., CSC Docket No. 2015-1402 (Dec. 5, 2014); and In re Reallocation of Local Gov't Titles from the Competitive to the Non-Competitive Division of the Career Serv., No. 2015-251, 2014 N.J. CSC LEXIS 572 (Aug. 4, 2014), (collectively, the "three decisions"), and decided to permanently reallocate the titles of Court Services Representative, Judiciary Clerk Driver, and Judiciary Clerk 1, as well as their bilingual variants.¹ The Commission, on the other hand, determined that there was "not a sufficient basis on which to reallocate the Judiciary Account Clerk 1 and the Judiciary Clerk 2 titles and their bilingual variants to the non-competitive division."

The AOC appeals, repeating its previous argument that the Commission's decision denying permanent reallocation of the titles of Judiciary Clerk 2 and Judiciary Account Clerk 1 (the "two titles") was arbitrary, capricious, and unreasonable. As to the Judiciary Clerk 2 title, the AOC contends the title

¹ On remand, the AOC and the Judiciary Council of Affiliated Unions (JCAU), which opposed reallocation, took advantage of the opportunity to submit additional arguments for the Commission to consider.

should be non-competitive because the record established that: (1) certification procedures are inadequate to meet the Judiciary's needs; and (2) competitive testing for this position is not practicable because of the minimal requirements of the position. As for the Judiciary Account Clerk 1 title, the AOC contends it is impracticable to test for the knowledge, skills, and abilities (KSAs) associated with the title.

Based upon our deferential standard of review, we conclude the Commission's decision was supported by substantial credible evidence in the record and consistent with our state constitutional preference that civil service positions be subject to competitive examination where practicable. See N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 384-85 (2008); N.J. Const. art. VII, § 1, ¶ 2. Consequently, we affirm, as the AOC has not shown that the Commission's decision was arbitrary, capricious, and unreasonable. See Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n., 234 N.J. 150, 157 (2018).

Because we incorporate by reference In re Reallocation of Judiciary Clerk 1, we need not detail the procedure and factual background relevant to this appeal. In accordance with our remand, we focus our attention on the

Commission's explanation of why the three decisions do not support reallocation of the two titles to the non-competitive division, as sought by the AOC.

Before discussing the Commission's reasoning, we reiterate that Article VII, Section 1, Paragraph 2 of the New Jersey Constitution, provides:

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

Hence, our Legislature has declared the non-competitive division was established "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." N.J.S.A. 11A:3-2.1(d).

Guided by these constitutional and statutory mandates, the Commission enacted N.J.A.C. 4A:3-1.2(c), which provides:

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 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.

Given these parameters, we consider the Commission's remand decision not to permanently reallocate the two titles considering the three decisions.

A. Judiciary Clerk 2 Title

The Commission's analysis of the three decisions primarily focused on the Judiciary Clerk 2 title. As for Local Government Titles, the Commission explained there were "significant" differences between the twenty-two titles at issue in that case and the Judiciary Clerk 2 title. The titles reallocated in Local Government Titles to the non-competitive division were all entry-level "professional titles" requiring "possession of a Bachelor's degree, a Bachelor's degree in a specific major, and/or possession of a specialized license or certificate." The Commission explained the Judiciary Clerk 2 title was not an entry level title, and stated the title was a non-professional title "requir[ing] less

than 60 college credits or less than 12 specialized college credits." The title was a step above the Judiciary Clerk 1 title, and "has specific minimum requirements to establish eligibility, i.e., the ability to type a minimum of 25 net words per minute." In addition, the Commission noted:

all of the titles reallocated in Local Government Titles, . . . were entry level professional titles that were not practicable to test because the required education demonstrated successful testing of the required KSAs to bring to the position and the eligible lists provided by this agency were often non-competitive as evidenced by the inability of this agency to consistently provide complete eligible lists for the reallocated titles to local appointing authorities. Moreover, this agency has consistently provided complete eligible lists for the above entry-level title of Judiciary Clerk 2

With respect to Payroll Clerk, the Commission stated the reallocated title was an entry-level title for which the Commission had "historically been unable to produce a complete list." The three examinations administered between 2014 and 2021 for the Payroll Clerk title resulted in a single applicant for one examination, and the other two examinations had only two applicants each. Because the title's applicant pool "could not result in a complete list, the test mode utilized was a qualifying unassembled examination" through which each admitted candidate was assigned the same base passing score. The Commission pointed out that in Payroll Clerk, "testing [did] not usefully differentiate the

candidates for merit or fitness [because] all would be eligible for appointment consideration." By contrast, the Commission noted Judiciary Clerk 2 examinations have "consistently resulted in numerous applicants and complete lists."

And as to Security Guard, the Commission stated there, the "entry-level Security Guard title has no minimum requirements," whereas Judiciary Clerk 2 is an "above entry-level" title with a minimum typing requirement. It also noted that "a review of the State Classification Plan finds all 'next above entry-level' non-professional clerical titles are allocated to the competitive division."²

The AOC argues the Commission lacked "substantial credible evidence" to "declin[e] to permanently reallocate" the Judiciary Clerk 2 title. However, as we previously ruled, the Commission found there was not a sufficient basis for permanent reallocation, and "[t]he only support that determination requires is a lack of evidence that permanent reallocation is necessary. Thus, the Commission did not need substantial evidence that permanent reallocation was unnecessary to justify its findings." In re Reallocation of Judiciary Clerk 1, slip

² The Commission determined that based on the reasoning applied in Security Guard the entry-level, non-professional clerical titles, Judiciary Clerk 1, Court Services Representative, and Judiciary Clerk Driver should be reallocated to the non-competitive division.

op. at 11. The burden rests on the AOC to overcome the constitutional presumption of competitive testing, and "demonstrate[] that it [will remain] impracticable for it to continue filling [Judiciary Clerk 2] positions through open, competitive examinations." In re Reallocation of Prob. Officer, 441 N.J. Super. 434, 450 (App. Div. 2015).

The AOC next argues it has met the criteria of N.J.A.C. 4A:3-1.2(c)(2) by demonstrating "that the Commission's certification procedures have not met and are not likely to meet the Judiciary's needs for" the Judiciary Clerk 2 title. We are not convinced.

The Commission initially granted a one-year interim non-competitive reallocation under N.J.A.C. 4A:3-1.2(c)(2) and (g) to the AOC because it found that the "certification procedures based on the existing ranked eligible list are not likely to meet [the current critical staffing needs] of the appointing authority." This issue was not before the Commission on remand, which directed the Commission to address how the AOC's reallocation request differed from the three decisions granting reallocation. Although we did not specifically direct the Commission to consider the impact of the interim reallocation on remand, it was certainly within its authority to do so. Nevertheless, in their

merit briefs and at oral argument, the parties agree that the interim reallocation did not have a major impact on the number of vacancies.³

The AOC also contends "[t]here is no rational, evidence-based reason to believe that [its staffing] need[s] will be adequately addressed by anything other than permanent reallocation. The Commission and the JCAU certainly have not substantiated any such reason." Yet, as noted, the burden to substantiate reallocation is on the AOC, not the Commission, and certainly not on the JCAU.

Granted, the AOC has demonstrated that several years of serious staffing and recruitment problems could possibly be resolved by an ongoing non-competitive designation. This, however, could also possibly be resolved by a second interim reallocation, or by other means entirely, including, but not limited to, a salary increase for the position. That said, an appellate court is not permitted to "vacate an agency determination . . . because the record may support more than one result." Reallocation of Prob. Officer, 441 N.J. Super. at 443

³ The AOC points out that "[a] significant portion of that one[-]year period of May 25, 2019 through May 24, 2020 occurred during the onset of the Covid [pandemic] period when the Judiciary's functions . . . were greatly curtailed." But the pandemic's impact did not begin until March 2020, about nine months after the interim reallocation period commenced. See Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020).

(quoting In re N.J. Pinelands Comm'n Resol. PC4-00-89, 356 N.J. Super. 363, 372 (App. Div. 2003)).

The AOC's contention that In re Reallocation of Technician, MVC Title to the Noncompetitive Division of the Career Service and Inactivation of Technician Trainee MVC Title, No. 2022-2121, 2022 N.J. CSC LEXIS 249 (May 11, 2022), supports permanent reallocation of the Judiciary Clerk 2 title is misplaced. The Commission found certification procedures were unlikely to meet the Motor Vehicle Commission's (MVC) needs and "the series of Commission decisions approving interim noncompetitive designations for the Technician MVC title demonstrates the necessity of a more permanent reallocation." Id. at *6. Moreover, the non-competitive designation of the Technician MVC title made the Technician Trainee MVC title's "function as a noncompetitive entry-level title" obsolete, justifying eliminating the trainee title. Id. at *6-7. Unlike Technician, MVC Title, there is no record before the Commission that the interim reallocation of Judiciary Clerk 2 has addressed the AOC's concerns, and the AOC has not sought elimination of Judiciary Clerk 1 to make Judiciary Clerk 2 an entry-level title. Thus, Technician, MVC Title does not support the AOC's reallocation position here.

The AOC argues the Commission erred in not permanently reallocating the Judiciary Clerk 2 title under N.J.A.C. 4A:3-1.2(c)(1), because competitive testing is not practicable "due to the nature of the knowledge, skills and abilities associated with" the title. The AOC, however, fails to establish that the Commission cannot competitively test for the Judiciary Clerk 2 title due to the title's lack of education or experience requirements. We appreciate that a non-competitive process may provide greater flexibility and allow appointing authorities to meet hiring responsibilities more efficiently and quickly, but that does not "mean that the competitive process is not practicable." Reallocation of Prob. Officer, 441 N.J. Super. at 450. Given the constitutional competitive-examination mandate governing the outcome of its reallocation request, the AOC has a high burden to satisfy. While the Commission's remand decision could be more descriptive of how, or under what circumstances, the basic skills required of an entry-level title make competitive testing impracticable, its reasoning is consistent with its approach to entry-level titles. Additionally, we see nothing illogical with the Commission emphasizing its ability to provide complete lists for the Judiciary Clerk 2 title, unlike the titles at issue in Local Government Titles and Payroll Clerk. While, by itself, the ability to provide complete eligibility lists may not mean that competitive testing is practicable,

the Commission has determined that testing is impracticable if too few candidates apply for testing to "usefully differentiate the candidates," resulting in a non-competitive situation. It was perfectly reasonable for the Commission to consider the absence of such a problem with respect to Judiciary Clerk 2 title in determining that the AOC failed to demonstrate "a sufficient basis on which to reallocate" it.

In sum, the Commission's decision not to grant permanent reallocation of Judiciary Clerk 2 under N.J.A.C. 4A:3-1.2(c) was not arbitrary, capricious, or unreasonable, nor lacking substantial evidence in the record.

B. Judiciary Account Clerk 1 Title

Turning to the Judiciary Account Clerk 1 title, the Commission did not reference the three decisions, briefly, stating:

With respect to Judiciary Account Clerk 1, the comparable title series used in State Executive branch service is Audit Account Clerk. While Agency Services^[4] recommended that the local service entry-

⁴ The Commission's Division of Agency Services, in a brief memorandum, recommended that the AOC's reallocation request be granted, because:

(1) it was for entry-level titles "requiring skills best assessed by direct observation during the working test period[,] similar to executive branch titles that have been reallocated to the noncompetitive division; and (2) the "ranked eligible lists have not or are not likely to

level Account Clerk title should be reallocated, it did not recommend that the entry-level State Audit Account Clerk title be reallocated as it was practicable to test the KSAs. Therefore, consistent with other State Account Clerk titles, this title shall remain . . . in the competitive division.

The Commission concluded that "there is not a sufficient basis on which to reallocate the Judiciary Account Clerk 1" title to the non-competitive division.

The AOC contends the same reasons it is impracticable to test for the KSAs associated with the Judiciary Clerk 2 title apply to the Judiciary Account Clerk 1 title, an entry-level title. The Commission, according to the AOC, "does not provide any reasoned difference between the local and state Account Clerk titles, and why any such difference justifies its refusal to permanently reallocate the [Judiciary Account Clerk 1] title."

meet the needs of the appointing authority due to such factors as salary, geographic locations, recruitment problems, and working conditions."

[In re Reallocation of Judiciary Clerk 1, slip op. at 9-10.]

In addition, "Agency Services 'determined that despite almost annual open competitive announcements for some of the subject titles, the Judiciary continued to exhaust these lists, particularly in certain [v]icinations.'" Id. at 10 (alteration in original).

Despite the Commission's brief and conclusory decision, made without assessing the applicability of the three decisions to reallocation of the Judiciary Account Clerk 1 title, the AOC has not established the title should be reallocated to the non-competitive division. The Judiciary Account Clerk 1 title, as a "Level 2" title, has a typing speed minimum requirement. Given the minimum typing requirement justified treating the Judiciary Clerk 2 title differently than other low-level titles that the Commission has reallocated, this same reasoning applies to the Judiciary Account Clerk 1 title. Moreover, nothing in the record compels the conclusion that the skills required of the Judiciary Account Clerk 1 title make competitive testing impracticable. Nor has the AOC shown that competitive testing and certification procedures are unlikely to meet hiring needs for this title on an ongoing basis. The only vacancy data concerning the Judiciary Account Clerk 1 title is now several years old, and it grouped Judiciary Clerk 2 and Judiciary Account Clerk 1 vacancies together, making it impossible to know whether, and to what extent, the Judiciary had trouble filling Judiciary Account Clerk 1 positions.

In sum, the Commission's decision not to grant permanent reallocation of Judiciary Account Clerk 1 under N.J.A.C. 4A:3-1.2(c)(1) was not arbitrary, capricious, or unreasonable, nor lacking substantial evidence in the record.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION