

COMMONWEALTH OF PENNSYLVANIA

Mary C. Zollo : State Civil Service Commission
 :
 v. :
 :
 Pennsylvania Liquor Control Board : Appeal No. 29234

Shane Donnelly
Indispensable Party¹

Mary C. Zollo
Pro Se

Alina L. Andreoli
Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Mary C. Zollo challenging her non-selection for appointment to Wine Specialty Coordinator employment with Pennsylvania Liquor Control Board. A hearing was held on March 31, 2017, at the State Civil Service Commission's Eastern Regional Office, in Philadelphia, Pennsylvania, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether appellant established her non-selection for appointment was the result of discrimination.

¹ In recognition of the due process requirements noted in *Jefferson County Assistance Office, Department of Public Welfare v. Wolfe*, 136 Pa. Commw. 115, 582 A.2d 425 (1990), the individual currently occupying the challenged position was given the opportunity to participate in the proceedings. Comm. Ex. B. The indispensable party was present and participated in the hearing. N.T. pp. 26, 85-86.

FINDINGS OF FACT

1. Appellant challenged her non-selection to the Wine Specialty Coordinator position on the basis of age discrimination and violation of the Civil Service Act and Rules. Specifically, appellant alleged the selected candidate was fifteen years younger than her. Comm. Ex. A.
2. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended.
3. Appellant is a Wine Specialty Coordinator for the Bureau of Talent Management Organization and Development (hereinafter “Wine Specialty Coordinator TMOD”) as an educator. N.T. pp. 13, 19-20, 51; AA Ex. 5.
4. A Wine Specialty Coordinator TMOD provides education regarding various wine products; develops and conducts product education seminars on wine growing regions; suggests alterations in wine course texts, assessments, and presentations; and maintains records of wine curriculum and course completions for all product related courses, seminars, and wine trips. AA Ex. 5.

5. Appellant was fifty-six years old at the time of the hearing. N.T. p. 29.
6. Shane Donnelly, the selected applicant for the Wine Specialty Coordinator position under Store Operations (hereinafter “Wine Specialty Coordinator SO”) position was thirty-two years old at the time of the hearing. AA Ex. 3.
7. On November 7, 2016, appellant applied for reassignment to the Wine Specialty Coordinator SO position within Region One.² N.T. p. 20; AA Ex. 4.
8. On November 7, 2016, Donnelly applied for promotion without examination to the Wine Specialty Coordinator SO position within Region One. AA Ex. 3.
9. A Wine Specialty Coordinator SO reviews sales data, upcoming inventory, inventory reports, and sales projection. The position also recommends allocations to stores based upon previous wine sales performance, develops action plans for under-

² The appointing authority has three different Regions within the Commonwealth. N.T. p. 25.

performing stores, and creates sales goals, training plans, and other measurable marketing initiatives. AA Exs. 1, 9.

10. The Wine Specialty Coordinator SO position's job posting was open from October 27, 2016 to November 10, 2016. The appointing authority elected to fill this position through promotion without examination, reassignment, voluntary demotion, or reinstatement. N.T. p. 76; AA Ex. 9.
11. In December 2016, the Wine Specialty Coordinator SO position in Region One was vacant. N.T. p. 40.
12. The appointing authority received appellant's application on November 15, 2016. Although appellant's application was beyond the posting's closing date, Human Resource Analyst 2, Cheryl Sprout, accepted appellant's application and added appellant's name to the list of eligible applicants. N.T. pp. 40, 78; AA Ex. 2.
13. Sprout sent Assistant Regional Manager Joseph McGill the list of eligible applicants. N.T. pp. 40, 41-42; AA Ex. 2.

14. When he reviewed each eligible applicant's application, McGill evaluated the applicant's current job position and performance evaluations. N.T. p. 42.
15. McGill noticed how Donnelly's application revealed Donnelly's extensive experience in store operations as an Assistant Manager of the Ardmore store, which is one of the largest stores in the Commonwealth. N.T. pp. 44-45, 46; AA Ex. 3.
16. Donnelly also held two wine certifications, which were also taken into consideration by the appointing authority. N.T. p. 46; AA Ex. 3; IP Exs. 1, 2.
17. Appellant's job application revealed appellant has not worked in a store since 2010. N.T. p. 44; AA Ex. 4.
18. McGill took into consideration how Donnelly's performance evaluation reflected Donnelly's understanding of current store operations. N.T. pp. 47, 48; AA Ex. 3.

19. Since appellant's position is a Wine Specialty Coordinator TMOD as an educator, appellant's performance evaluation ratings do not reflect her knowledge of current store operations. N.T. p. 49; AA Ex. 4.
20. McGill, Christina Hanley, and Nicole Resto conducted the interviews for the eligible applicants. The interview panel asked the same interview questions to each applicant. N.T. pp. 40-41, 53; AA Ex. 6.
21. During appellant's interview, appellant provided vague answers to some of the interview questions. N.T. pp. 54, 55.
22. During his interview, Donnelly provided polished, professional, and concise answers to the interview questions regarding store operations and "crises" management based upon his extensive experience working in the Ardmore store. N.T. pp. 54, 55.
23. McGill felt that Donnelly performed stronger than appellant in his interview. N.T. p. 56.

24. After the interviews were conducted, the interview panel unanimously agreed the best candidate for the Wine Specialty Coordinator SO position was Donnelly because he interviewed very well and was very knowledgeable about the Wine Specialty Coordinator SO's responsibilities. N.T. p. 56.
25. The interview panel did not consider age as a factor in appellant's non-selection. N.T. p. 58.
26. After selecting Donnelly, McGill completed a Selection Recommendation Summary Form. The Selection Recommendation Summary Form reflects that Donnelly was ranked first among the four applicants. Appellant ranked third among the four applicants. N.T. pp. 56-57; AA Ex. 7.
27. On December 1, 2016, McGill created and attached a memorandum to an Equal Employment Review Certification explaining why Donnelly was recommended. N.T. p. 58; AA Ex. 8.
28. Sprout received and reviewed the submitted Selection Recommendation Summary Form and Equal Employment Review Certificate. She found no evidence of discrimination. N.T. p. 80; AA Exs. 7, 8.

29. Sprout approved Donnelly's selection to the Wine Specialty Coordinator SO position. N.T. p. 81.

DISCUSSION

The issue in the present appeal is whether appellant has established her non-selection for appointment to Wine Specialty Coordinator employment with the appointing authority was the result of discrimination. In her appeal, appellant alleged she was discriminated against based upon her age and that her non-selection for appointment was a violation of the Civil Service Act and Rules. Comm. Ex. A.

In an appeal alleging discrimination, appellant bears the burden of establishing that the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989) *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990). In analyzing claims of discrimination³ under Section 905.1 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 P.S. § 741.951(b); 4 Pa. Code § 105.16; *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Once a *prima facie* case of discrimination has

³ The Act addresses both "traditional" and "procedural" discrimination. "Traditional discrimination" encompasses only those claims of discrimination based on race, sex, national origin or other non-merit factors. "Procedural discrimination" refers to a technical violation of the Act. In a case where an employee alleges a technical violation, no showing of intent is required. There must be evidence, however, to show that the employee was harmed by the technical noncompliance or that because of the peculiar nature of procedural impropriety that he or she could have been harmed, but there is no way to prove that for certain. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 462 (1988); 71 P.S. § 741.905a.

been established, the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for the personnel action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretext. *Id.* at 614-615. In particular, an employee claiming disparate treatment must demonstrate that he or she was treated differently than others. *Nwogwugwu*, 141 Pa. Commw. at 40, 594 A.2d at 851.

In support of her appeal, appellant testified on her own behalf. In response, the appointing authority presented the testimony of Assistant Regional Manager Joseph McGill and Human Resources Analyst 2 Cheryl Sprout.

Appellant is a Wine Specialty Coordinator for the Bureau of Talent Management Organization and Development (hereinafter “Wine Specialty Coordinator TMOD”) and has been employed by the appointing authority for over twenty-three years. In this position, she is employed as an educator and has held the position for six and a half years. N.T. pp. 13-14, 19-20. Prior to holding the Wine Specialty Coordinator TMOD position, appellant was a Retail Wine Specialist for seven years. N.T. p. 13. Appellant was promoted to Manager 3 so that she could handle the Wine Specialty Coordinator TMOD position. N.T. p. 14. Appellant asserted that Donnelly was also trained in a temporary Wine Specialty Coordinator assignment before the job posting. N.T. pp. 15-16. Appellant contended that although she has known McGill for years, McGill told appellant during her interview that he is not familiar with her work. N.T. p. 16.

On November 7, 2016, appellant applied for reassignment to the Wine Specialty Coordinator position under Store Operations (hereinafter “Wine Specialty

Coordinator SO”) within Region One. N.T. p. 20; AA Ex. 4. On November 7, 2016, Donnelly applied for the Wine Specialty Coordinator SO position through promotion without examination. AA Ex. 3. Previously in Region One, there were two available Wine Specialty Coordinator SO positions but when appellant applied, there only was one position available. N.T. p. 26. Appellant acknowledged that there is a difference between a Wine Specialty Coordinator SO and a Wine Specialty Coordinator TMOD. A Wine Specialty Coordinator TMOD provides education regarding various wine products; develops and conducts product education seminars on wine growing regions; suggests alterations in wine course texts, assessments, and presentations; and maintains records of wine curriculum and course completions for all product related courses, seminars, and wine trips. N.T. pp. 20-21; AA Ex. 5. Appellant admitted that she does not provide education on topics such as the appointing authority’s point of sale system, data collection, or an employee’s interactions with the LOOP system.⁴ N.T. pp. 21-22.

Appellant was fifty-six years old at the time of the hearing. N.T. p. 29. Appellant alleged that Shane Donnelly was fifteen years younger than her when the appointing authority selected him to the Wine Specialty Coordinator SO position within Region One. Comm. Ex. A. Appellant contended that Region One has a pattern of age discrimination and cited another civil service appeal by Beverly Jensen. N.T. pp. 15, 24.⁵ Appellant also claimed that a Rule was violated by the appointing authority’s non-selection but did not remember which Rule. N.T. p. 29.

⁴ The “LOOP” system was not defined or otherwise explained by the appointing authority’s witnesses.

⁵ At the hearing on the instant appeal, the appointing authority requested that the Commission take administrative notice of its adjudication of *Beverly Jensen v. Pennsylvania Liquor Control Board*, Appeal No. 28682. N.T. p. 30. Appellant did not object to this request. N.T. p. 30. The Commission takes administrative notice of our decision in the matter of *Beverly Jensen v. Pennsylvania Liquor Control Board*, where we concluded that Ms. Jensen had failed to present evidence establishing discrimination violative of § 905.1 of the Civil Service Act and dismissed her appeal. *Beverly Jensen v. Pennsylvania Liquor Control Board*, Appeal No. 28682.

At the close of appellant's presentation, the appointing authority entered a motion to dismiss for failure to establish a *prima facie* case of discrimination. N.T. pp. 16-17. Appellant is fifty-six years old and has alleged that the selected candidate, Donnelly, is fifteen years younger than her. Appellant explained how she has been employed by the appointing authority for over twenty-three years, where she currently is employed as a Wine Specialty Coordinator TMOD. Appellant also contended that the appointing authority placed Donnelly in a temporary Wine Specialty Coordinator position before the job posting. Having reviewed appellant's presentation in support of her age discrimination claim, appellant has established a *prima facie* case of age discrimination.⁶

Once appellant establishes a *prima facie* case of discrimination, the burden of proof shifts to the appointing authority to present legitimate, non-discriminatory reasons for the personnel action. *Henderson, supra*.

As a Human Resources Analyst 2, Sprout supervises job placements in the appointing authority. N.T. p. 72. Sprout testified the Wine Specialty Coordinator SO position was posted online on Jobnet and Sharepoint. N.T. pp. 73, 74; AA Ex. 9. The posting was open from October 27, 2016 to November 10, 2016. The appointing authority elected to fill this position through promotion without examination, reassignment, voluntary demotion, and reinstatement. N.T. p. 76; AA Ex. 9.

⁶ Appellant was asked by Commissioner Lane "what is the rule that you claim might be violated here?" N.T. p. 29. Appellant responded "I don't have it. I have it on my application." N.T. p. 29. Appellant's "application" is her Appeal Request Form. Comm. Ex. A. In her appeal request form, appellant cites to the Civil Service Act, as amended, in its entirety. Comm. Ex. A. Since appellant has failed to specify a provision within the Civil Service Act and Rules, appellant's procedural discrimination claim is dismissed. Therefore, appellant's appeal will be decided solely on the basis of her allegation of age discrimination.

Sprout explained appellant sent her application to the State Civil Service Commission's Administrative Office in Harrisburg, which then sent it through interoffice mail to the appointing authority's office where it was received on November 15, 2016. N.T. p. 77. Although she received appellant's application after November 10, 2016, Sprout accepted appellant's application and hand wrote her name onto the printed list of eligible applicants. N.T. p. 78; AA Ex. 2. In December 2016, the Wine Specialty Coordinator SO position in Region One became vacant. N.T. p. 40. Sprout sent the list of eligible applicants to McGill. N.T. p. 40; AA Ex. 2. Initially, there were five eligible applicants for the Wine Specialty Coordinator SO position, but one applicant withdrew her application. N.T. pp. 41-42; AA Ex. 2.

As an Assistant Regional Manager for Region One, McGill supervises, in addition to various other personnel, one Wine Specialty Coordinator SO. N.T. p. 37. The appointing authority assigns one Wine Specialty Coordinator SO per Region. The three current Wine Specialty Coordinator SOs are Robert Fogel, Janice Karynok, and Shane Donnelly. N.T. pp. 37-38.

McGill described the Wine Specialty Coordinator SO position's job duties. A Wine Specialty Coordinator SO must review sales data, upcoming inventory, inventory reports, and sales projections. Also, a Wine Specialty Coordinator SO recommends allocations to stores based upon previous wine sales performance, develops action plans for under-performing stores, and determines sales goals, training plans, and other measurable marketing initiatives. N.T. pp. 39-40; AA Exs. 1, 9.

McGill testified when he reviewed each application, he evaluated each applicant's current job position and their performance evaluation. N.T. p. 42. McGill reviewed each of the remaining four applicant's applications, which included Donnelly's and appellant's job applications. N.T. pp. 42-43; AA Exs. 3, 4. After reviewing appellant's job application, McGill learned appellant had not worked in a state liquor store since 2010. N.T. p. 44; AA Ex. 4. McGill believed appellant has been "out of touch" with how stores currently operate because she has worked as an educator for over six years. N.T. p. 44.

In comparison, McGill testified Donnelly's job application shows he has been working as an Assistant Manager, where he supervised two wine specialists in the Ardmore store, which is one of the largest stores in the Commonwealth. N.T. pp. 44-45; AA Ex. 3. McGill further reviewed Donnelly's and appellant's education in relation to the Wine Specialty Coordinator SO position. N.T. pp. 45-46. McGill noticed Donnelly had more training in store operations than appellant based on his extensive experience in the Ardmore store. Donnelly also held two wine certifications, which were taken into consideration by the appointing authority. N.T. p. 46; AA Ex. 3; IP Exs. 1, 2. Appellant only had one certification attached to her application. N.T. p. 65; AA Ex. 4.

McGill also reviewed Donnelly's and appellant's performance evaluations. N.T. pp. 46-47. Since Donnelly worked as an Assistant Manager in the Ardmore store and appellant worked as a Wine Specialty Coordinator TMOD, their evaluation factors are different. N.T. p. 47. McGill considered how Donnelly's strongly rated evaluations corroborated his understanding of current store operations. N.T. pp. 47, 48; AA Ex. 3. McGill explained appellant's evaluation ratings do not similarly reflect her knowledge of how stores currently operate. N.T.

p. 49; AA Ex. 4. McGill identified that appellant's current job is in an entirely different organization within the appointing authority than the Wine Specialty Coordinator SO position. N.T. pp. 50-51; AA Exs. 1, 5.

McGill conducted the interviews for the remaining four eligible applicants. N.T. pp. 40, 53. McGill, Christina Hanley, and Nicole Resto participated in each interview as interview panelists. N.T. pp. 40-41. During each interview, the interview panel asked the same questions of each applicant. N.T. p. 53; AA Ex. 6.

McGill described appellant's interview. McGill testified appellant provided vague answers to questions regarding store operations. Appellant's vague answers caused McGill concern. N.T. p. 54. McGill believed that appellant lacked the requisite knowledge of current store operations needed for the position. N.T. p. 57. In response to appellant's contention regarding his lack of knowledge of appellant's daily work performance, McGill does not supervise appellant and as such, is not familiar with her daily activities. N.T. pp. 51-52.

McGill also described Donnelly's interview. McGill testified Donnelly provided polished, professional, and concise answers to the interview questions regarding store operations and "crises" management because of his extensive experience working in the Ardmore store. N.T. pp. 54, 55. McGill felt that Donnelly performed stronger than appellant in his interview. N.T. p. 56.

McGill explained the interview panel unanimously agreed the best candidate for the Wine Specialty Coordinator SO position was Donnelly because he interviewed very well and was very knowledgeable about the position's responsibilities. N.T. p. 56. After selecting Donnelly, McGill completed a Selection

Recommendation Summary Form. N.T. pp. 56-57; AA Ex. 7. The Selection Recommendation Summary Form reflects that Donnelly was ranked first among the four applicants. Appellant ranked third among the four applicants. N.T. p. 57; AA Ex. 7. After creating the Selection Recommendation Summary Form, on December 1, 2016, McGill created and attached a memorandum to an Equal Employment Review Certification explaining why Donnelly was recommended. N.T. p. 58; AA Ex. 8. McGill's memorandum describes the interview panel's reasoning for recommending Donnelly as follows:

During the interview process, Mr. Donnelly clearly distinguished himself as being the best overall candidate to fill the position by being extremely well prepared and demonstrating the knowledge and essential skills relevant to the position. His quick responses and communication skills were very clear and concise when providing information which was also done in a professional manner. Mr. Donnelly showed enthusiasm in truly wanting the position and came prepared which separated him over the other candidates. His past experience of being an employee since September 2009 which includes his long-term service as an Assistant Manager at store #4646 and his current position as Acting Wine Specialty Coordinator, give him a large scope of our entire operation.

AA Ex. 8. McGill testified the interview panel did not consider age as a factor in selecting the best candidate. N.T. p. 58. Sprout reviewed the submitted Selection Recommendation Summary Form and Equal Employment Review Certificate. N.T. p. 80; AA Exs. 7, 8. Sprout testified she did not observe any forms of discrimination during her review of Donnelly's recommendation. After her review, Sprout approved Donnelly's selection to the Wine Specialty Coordinator SO position. N.T. p. 81.

In response to appellant's contention that Donnelly was pre-selected for the Wine Specialty Coordinator SO position because he was appointed temporarily to the position before the job posting, McGill explained how Donnelly received a temporary assignment in a different Wine Specialty Coordinator position during the holiday season. Specifically, Frank Rossi, the previous Wine Specialty Coordinator under store operations, retired before the holiday season. During the holiday season, store operations become incredibly busy and it is crucial for the appointing authority to have a Wine Specialty Coordinator in store operations. N.T. p. 59. Anticipating the holiday season, Rossi suggested Donnelly to fill the temporary position based upon his own personal experience working with Donnelly in Ardmore; he described Donnelly as both knowledgeable and capable. N.T. pp. 61-62. McGill testified Rossi's suggestion was given serious consideration in making the decision at the time to place Donnelly in the temporary Wine Specialty Coordinator position. N.T. p. 62.

Having carefully reviewed the record, the Commission finds that appellant has not presented sufficient evidence to establish age discrimination. In support of our conclusion we find credible⁷ the testimonies of Joseph McGill and Cheryl Sprout.

The appointing authority clearly differentiated the responsibilities between a Wine Specialty Coordinator TMOD and a Wine Specialty Coordinator SO. While appellant's position as a Wine Specialty Coordinator TMOD provides educational services, the Wine Specialty Coordinator SO creates marketing initiatives for store operations. Although Donnelly's job application shows he was

⁷ It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 95 Pa. Commw. 475, 478, 505 A.2d 339, 341 (1986).

thirty-two years old, the interview panel selected Donnelly based on his experience in the Ardmore store and his strong performance during the interview. AA Exs. 3, 7, 8. In contrast, appellant did not perform as well during her interview, where she provided vague answers to some of the interview panel's questions. Notably, appellant did not dispute the appointing authority's characterization of her interview responses as vague. She also did not rebut the evidence supporting the conclusion that she had no recent experience in store operations. The appointing authority further presented that age was not considered as a factor during the hiring process. As such, the appointing authority has presented legitimate, non-discriminatory reasons for deciding not to select appellant for the Wine Specialty Coordinator position, and appellant has failed to persuade us how the appointing authority's legitimate, non-discriminatory reasons are merely pretextual. *Henderson, supra*. Accordingly, we enter the following:

CONCLUSION OF LAW

Appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members,⁸ dismisses the appeal of Mary C. Zollo challenging her non-selection for appointment to Wine Specialty Coordinator employment with the Pennsylvania Liquor Control Board and sustains the action of the Pennsylvania Liquor Control Board in the non-selection for appointment of Mary C. Zollo to Wine Specialty Coordinator employment.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Officially Mailed: August 16, 2019
Emailed: August 16, 2019

⁸ Commission Chairman Teresa Osborne, who took office on March 22, 2019, did not participate in the discussion of or decision for this appeal.