

COMMONWEALTH OF PENNSYLVANIA

Tammy L. Keilman : State Civil Service Commission
 :
 v. :
 :
 Ebensburg Center, :
 Department of Human Services : Appeal No. 29558

Michael Killinger
Indispensable Party¹

Tammy L. Keilman
Pro Se

Eugene K. Cuccarese
Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Tammy L. Keilman challenging her non-selection for appointment to Semi-Skilled Laborer employment with the Ebensburg Center, Department of Human Services. A hearing was held on May 16, 2017, at the State Civil Service Commission’s Western Regional Office in Pittsburgh, Pennsylvania before Commissioner Odelfa Smith Preston.²

¹ In recognition of the due process requirements noted in *Jefferson County Assistance Office, Department of Public Welfare v. Wolfe*, 582 A.2d 425 (Pa. Commw. 1990), the individual currently occupying the challenged position was given the opportunity to participate in the proceedings. Comm. Ex. B-1. However, he did not respond to the Memorandum of Notice, which was sent to him. N.T. pp. 8-9.

² Commissioner Odelfa Smith Preston resigned from the Commission effective March 21, 2019, before this adjudication was issued.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether the appointing authority did not select appellant for this position for reasons motivated by discrimination.

FINDINGS OF FACT

1. On or about January 6, 2017, appellant was informed that she was not selected for the Semi-Skilled Laborer position with the Ebensburg Center, Department of Human Services because she did not hold a civil service position. 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 holds a part-time “Dietary” position with the appointing authority. This position is not a civil service position. Appellant has held this position for almost one year. Appellant has not held any other Commonwealth employment prior to this position. N.T. pp. 15-16, 44-45, 53; AA Ex. 2.

4. The appointing authority received approval from the Office of Developmental Programs (hereinafter “ODP”) to fill a vacant Semi-Skilled Laborer position from its existing civil service complement. N.T. pp. 27-28, 30, 46.
5. The vacant Semi-Skilled Laborer position was posted from December 20, 2016 through January 3, 2017. AA Ex. 1.
6. The posting was closed on January 3, 2017. AA Ex. 1.
7. The possible recruitment methods identified on the job posting were civil service lists, transfer, reassignment, and voluntary demotion. N.T. p. 34; AA Ex. 1.
8. The civil service lists that were considered by the appointing authority when filling the Semi-Skilled Laborer position were the Code 12, 13, and 15 civil service lists. N.T. pp. 34-35.
9. The Code 11 civil service list was not used to fill the position because it contained the names of external candidates who did not work at the appointing authority. N.T. pp. 43, 46.

10. Appellant bid on the position as a non-civil service employee. N.T. p. 48.
11. Appellant's bid was received on January 3, 2017. N.T. pp. 48, 52.
12. Appellant took the civil service test for the Semi-Skilled Laborer classification in January of 2017. N.T. pp. 16, 18-20.
13. Appellant's name was not on a civil service list when the posting for the Semi-Skilled Laborer position was closed on January 3, 2017. N.T. pp. 20-21, 49.
14. On January 10, 2017, appellant's test score appeared on the Code 11 civil service list. N.T. p. 49.
15. Appellant was not within the Rule-of-Three on the Code 11 civil service list. N.T. pp. 45, 49.
16. Appellant's name did not appear on the Code 12, 13, or 15 civil service lists because appellant did not meet the criteria to be on those lists. N.T. p. 46.

DISCUSSION

The issue before the Commission is whether appellant presented sufficient evidence to prove that the appointing authority did not select her for the position of Semi-Skilled Laborer for reasons motivated by discrimination. Section 905.1 of the Civil Service Act (hereinafter “Act”),³ 71 P.S. § 741.905a, provides no officer or employee of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations, because of labor union affiliations, or because of race, national origin or other non-merit factors. Under the Act, an employee who appeals a non-selection for promotion may do so only on the basis of discrimination, as provided by Section 905.1 of the Act, 71 P.S. § 741.905a. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409 (Pa. Commw. 1996). A public employee complaining of employment discrimination must make out a *prima facie* case of discrimination by producing sufficient evidence which, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. *Department of Health v. Nwogwugwu*, 594 A.2d 847, 851 (Pa. Commw. 1991). The burden of presenting evidence in support of each allegation of discrimination lies with the appellant. *Price*, 672 A.2d at 413; 71 P.S. § 741.951(b); 4 Pa. Code § 105.16(a).

The Act addresses both “traditional” and “procedural” discrimination, and both are appealable under Section 951(b) of the Act, 71 P.S. § 741.951(b). “Traditional discrimination” encompasses claims of discrimination based on race,

³ Act of August 5, 1941, P.L. 742, as amended.

national origin, disability and other non-merit factors. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 438, 539 A.2d 456, 462 (1988); 71 P.S. § 741.905a. “Procedural discrimination” refers to a technical violation of the Act. *Id.*

Appellant has alleged procedural discrimination. Comm. Ex. B. In support of her allegation, appellant argued that the appointing authority should have interviewed her for the Semi-Skilled Laborer position because she passed the civil service test and was otherwise qualified for the position. N.T. pp. 16-17, 20-22. At the hearing, appellant testified on her own behalf. The appointing authority presented the testimony of Denise Crynock. The indispensable party, Michael Killinger, did not participate.

Appellant holds a part-time “Dietary” position with the appointing authority. N.T. p. 15. Appellant has held this position for almost one year. N.T. p. 16. Appellant has not held any other Commonwealth employment prior to this position. N.T. p. 16.

Appellant testified that she took the civil service test for the semi-skilled laborer classification in January 2017. N.T. pp. 16, 18-20. Appellant stated that the bids for the Semi-Skilled Laborer position with the appointing authority closed on January 3, 2017. N.T. p. 20. Appellant stated that she received her test results prior to January 3, 2017 and noted that she passed the test. N.T. p. 20. Appellant testified that she did not know how many people received higher scores on the test than her. N.T. p. 17. Appellant stated that she was only informed that she passed the test. N.T. p. 17.

Appellant testified that, after she passed, she called Denise Crynock and told her that she passed the test. N.T. pp. 17-18. Appellant stated that Crynock responded that she had already sent out the letters for the interviews and that appellant may get an interview next time the position is open. N.T. p. 18. Appellant acknowledged that her name was not yet on the civil service list at the time of this conversation. N.T. pp. 20-21.

Appellant argued that, because she passed the test, she should have been interviewed for the Semi-Skilled Laborer position with the appointing authority. N.T. pp. 16-17, 20. Appellant further argued that she should have been given an interview because she worked at Johnstown America Corporation (hereinafter “the Corporation”), which is a railroad car manufacturer, for eleven years. N.T. p. 21. Appellant testified that she started working for the Corporation in the “labor gang.” N.T. p. 21. Appellant noted that she also ran an overhead ten-ton truck, loaded trucks, unloaded trucks, and lifted up roller car sides. N.T. p. 21. Appellant further testified that she has a farm on which she runs a tractor and loads “stuff.” N.T. p. 21. Therefore, appellant argued that she is “very qualified” for the position and “could do a good job.” N.T. pp. 21-22.

Denise Crynock is employed by the appointing authority as a “Human Resource Analyst and Recruitment.” N.T. p. 24. Crynock has held this position for approximately four and a half years. N.T. p. 24. Crynock testified that the primary function of her job is recruitment, which involves posting job vacancies, answering questions about those postings, and submitting documentation to “Civil Service EEO.” N.T. p. 25.

Crynock testified that the hiring process begins with a request from the facility director to fill a vacancy. N.T. pp. 25-26. Upon receiving the request, an ePAR is submitted to ODP. N.T. p. 26. Crynock explained that an ePAR is an acronym for Electronic Personnel Action Request, which is a form requesting approval to fill a position. N.T. pp. 27-28. After receiving the ePAR, ODP will send a reply indicating whether the position may be filled. N.T. pp. 26-27. If the position may be filled, ODP will note whether this may be done internally and/or externally. N.T. pp. 26-27. Once ODP approves filling the position, the position is posted and bid forms are received from the staff. A civil service list is also pulled according to the recruitment method being used. N.T. pp. 26-27.

Crynock testified this process was followed when filling the Semi-Skilled Laborer position, which is the subject of the instant appeal. Crynock testified that upon receiving the request to fill the Semi-Skilled Laborer position, she submitted an ePAR to the facility director, who approved it and forwarded it to ODP. N.T. pp. 27-28. Crynock stated that ODP indicated that they could only fill the position with someone from their current complement, which meant that only employees who worked at the Ebensburg Center would be eligible for the position. N.T. p. 28. Crynock explained that the Ebensburg Center's complement had been reduced because of the budget. N.T. p. 30. So, they were not permitted to fill any positions externally because that would increase their complement numbers. N.T. p. 30. Therefore, the position was posted for Ebensburg Center employees only. N.T. p. 28.

Crynock testified she was responsible for developing the job posting for the Semi-Skilled Laborer position. N.T. pp. 31-32; AA Ex. 1. This was posted from December 20, 2016 through January 3, 2017. N.T. p. 32; AA Ex. 1. Crynock

summarized the following essential functions for the position as set forth on the job posting: working in the assigned trade; interpreting sketches and diagrams; and performing basic laboring work, which includes snow removal; assisting the grounds maintenance crew; and being able to lift fifty pounds. N.T. pp. 32-33. Crynock further stated that the minimum experience and training necessary to bid on the position was one year of laboring work experience, including the use of tools and equipment used in maintenance or construction, or an equivalent combination of training and experience. N.T. p. 33.

Crynock testified that the possible recruitment methods identified on the job posting were civil service lists, transfer, reassignment, and voluntary demotion. N.T. p. 34. Crynock stated that there were no employees from the Ebensburg Center who were within the Rule-of-Three on the three civil service lists that were pulled. N.T. pp. 34, 39, 41. Crynock explained that, since there were no internal candidates within the Rule-of-Three, there were no candidates on the civil service lists who she could interview. N.T. pp. 34-36, 39.

Crynock further explained that she cannot by-pass the candidates who are within the Rule-of-Three merely because they do not work at the Ebensburg Center. N.T. p. 40. Crynock stated, for example, if there were three candidates within the Rule-of-Three and one candidate worked at the Ebensburg Center, she would still need to interview the other two external candidates in order to meet the criteria for the Rule-of-Three. N.T. pp. 40-41. However, in doing so, she would be violating the approval that she received from OPD because she was directed only to fill the position internally. N.T. p. 41. Therefore, Crynock did not utilize the civil service list to fill the position. N.T. pp. 34, 39.

Regarding the other recruitment methods for filling the position, Crynock stated that there were no bidders under the voluntary demotion or transfer recruitment methods. N.T. pp. 34, 41-42. However, there were six internal candidates who bid as reassignments. N.T. pp. 34, 41. Crynock explained that these six candidates worked as residential service aides at the Ebensburg Center, which is the same pay scale as a semi-skilled laborer. N.T. p. 42. Therefore, all six of these candidates met the criteria for bidding on the position and became part of the interview pool. N.T. pp. 42-43.

Crynock testified that appellant was not eligible to be considered for the position. Crynock explained that appellant's present position with the Ebensburg Center is a non-civil service position. N.T. pp. 44-45. Crynock stated that because appellant's present position is non-civil service, it is not included in the existing Civil Service complement for the Ebensburg Center. N.T. p. 46. Crynock further explained that to move from a non-civil service position to a civil service position, appellant is required to take the civil service test. N.T. p. 46.

Crynock indicated that appellant took the civil service test for the semi-skilled laborer classification on January 10, 2017. N.T. p. 45. This put appellant on the Code 11 civil service list. N.T. p. 44. Crynock explained that the Code 11 list was not used to fill the position because it contained the names of external candidates who do not work at the Ebensburg Center. N.T. pp. 43, 46. Anyone who takes the semi-skilled laborer civil service test will be on the Code 11 list. N.T. p. 43. Therefore, the Code 11 list did not meet the criteria to fill the Semi-Skilled Laborer position from the existing complement. N.T. p. 46.

Additionally, Crynock testified that she did not receive notification of appellant's test score until January 10, 2017, which was more than a week after the bidding for the Semi-Skilled Laborer position closed. N.T. pp. 47, 49. Crynock further noted that, had appellant's score been on the list, appellant would not have been within the Rule-of-Three on the Code 11 civil service list. N.T. pp. 45, 49. Crynock testified that appellant had a score of seventy-four, which put her far outside of the Rule-of-Three on this list. N.T. pp. 45, 49. Crynock testified that there were close to forty names on the list with higher scores than appellant. N.T. pp. 49-50. Therefore, Crynock stated that, even if she was permitted to fill the position from the outside, she still would not have been able to reach appellant on this list. N.T. pp. 45, 49-50.

Crynock further testified appellant was not on the three civil service lists that she looked at when filling the position. N.T. p. 46. The lists that Crynock looked at when filling the position were the Code 12, 13, and 15 civil service lists. N.T. pp. 34-35. Crynock stated that the Code 12 list names persons who work for the Department of Human Services, and the Code 13 and 15 lists name persons who work for the Commonwealth. N.T. p. 35. To be on the Code 12, 13, and 15 lists, the employees need to have taken the civil service test and have worked for the Commonwealth for at least two years. N.T. p. 46. Crynock stated that appellant had not even worked a full year for the Commonwealth. N.T. p. 46. Since appellant had not worked for the Commonwealth for the required length of time, her name did not appear on the Code 12, 13, or 15 lists. N.T. p. 46.

However, Crynock noted that appellant did bid on the position as a non-civil service employee. N.T. p. 48. Crynock stated that appellant's bid was received on January 3, 2017, which was within the posting period. N.T. pp. 48, 52. This bid

was separate from the civil service lists. N.T. p. 48. Crynock explained that appellant's bid form was returned to her because she was not eligible for the position. N.T. pp. 48, 53; AA Ex. 2. Crynock stated she wrote the reason that appellant was not eligible on the bid form. N.T. p. 48, 52; AA Ex. 2. Appellant was not eligible because her current position was not a civil service position. AA Ex. 2.

Crynock testified that appellant twice contacted her about the position. N.T. p. 53. Crynock stated that, prior to January 4, 2017, appellant asked her what the process was to bid on the position. N.T. p. 53. Crynock explained to appellant that she needed to submit the bidding form. N.T. p. 53. Crynock also explained to appellant that she did not have civil service status, which meant that she would need to take the civil service test. N.T. p. 53.

After the bid form was returned to appellant, she contacted Crynock again. N.T. p. 54. Crynock stated that, during this conversation, appellant told her she had taken the civil service test and received a score. N.T. p. 54. Crynock stated she reviewed all the lists to see what appellant's score was and to determine whether she could reach her on the civil service list. N.T. p. 54. Crynock stated appellant was not within the Rule-of-Three; therefore, she was not able to interview her. N.T. p. 54. Crynock explained this to appellant. N.T. pp. 54-55. Crynock also told appellant that, in the future, there was a possibility of her being interviewed depending on the recruitment methods being used at that time. N.T. p. 55.

Crynock testified that, on January 10, 2016, she sent letters to the six individuals who met the criteria to be interviewed. N.T. pp. 48, 55. Crynock stated that all but one of these individuals were interviewed. N.T. p. 55. The person who

was not interviewed failed to come to the interview and did not provide a reason as to why he failed to come. N.T. p. 55. Crynock testified that Michael Killinger was selected and appointed to the position of Semi-Skilled Laborer. N.T. p. 56.

The Commission finds appellant has not met her burden of establishing “procedural” discrimination. “Procedural discrimination” involves a violation of procedures required pursuant to the Act or related Rules. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988); 71 P.S. § 905a. Where a procedural violation of the Act constitutes the alleged discrimination, no showing of intent is required. *Price, supra*. However, to obtain relief, the employee must show that she was harmed because of the procedural non-compliance with the Act, or that because of the peculiar nature of the procedural impropriety, she could have been harmed, but there is no way to prove that for certain. *Price, supra*.

There is no credible evidence to support appellant’s claim that the appointing authority violated the Act or Rules by failing to interview her for the Semi-Skilled Laborer position. Appellant argued that she should have been interviewed because she passed the civil service test for the Semi-Skilled Laborer position. N.T. pp. 16-17, 20. Appellant further argued that she was qualified for the position based on the non-civil service positions that she previously held. N.T. pp. 21-22.

The Act and Rules do not require the appointing authority to interview all persons who take the civil service test. Only those candidates within the Rule-of-Three are interviewed. Here, there is no credible evidence that appellant was

within the Rule-of-Three, nor is there any credible evidence that appellant was qualified for the position under the other recruitment method used by the appointing authority.

Section 602 of the Act provides for the “Rule-of-Three.” The relevant provision of this section provides:

If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the three highest ranking available persons on the certification of eligibles. In making the second, third or any additional selection from the eligibles on an employment or promotional certification, each selection shall be from among the three highest scoring available persons remaining on such certification of eligibles. . .

71 P.S. § 741.602. *See also* 4 Pa. Code § 91.3.

Appellant was not within the Rule-of-Three on any of the civil service lists that were considered for the Semi-Skilled Laborer position, which is the subject of the instant appeal. Crynock credibly⁴ testified that appellant’s test score was not within the Rule-of-Three on the Code 11 civil service list. N.T. pp. 45, 49. Crynock also credibly testified that appellant’s name did not appear on the Code 12, 13, or 15 civil service lists because appellant did not meet the criteria to be on those lists. N.T. p. 46.

⁴ 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*, 505 A.2d 339, 341 (Pa. Commw. 1986).

Furthermore, it is important to note that appellant's test score was not received until more than a week after the bidding for the position closed. N.T. pp. 47, 49. Nonetheless, when appellant's score was able to be viewed on the list, she still was not within the Rule-of-Three. N.T. p. 49. Thus, the appointing authority was not required to interview appellant because she was not within the Rule-of-Three.

Additionally, appellant was not eligible for the position under the other recruitment methods considered by the appointing authority. The additional recruitment methods considered by the appointing authority were voluntary demotion,⁵ transfer,⁶ and reassignment.⁷ To be eligible under these recruitment methods, the employee must currently hold and/or have previously held a particular position in the classified service. *See* 4 Pa. Code §§ 99.21(a)(1),(2); 99.32. Non-civil service positions held by an applicant cannot be substituted for this requirement.

Here, credible evidence established that appellant did not currently hold a civil service position, nor had she previously held a civil service position with the Commonwealth that would have made her eligible for the position under one of these

⁵ Section 99.32 of the Civil Service Rules provides in pertinent part: “[a]n appointing authority may demote an employee who requests the demotion...to a position in any class in the classified service in which the employee previously had the status of a regular employee, or to any position for which the employee is qualified.” 4 Pa. Code § 99.32.

⁶ Pursuant to section 99.21(a)(2) of the Civil Service Rules, an employee may be “[t]ransferred from one position to another position in the same class or in a similar class under a different appointing authority.” 4 Pa. Code § 99.21(a)(2).

⁷ Pursuant to section 99.21(a)(1) of the Civil Service Rules, an employee may be “[r]eassigned in the same appointing authority from one position to another in the same class or in a similar class for which the employee qualifies.” 4 Pa. Code § 99.21(a)(1).

recruitment methods. N.T. pp. 16, 44-45, 53; AA Ex. 2. Thus, appellant was also not eligible for the position under these recruitment methods. As such, the appointing authority was not required to interview her.

Based on the foregoing, the Commission finds appellant did not meet her burden to make out a *prima facie* case of discrimination. Appellant did not present evidence of any conduct by the appointing authority that, if believed and not otherwise explained, could be sufficient to persuade us that it is more likely than not that the appointing authority violated procedures required pursuant to the Act or related Rules. In fact, appellant acknowledged that her name was not yet on the civil service list when the bid closed. N.T. pp. 20-21.

Furthermore, appellant did not present any evidence that she held or had held a civil service position, which would otherwise make her eligible under another recruitment method. While the Commission recognizes that the burden of establishing a *prima facie* case cannot be an onerous one, *Nwogwugwu, supra.*, in this matter, appellant's evidence is not enough to show that her non-selection violated procedures required pursuant to the Civil Service Act or Rules. Moreover, the appointing authority introduced credible evidence sufficient to refute appellant's unsubstantiated assertion of procedural discrimination. Accordingly, we enter the following:

CONCLUSION OF LAW

The appellant has not presented 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 Tammy L. Keilman challenging her non-selection for appointment to Semi-Skilled Laborer employment with the Ebsensburg Center, Department of Human Services, and sustains the action of the Ebsensburg Center, Department of Human Services, in the non-selection for appointment of Tammy L. Keilman to Semi-Skilled Laborer employment.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Officially Mailed: July 24, 2019
Emailed: July 24, 2019

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