

COMMONWEALTH OF PENNSYLVANIA

Farzin Afrasiabipour : State Civil Service Commission
v. :
Pennsylvania Department of :
Transportation : Appeal No. 29616

Farzin Afrasiabipour : Joanne Steinke Faul
Pro Se : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Farzin Afrasiabipour challenging his Level-Two Alternative Discipline in Lieu of a three-day suspension from regular Civil Engineer Transportation employment with Pennsylvania Department of Transportation. A hearing was held on June 19, 2017, at the Eastern Regional Office in Philadelphia, Pennsylvania before Commissioner Bryan R. Lentz.

The Commissioners have reviewed the Notes of Testimony¹ and exhibits² introduced at the hearing, as well as the Briefs submitted by the parties. The issue before the Commission is whether there is good cause for Alternative Discipline in Lieu of Suspension (hereinafter “ADLS”)³ and whether appellant has established that the disciplinary action was the result of discrimination.

FINDINGS OF FACT

1. By letter dated March 22, 2017, appellant was issued a Level-Two ADLS from his position as regular Civil Engineer Transportation. The appointing authority charged appellant with a violation of Minor Work Rule #6—unsatisfactory work performance. Specifically, the appointing

¹ At the hearing on the instant appeal, the appointing authority requested that the Commission take administrative notice of the transcript from the prior hearing, which occurred on February 28, 2017. N.T. 6/19/17, pp. 13-14. Appellant did not object to this request. N.T. 6/19/17, pp. 14-15. We hereby take notice of the record in *Farzin Afrasiabipour v. Pennsylvania Department of Transportation*, Appeal Nos. 29123 and 29223. See *Falasco v. Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole*, 104 Pa. Commw. 321, 326 n.6, 521 A.2d 991, 994 (1987) (Administrative agency may take official notice of facts which are obvious and notorious to an expert in the agency’s field and those facts contained in reports and records in the agency’s files, in addition to those facts which are obvious and notorious to the average person).

² Several of the appointing authority’s exhibits, which were admitted into evidence at the February 28, 2017 and June 19, 2017 hearings, are identical. Specifically, appointing authority exhibit nos. 1, 2, 3, 8, and 9, which were introduced at the June 19, 2017 hearing, respectively correspond to appointing authority exhibit nos. 1, 3, 16, 17, and 18, which were introduced at the February 28, 2017 hearing. To avoid redundancy, the Commission will cite to the exhibits introduced at the June 19, 2017 hearing. Additionally, all exhibits referenced by the Commission will be followed by a parenthetical indicating the date of the hearing at which the exhibit was entered into evidence.

³ Under the ADLS, there was no effect on appellant’s pay, seniority, or other benefits. The Level-Two ADLS carries the same weight as if appellant served a three-day suspension. Comm. Ex. A. Consequently, the present appeal will be considered by the Commission as an appeal of a three-day suspension.

authority alleged that appellant received an overall “unsatisfactory” employee performance review (hereinafter “EPR”). Comm. Ex. A.

2. The appeal was properly raised before this Commission and was heard under Sections 951(a) and (b) of the Civil Service Act, as amended.
3. Appellant’s duties as a Civil Engineer Transportation include reviewing highway occupancy permit applications and any accompanying attachments that are submitted to the appointing authority. As part of that review, appellant is responsible for generating comments in the appointing authority’s electronic permitting system which detail any deficiencies in the submitted documentation. Appellant is also expected to conduct onsite visits, take site distance measurements, assess drainage features, and compare the submitted plans to the physical site. N.T. 6/19/17, pp. 24, 28-29; N.T. 2/28/17, pp. 39-42, 45; AA Ex. 1 (6/19/17).
4. Prior to completing his review in the electronic permitting system, appellant is required to submit a draft of his comments to his immediate supervisor. Appellant’s immediate supervisor reviews this

draft, notates any necessary corrections, returns the notated draft to appellant, and discusses the corrections with appellant. Appellant then makes the corrections, and if his immediate supervisor is satisfied with those corrections, appellant “hits complete” in the electronic system. Once appellant “hits complete,” appellant’s portion of the review is done. After the application has been approved by appellant’s immediate supervisor and the Traffic Services Manager, a letter is generated in the electronic system and forwarded to the permits office for processing. This letter is then sent to the applicant electronically. N.T. 6/19/17, pp. 29-30; N.T. 2/28/17, pp. 42-43.

5. The comments detailing the identified deficiencies are presented to the applicant, and the applicant or their engineer may revise their plans accordingly to become compliant. N.T. 6/19/17, p. 31; N.T. 2/28/17, p. 43.
6. Appellant received an overall rating of unsatisfactory on his annual EPR for rating period October 1, 2014 to October 1, 2015. This rating was based on appellant’s poor performance in reviewing highway occupancy permits. N.T. 2/28/17, pp. 46-48; AA Ex. 2 (2/28/17).

7. As a result of the unsatisfactory EPR for rating period October 1, 2014 to October 1, 2015, appellant was placed on a corrective action plan. This corrective action plan was presented to appellant on December 23, 2015. N.T. 6/19/17, pp. 37, 164-166; N.T. 2/28/17, pp. 51-52, 219; AA Ex. 2 (6/19/17).
8. When the corrective action plan was presented to appellant, the specific standards and measures by which appellant would be rated were explained to him. It was also explained to appellant that the corrective action plan would remain in place until appellant's performance ratings reached, at minimum, a satisfactory level. N.T. 6/19/17, p. 165; N.T. 2/28/17, pp. 52, 55-56, 235-236, 269-270.
9. The areas in which appellant was rated under the corrective action plan were as follows: (1) job knowledge/skills; (2) work results; (3) communications; (4) initiative/problem solving; (5) interpersonal relations/equal employment opportunity; and (6) work habits. The standards for each of these areas mirrored the EPR standards.

N.T. 2/28/17, pp. 55-56, 166; AA Exs. 2 (6/19/17), 4 (6/19/17), 4a (2/28/17), 4b (2/28/17), 6 (6/19/17), 10 (2/28/17), 14 (2/28/17).

10. To achieve an overall satisfactory performance under the corrective action plan, appellant was required to satisfactorily meet *all* of the individual job factors listed in Finding of Fact 9. N.T. 6/19/17, pp. 69, 165; AA Ex. 2 (6/19/17).
11. The corrective action plan set forth the following specific standard necessary for satisfactory performance in the area of job knowledge/skills:

Develop an understanding and proficient working knowledge of department regulations and policies and exercising of effective engineering judgement to completely perform duties as a civil engineer transportation in the Traffic Services Section. A reduction in the incidents where corrections must be made to reviews based on lack of understanding policy or a personal rejection of policy.

AA Ex. 2 (6/19/17), p. 1. This standard was measured as follows:

Limitation to 1X within the rating period the # of instances where corrections to basic policy or routine engineering judgment issues are

ignored or missed with the goal of eliminating all instances.

AA Ex. 2 (6/19/17), p. 1.

12. The corrective action plan set forth the following specific standard necessary for satisfactory performance in the area of work results:

Be able to adequately execute any and all of the requisite tasks essential to the position of Civil Engineer Transportation in the Traffic Services Section. Reviews of [highway occupancy permits] will not be in conflict with District and Unit Policy specifically related to sight distance. Non-value adding review comments which increase the number of review cycles will be reduced. Demonstration of the ability to give attention to detail such as reviewing scoping comments and meeting minutes to maintain consistency between those and the application reviews.

AA Ex. 2 (6/19/17), pp. 1-2. This standard was measured as follows:

Limitation to 1X within the rating period of instances where reviews are delayed and where extensive corrections must be made where basic policy or engineering judgement issues are ignored or missed with the goal of eliminating all instances. Limitation to 1X within the rating period of instances where supervisory

corrections to application reviews are required due to a failure to review all preliminary documents or meeting minutes with the goal of eliminating all instances.

AA Ex. 2 (6/19/17), p. 2.

13. The corrective action plan set forth the following specific standard necessary for satisfactory performance in the area of communications:

Written communication must convey information applicable to the assigned project. The employee will use appropriate and professional oral communication skills when receiving direction from supervisor or communicating to fellow employees. Employee will maintain a regular dialogue with supervisor regarding review progress and to receive direction on reviews. Employee will respectfully follow direction of all unit supervisors when performing reviews within that supervisor's area of responsibility. Employee will have direct verbal discussion of review comments with his supervisor in lieu of email only communication.

AA Ex. 2 (6/19/17), p. 2. This standard was measured as follows:

Maintaining direct communications with supervisors and management.
Zero instances where communications

are disrespectful, terse or of an inflammatory nature.

AA Ex. 2 (6/19/17), p. 2.

14. The corrective action plan set forth the following specific standard necessary for satisfactory performance in the area of initiative/problem solving:

The Employee must function as a team player. The employee must demonstrate a willingness to work with others in a professional and collaborative manner to achieve the goals of the unit. Employee must take the initiative to structure his review comments to provide insight to [Highway Occupancy Permit] Applicants that could reduce the number of review cycles. Employee must have better interaction with his supervisor and other co-workers. Employee must demonstrate his understanding of unit policy thereby improving confidence that he can work and make decisions independently.

AA Ex. 2 (6/19/17), p. 3. This standard was measured as follows:

Limitation to 1X within the rating period of non-value adding review comments with the goal of eliminating all non-value adding review comments.

AA Ex. 2 (6/19/17), p. 3.

15. Under the corrective action plan, interim EPRs were issued to appellant. N.T. 6/19/17, pp. 37-39, 40-41, 165-166, 168, 170-171; N.T. 2/28/17, pp. 56-57, 63-64, 87-88, 221, 227-228; AA Exs. 4 (6/19/17), 4a (2/28/17), 4b (2/28/17), 6 (6/19/17), 10 (2/28/17), 14 (2/28/17).
16. For each of the standards set forth in the corrective action plan, appellant would be rated as satisfactory on the interim EPRs only if all objectives were satisfactorily accomplished during the rating period. AA Ex. 2 (6/19/17).
17. The first interim EPR was issued for the period of December 23, 2015 through February 3, 2016. N.T. 2/28/17, p. 57; AA Ex. 4a (2/28/17).
18. The second interim EPR was issued for the period of February 4, 2016 through March 17, 2016. N.T. 2/28/17, p. 57; AA Ex. 4b (2/28/17).
19. The overall rating for both the first and second interim EPRs was unsatisfactory. N.T. 2/28/17, pp. 57-58; AA Exs. 4a, 4b (2/28/17).

20. Based on the first and second interim EPRs, appellant received a written reprimand, dated April 12, 2016, for unsatisfactory work performance, and the corrective action plan was continued. N.T. 2/28/17, pp. 61-62; AA Ex. 7 (2/28/17).
21. A third interim EPR was issued for rating period March 18, 2016 through June 20, 2016. Appellant received an overall rating of unsatisfactory on this interim EPR. N.T. 2/28/17, pp. 63-65; AA Ex. 10 (2/28/17).
22. During the rating period for the third interim EPR, appellant reviewed nineteen highway occupancy permit applications. Fourteen of these applications required extensive corrections, which amounts to seventy-four percent. N.T. 2/28/17, pp. 64-65; AA Ex. 10 (2/28/17).
23. Based on the third interim EPR, a Level-One ADLS, dated August 15, 2016, was issued to appellant for unsatisfactory work performance. N.T. 2/28/17, pp. 86-87; AA Ex. 13 (2/28/17).

24. After the issuance of the third interim EPR, it was explained to appellant that the corrective action plan would continue for another interim period. N.T. 2/28/17, p. 87.
25. A fourth interim EPR was issued for rating period June 21, 2016 through October 26, 2016. Appellant received an overall rating of unsatisfactory on this interim EPR. N.T. 2/28/17, pp. 87-88; AA Ex. 14 (2/28/17).
26. During the rating period for the fourth interim EPR, appellant reviewed twenty-two highway occupancy permit applications. Eleven of these applications required extensive corrections, which amounts to fifty percent. N.T. 2/28/17, pp. 88-89; AA Ex. 14 (2/28/17).
27. Based on the fourth interim EPR, a Level-Two ADLS, dated November 28, 2016, was issued to appellant for unsatisfactory work performance. N.T. 6/19/17, pp. 39-40; N.T. 2/28/17, pp. 99-101 AA Ex. 3 (6/19/17).
28. The corrective action plan remained in place after the issuance of the November 28, 2016 Level-Two ADLS. N.T. 6/19/17, p. 69.

29. A fifth interim EPR was issued for the period of October 27, 2016 to January 17, 2017. N.T. 6/19/17, pp. 40-41, 168; AA Ex. 4 (6/19/17).
30. Appellant received an overall rating of unsatisfactory on the fifth interim EPR. This rating was based on appellant's poor performance in reviewing highway occupancy permits and his failure to interact and collaborate with his immediate supervisor and other employees when developing comments pertaining to highway occupancy permit applications. N.T. 6/19/17, pp. 41-44, 72; AA Ex. 4 (6/19/17).
31. During the rating period for the fifth interim EPR, seven of the highway occupancy permit applications reviewed by appellant required corrections. N.T. 6/19/17, pp. 44, 72.
32. On January 17, 2017, appellant's immediate supervisor reviewed the fifth interim EPR with appellant. At this meeting, all seven of the applications that required corrections were reviewed with appellant. Appellant was also

provided an opportunity to explain his position regarding the rating on his fifth interim EPR. N.T. 6/19/17, pp. 43-44, 72-73.

33. On January 31, 2017, a PDC was held regarding appellant's poor work performance, at which appellant was provided an opportunity to explain his work performance. N.T. 6/19/17, pp. 73, 221-223, 225.
34. Five days after the January 31, 2017 PDC, appellant submitted a written response explaining why he disagreed with the instructions given to him by his supervisor. N.T. 6/19/17, pp. 282, 326-327.
35. After the January 31, 2017 PDC, the start date for the rating period for the fifth interim EPR was revised so that the rating period began after the issuance of the November 28, 2016 Level-Two ADLS. Specifically, the start date was changed from October 27, 2016 to November 29, 2016. The comments on the EPR were also revised to eliminate those incidents that occurred outside of the revised rating period. No new incidents were added. N.T. 6/19/17, pp. 44-46, 170-172.

36. The number of highway occupancy permit applications that fell within the revised review period were reduced to nine applications. Five of these applications required major corrections, which amounts to more than fifty percent. N.T. 6/19/17, pp. 47, 49-50, 171-172.
37. On March 16, 2017, appellant's immediate supervisor reviewed the revised interim EPR with appellant. During this meeting, all five applications requiring corrections were reviewed with appellant. N.T. 6/19/17, pp. 48-49, 72.
38. The overall rating on the revised interim EPR was unsatisfactory. N.T. 6/19/17, pp. 49, 68-69; AA Ex. 6 (6/19/17).
39. On the revised interim EPR, appellant received unsatisfactory ratings for the following job factors: job knowledge/skills; work results; communications; and initiative/problem solving. Appellant received a needs improvement rating for the work habits factor. N.T. 6/19/17, pp. 49, 65-68.
40. Appellant's unsatisfactory rating for the job knowledge/skills and work result factors was based on the five applications that required major

corrections during the rating period for the revised interim EPR. N.T. 6/19/17, pp. 49, 65; AA Ex. 6 (6/19/17).

41. Appellant received an unsatisfactory rating for the communications factor because he failed to communicate with his immediate supervisor and listed unnecessary comments when reviewing the highway occupancy permit applications. N.T. 6/19/17, p. 66; AA Ex. 6 (6/19/17).
42. Appellant received an unsatisfactory rating for initiative/problem solving factor because he failed to seek guidance and assistance when reviewing highway occupancy permits. N.T. 6/19/17, p. 66; AA Ex. 6 (6/19/17).
43. The five applications, which required major corrections during the rating period for the revised interim EPR included applications for a soccer field, a townhouse development, a Dunkin' Donuts™, and a minor subdivision. N.T. 6/19/17, pp. 52-64.
44. Regarding the application for the soccer field, appellant failed to include a comment noting that the applicant's plans inaccurately depicted the speed limit. N.T. 6/19/17, pp. 52-53.

45. Appellant is responsible for checking the speed limit on the applications that he reviews. N.T. 6/19/17, pp. 53-54.
46. The sight distance needed to safely access the roadway is based on the speed limit and the grade of the road. If the wrong speed limit is used, then the values for the site distance will be erroneous. N.T. 6/19/17, pp. 51-53.
47. Appellant had access to a document that accurately identified the speed limit for the section of roadway in question on the soccer field application. N.T. 6/19/17, p. 54.
48. On the application for the soccer field, the applicant did not provide the “spread of flow” calculation. This calculation was necessary because the driveway sloped toward the state highway. N.T. 6/19/17, pp. 54-56.
49. Appellant is responsible for assessing the “spread of flow” that would result from the drainage design. N.T. 6/19/17, pp. 54-56.

50. The “spread of flow” measures the amount of water coming down the drainage ditch or swale and crossing into the driveway. A “spread of flow” greater than eight feet is unacceptable and measures must be taken to remedy it. N.T. 6/19/17, pp. 54-55.
51. Appellant is responsible for requesting the “spread of flow” calculation from the applicant if it is necessary. Appellant failed to request it from the soccer field applicant. N.T. 6/19/17, pp. 54-56.
52. Regarding the townhouse development application, appellant requested a “spread of flow” calculation when it was not necessary. Appellant also failed to include a comment regarding a deficiency with the roadway design that created a safety hazard. N.T. 6/19/17, pp. 56, 58-60, 93.
53. Regarding the Dunkin’ Donuts™ application, appellant failed to include comments addressing roadway design issues with the inlets for both driveways. One of the driveways needed to be converted from a type M inlet to a type C inlet, and the radius of the other driveway conflicted with another existing inlet and utility pole. N.T. pp. 61-62.

54. Regarding the application for the minor subdivision, appellant failed to appropriately address the last remaining comment through a conditional permit. The last remaining comment instructed the applicant to dedicate their property fronts to the State. N.T. 6/19/17, pp. 62-64.
55. Appellant is expected to discuss projects with his immediate supervisor prior to submitting draft comments. N.T. 6/19/17, p. 66.
56. During the rating period for the revised interim EPR, appellant did not discuss any of his projects with his immediate supervisor. N.T. 6/19/17, pp. 66-67.
57. During the rating period for the revised interim EPR, appellant failed to interact or collaborate with other employees when developing comments pertaining to highway occupancy permits. N.T. 6/19/17, p. 43.
58. The appointing authority's standard procedure for issuing EPRs is as follows. EPRs are initially drafted by the employee's immediate supervisor. The immediate supervisor then reviews the draft EPR with the reviewing officer. The reviewing

officer provides his edits, changes, and observations to the immediate supervisor. After the immediate supervisor and reviewing officer agree on the language and rating, a meeting is arranged with the employee and the EPR is presented to the employee. N.T. 6/19/17, p. 163; N.T. 2/28/17, pp. 112-113, 228.

59. The standard procedure was followed when issuing interim EPRs to appellant during the disciplinary period of December 2015 through the hearing on June 19, 2017. N.T. 6/19/17, pp. 163-164.
60. On appellant's yearly and interim EPRs, it was noted that appellant would benefit from taking courses directly related to the review of highway occupancy permits as well as trainings in co-worker relations and team building. Appellant was not mandated to take the suggested trainings. N.T. 2/28/17, pp. 118-119, 121; AA Exs. 2 (6/19/17), 4 (6/19/17), 4a (2/28/17), 4b (2/28/17), 6 (6/19/17), 10 (2/28/17), 14 (2/28/17).
61. Prior to the issuance of the fifth interim EPR, appellant was offered all available trainings including webinars and routine trainings, which were transmitted to all employees via their

computers. These trainings included the following topics: drainage; storm water management; and analysis. N.T. 2/28/17, pp. 240-241.

62. During appellant's PDCs and interim EPR meetings, appellant's unsatisfactory comments were reviewed with him and the corresponding written and unwritten policies were explained to appellant. N.T. 6/19/17, pp. 187-188; N.T. 2/28/17, pp. 271-272, 274.
63. Appellant's immediate supervisor was available on a daily basis to help appellant with any issues. N.T. 6/19/17, p. 71; N.T. 2/28/17, p. 55.
64. Appellant was encouraged to ask questions of his immediate supervisor before providing his draft comments. N.T. 2/28/17, pp. 253-254.
65. The appointing authority's Working Rules establish that unsatisfactory work performance is a minor rule violation. Pursuant to the Working Rules, minor rule violations can result in either verbal or written warnings, as well as a suspension or more stringent disciplinary action if such violations continue after verbal and written warnings. AA Ex. 8 (6/19/17).

66. Appellant signed an acknowledgement in June 2010 indicating that he received a copy of the Working Rules. This acknowledgment cautioned appellant to read and become familiar with the contents of the Working Rules since violations may result in disciplinary action. N.T. 6/19/17, p. 218; N.T. 2/28/17, pp. 279-280; AA Ex. 9 (6/19/17).
67. The meeting on January 17, 2017 was scheduled through Microsoft Outlook. The calendar email invites scheduling this meeting are only seen by the persons to whom the invites are sent. N.T. 6/19/17, pp. 134-136; Ap. Exs. 5 (6/19/17), 6 (6/19/17).
68. The calendar reservation for the January 17, 2017 EPR meeting reads: "11:00 am HOP Review; PD, CR_D06_4419; Otten, John." "PD, CR_D06_4419" is a code for "PennDOT conference room District Six, Room 419, Fourth Floor." This reservation was marked private, which means others cannot view any notations about the meeting. N.T. 6/19/17, pp. 136-137. N.T. 6/19/17, pp. 136-138; Ap. Ex. 7 (6/19/17).
69. Appellant did not inform anyone that his religion prohibited him from being disturbed during his mealtimes. N.T. 6/19/17, pp. 319-320.

DISCUSSION

The issues before the Commission are: (1) whether the appointing authority established good cause for appellant's Level-Two ADLS from his regular position as a Civil Engineer Transportation; and (2) whether appellant established that the discipline was the result of discrimination. The appointing authority notified appellant that he was being issued the Level-Two ADLS due to his "violation of Minor Work Rule #6: Unsatisfactory work performance," in that he received an overall "unsatisfactory" employee performance review. Comm. Ex. A.

In an appeal challenging the suspension of a regular status employee, the appointing authority bears the burden of establishing good cause for the personnel action. *White v. Commonwealth, Department of Corrections*, 110 Pa. Commw. 496, 532 A.2d 950 (1986); 71 P.S. §§ 741.803, 741.951(a); 4 Pa. Code § 105.15. Good cause must be based upon meritorious criteria and be related to one's competency and ability to execute job duties properly. *White*, 110 Pa. Commw. at 498, 532 A.2d at 951.

Concerning the discrimination claim, 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 discrimination⁴ under Section 905.1 of the Act, appellant has the burden of

⁴ 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 non-compliance 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.

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 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. Here, appellant alleged discrimination based upon race, disability, and other non-merit factors. Comm. Ex. B. Specifically, appellant alleged a non-merit factor based on retaliation for filing prior equal employment opportunity complaints. Comm. Ex. B.

In support of its charges, the appointing authority presented the testimony of John Otten, Francis Hanney, Cheryl Babiarz, Sharion Fletcher, Karen Brown, and Anthony Reda. In support of his appeal, appellant testified on his own behalf. The evidence provided by the parties has been reviewed by the Commission and is summarized below.

I. The Appointing Authority's Evidence

A. John Otten's Testimony

Otten is employed by the appointing authority as a Senior Civil Engineer of Transportation Supervisor. N.T. 6/19/17, p. 20; N.T. 2/28/17, p. 36. Otten has worked for the appointing authority for approximately twenty-three years. N.T. 6/19/17, p. 20; N.T. 2/28/17, p. 37. Otten has held his current supervisory position since 2003. N.T. 6/19/17, p. 20; N.T. 2/28/17, pp. 37-38. Prior to holding his present supervisory position, Otten worked for the appointing authority as a civil engineer of transportation. N.T. 6/19/17, p. 20; N.T. 2/28/17, p. 38. When Otten worked as a civil engineer in transportation, his job duties were the same as appellant's current job duties. N.T. 6/19/17, p. 21; N.T. 2/28/17, p. 38.

Otten testified he became appellant's direct supervisor in February 2008. N.T. 6/19/17, pp. 23, 149-150; N.T. 2/28/17, p. 39. Otten stated he supervises one other person in addition to appellant. N.T. 6/19/17, pp. 23, 34. Otten stated that Suzanne LaPenta was appellant's prior supervisor. N.T. 2/28/17, p. 39.

Otten testified appellant's primary function is to review highway occupancy permit applications. N.T. 6/19/17, p. 24; N.T. 2/28/17, pp. 39-40. Otten noted such permits are required for any type of work requiring access to state highways, such as driveways, roadways, right of ways, drainage structures, or changes to signage. N.T. 6/19/17, pp. 32-34. Otten explained that, for example, an applicant seeking to construct a driveway along a state highway would electronically submit an application for a highway occupancy permit, along with any applicable plans, calculations, right-of-way documents, deeds, and township letters. N.T.

6/19/17, pp. 24-25; N.T. 2/28/17, p. 40. This application would be received by the traffic unit and sent to Otten's supervisor, Francis Hanney. N.T. 6/19/17, p. 26; N.T. 2/28/17, pp. 40-41. Depending on the county where the application originated and the current workload, Hanney would give the application to either LaPenta or Otten. N.T. 6/19/17, p. 26; N.T. 2/28/17, p. 41. Otten stated he would then assign it to one of his subordinates or consult a contractor, depending on the workload and the county in which the application is presented. N.T. 6/19/17, pp. 26-27; N.T. 2/28/17, p. 41.

If the application was assigned to appellant, appellant would be responsible for reviewing the application and its attachments to determine whether it complies with the appointing authority's regulations and policies. N.T. 6/19/17, pp. 28-29; N.T. 2/28/17, p. 41. Otten explained the attachments typically include the highway occupancy permit plans, land development plans, traffic studies, and transit studies. N.T. 6/19/17, p. 28. Otten stated appellant is also responsible for conducting a site visit and taking measurements to determine that the submitted plans reflect what is actually in the field. N.T. 6/19/17, p. 28. Appellant is responsible for generating comments in the electronic permitting system, which notate any deficiencies in the application and attachments. N.T. 6/19/17, p. 29; N.T. 2/28/17, pp. 41-42.

Prior to completing the review in the electronic permitting system, appellant must print out a copy of his comments and submit this printout to Otten for review. N.T. 6/19/17, p. 29; N.T. 2/28/17, p. 42. If appellant's comments are not acceptable, Otten returns the printout to appellant, with his corrections which are notated in red ink, and discusses the corrections with appellant. N.T. 2/28/17, p. 42. Appellant then makes the corrections, and if Otten is satisfied with those correction,

appellant “hits complete” in the electronic system. N.T. 2/28/17, p. 42. Once appellant “hits complete,” appellant’s portion of the review is accomplished and it is forwarded to Otten, who may add additional comments or edit the comments. N.T. 2/28/17, p. 42. Otten also discusses the application with his supervisor, Hanney. N.T. 6/19/17, pp. 29-30; N.T. 2/28/17, pp. 42-43. Once they are satisfied, Otten “hits complete,” and the application is forwarded to Hanney, who can make additional comments or edits. N.T. 2/28/17, pp. 42-43.

After Hanney is satisfied, a letter is generated in the electronic system and it is forwarded to the permits office for processing. N.T. 6/19/17, p. 30; N.T. 2/28/17, p. 43. The letter is then sent to the applicant electronically. N.T. 6/19/17, p. 30; N.T. 2/28/17, p. 43. Otten explained the comments detailing the deficiencies in the applicant’s plan and calculations are set forth in this letter. N.T. 6/19/17, p. 30. Otten further explained the comments are presented to the applicant so that the applicant is aware of the issues that need to be resolved, and the applicant or their engineer may revise their plans accordingly to become compliant. N.T. 6/19/17, p. 31; N.T. 2/28/17, p. 43. Once all issues have been resolved, Otten’s unit recommends approval to the permits office. N.T. 6/19/17, p. 32. The permits office then processes it and sends a permit to the applicant through the electronic permitting system. N.T. 6/19/17, p. 32.

Otten testified that appellant’s job duties are set forth in his position description. N.T. 6/19/17, pp. 34-35; N.T. 2/28/17, p. 44; AA Ex. 1 (6/19/17). Otten stated that as part of his duties, appellant is expected to do the following: conduct onsite visits; take site distance measurements; assess drainage features; and compare the submitted plans to the physical site. N.T. 2/28/17, p. 45. Otten further explained

that the primary concerns when conducting an onsite visit are whether the access will be acceptable for vehicles to enter and exit safely and whether the access is compliant with the appointing authority's regulations. N.T. 2/28/17, p. 45.

Otten testified that, as appellant's supervisor, he is responsible for annually preparing appellant's EPR. N.T. 6/19/17, p. 35; N.T. 2/28/17, p. 46. Otten explained he prepares EPRs together with his supervisor. N.T. 6/19/17, p. 35-36. Otten stated he then meets with the employee after preparing the EPR to discuss it. N.T. 6/19/17, p. 36.

Otten testified appellant received an overall rating of unsatisfactory on his annual EPR for rating period October 1, 2014 to October 1, 2015. N.T. 2/28/17, pp. 46-47; AA Ex. 2 (2/28/17). Otten stated he prepared this EPR in conjunction with his supervisor, Hanney. N.T. 2/28/17, p. 47. Otten explained the rating was based on appellant's poor performance in reviewing the highway occupancy permits.⁵ N.T. 2/28/17, p. 48; AA Ex. 2 (2/28/17). Specifically, the letters drafted by appellant required extensive corrections, which Otten made to the appellant's drafts. N.T. 2/28/17, pp. 48, 54; AA Ex. 2 (2/28/17). Otten further noted appellant's poor work performance began prior to this EPR. N.T. 2/28/17, p. 49.

⁵ Additional reasons for appellant's unsatisfactory work performance were set forth in the EPR for rating period October 1, 2014 to October 1, 2015. AA Ex. 2 (2/28/17). These reasons included appellant's failure to abide by the appointing authority's policies and regulations, as well as appellant's unwillingness to function as a team player. AA Ex. 2 (2/28/17).

On December 23, 2015, Otten met with appellant to discuss the unsatisfactory rating and his concerns with appellant's performance.⁶ N.T. 2/28/17, p. 49, 56. Also, at this meeting, a corrective action plan was presented to appellant. N.T. 6/19/17, p. 37; N.T. 2/28/17, p. 52; AA Ex. 2 (6/19/17). The purpose of the corrective action plan was to improve appellant's performance. N.T. 2/28/17, pp. 51-52. The specific standards and measures by which appellant would be rated under the corrective action plan were explained to appellant. N.T. 2/28/17, p. 52. Otten noted that these standards mirrored the factors on the EPR. N.T. 2/28/17, p. 56. Otten also stated that he was available on a daily basis to help appellant with any issues. N.T. 2/28/17, p. 55.

Otten further indicated that, under the corrective action plan, interim EPRs were conducted. N.T. 6/19/17, pp. 37-39; N.T. 2/28/17, pp. 56-57. Otten stated that the first interim EPR was issued for the period of December 23, 2015 through February 3, 2016. N.T. 2/28/17, p. 57; AA Ex. 4a (2/28/17). The second interim EPR was issued for the period of February 4, 2016 through March 17, 2016.⁷ N.T. 2/28/17, p. 57; AA Ex. 4b (2/28/17). The overall rating for both reviews was unsatisfactory. N.T. 2/28/17, pp. 57-58; AA Exs. 4a (2/28/17), 4b (2/28/17). Otten further noted that appellant was not rated satisfactory in any of the factors on either

⁶ The December 23, 2015 meeting was also attended by Hanney and Blue Belmont, who, at the time, was the District Traffic Engineer. N.T. 2/28/17, pp. 50, 52. Belmont was subsequently promoted to the position of Assistant Executive for Services. N.T. 6/19/17, pp. 168-169. When Belmont served as the District Traffic Engineer, he was directly above Hanney within the chain-of-command. N.T. 6/19/17, p. 169; N.T. 2/28/17, p. 50. The Assistant Executive for Services position is one step above Belmont's prior position. N.T. 6/19/17, p. 168.

⁷ During his testimony, Otten misspoke and stated that the time period for the second interim EPR ended on March 17, 2017. N.T. 2/28/17, p. 57. It is clear from appointing authority exhibit no. 4b that the rating period ended on March 17, 2016. AA Ex. 4b (2/28/17).

interim EPR. N.T. 2/28/17, p. 58; AA Exs. 4a (2/28/17), 4b (2/28/17). Based on these two interim EPRs, appellant received a written reprimand, and the corrective action plan was continued. N.T. 2/28/17, pp. 61-62; AA Ex. 7 (2/28/17).

A third interim EPR was completed by Otten for the period of March 18, 2016 through June 20, 2016. N.T. 2/28/17, pp. 63-64; AA Ex. 10 (2/28/17). On the third interim EPR, appellant received an overall rating of unsatisfactory. N.T. 2/28/17, p. 64. During the three-month review period for this EPR, appellant reviewed nineteen applications, fourteen of which required significant corrections to achieve compliance with the appointing authority's policies and regulations. N.T. 2/28/17, pp. 64-65. These corrections addressed appellant's failure to adhere to basic policy and routine engineering judgment, such as right-in, right-out driveways, failure to eliminate non-value adding comments, and failure to review all preliminary documents. N.T. 2/28/17, pp. 65-68, 71-81; AA Exs. 19a (2/28/17), 19b (2/28/17), 20 (2/28/17). In addition to these corrections, Otten stated there were behavioral issues and noted that appellant did not interact with him during the review process and did not discuss his work until after he had handed in his comments. N.T. 2/28/17, pp. 81-83; AA Ex. 10 (2/28/17). As a result of appellant's poor performance, discipline was issued, and the corrective action plan was continued for another interim period.⁸ N.T. 2/28/17, pp. 86-87.

A fourth interim EPR was completed by Otten for the period of June 21, 2016 through October 26, 2016. N.T. 2/28/17, pp. 87-88; AA Ex. 14 (2/28/17). Otten stated appellant's performance did not improved during this period. N.T. 2/28/17, p. 88. Otten noted appellant reviewed a total of twenty-two applications

⁸ The discipline issued to appellant was a Level-One ADLS. AA Ex. 13 (2/28/17).

during this period, and eleven of these applications needed extensive corrections. N.T. 2/28/17, pp. 88-89. Otten further noted appellant continued to have issues when reviewing sight distance and drainage. N.T. 2/28/17, p. 89. Also, for one of the applications, appellant unnecessarily requested documents and failed to consider documents previously provided by the applicant. N.T. 2/28/17, pp. 89-96; AA Ex. 21 (2/28/17). As a result, a Level-Two ADLS was issued to appellant. N.T. 6/19/17, pp. 39-40; N.T. 2/28/17, pp. 99-101; AA Ex. 3 (6/19/17).

Otten testified that, following the issuance of the Level-Two ADLS, a fifth interim EPR was issued for the period of October 27, 2016 to January 17, 2017. N.T. 6/19/17, pp. 40-41; AA Ex. 4 (6/19/17). On the fifth interim EPR, appellant received an overall rating of unsatisfactory. N.T. 6/19/17, pp. 41-42; AA Ex. 4 (6/19/17). Otten noted there continued to be excessive instances where appellant's work results were incorrect, not applicable, or in conflict with the standard operating procedures. N.T. 6/19/17, p. 42. Otten further noted appellant failed to interact or collaborate with him or other employees when developing comments pertaining to highway occupancy permit applications. N.T. 6/19/17, p. 43. Rather, appellant continued to work in isolation and relied upon Otten and Hanney to catch his mistakes. N.T. 6/19/17, p. 43. Otten explained this lowers the overall work quality and it requires a lot of his time to correct appellant's mistakes and remove unnecessary comments, which negatively impacts efficiency. N.T. 6/19/17, p. 43.

Otten testified he reviewed the fifth interim EPR with appellant on January 17, 2017 and explained his concerns to appellant. N.T. 6/19/17, pp. 43-44, 72. During this review period, there were seven applications that required

corrections, all of which were reviewed with appellant.⁹ N.T. 6/19/17, pp. 44, 72. Otten noted he discussed the issues with these applications at and prior to the meeting on the fifth interim EPR. N.T. 6/19/17, p. 44. Otten further noted a PDC was held on January 31, 2017, regarding the fifth interim EPR, at which appellant was provided an opportunity to explain his work performance. N.T. 6/19/17, p. 73. Otten stated he was instructed to revise the EPR, after this PDC, and he made the revision as instructed. N.T. 6/19/17, pp. 44-45.

Otten testified he was instructed to change the date on the fifth interim EPR from October 27, 2016 to November 29, 2016, based on when the prior discipline occurred.¹⁰ N.T. 6/19/17, p. 46; AA Ex. 6 (6/19/17). Otten explained that, by shortening the review period to one month, the number of applications that fell within the review period were reduced. N.T. 6/19/17, p. 47. Otten explained he reviewed the data and reanalyzed it to determine which applications fell within the shortened review period. N.T. 6/19/17, p. 48. Otten stated appellant reviewed nine applications during the shorted review period. N.T. 6/19/17, p. 50. Five of the nine applications required major corrections. N.T. 6/19/17, pp. 47, 49-50. Otten stated he reviewed the five applications with appellant when he met with him on March 16, 2017 about the revised EPR. N.T. 6/19/17, pp. 48-49, 72.

Otten testified the overall rating on the revised EPR remained unsatisfactory. N.T. 6/19/17, pp. 49, 68-69. Otten stated appellant also received unsatisfactory ratings for the following job factors: job knowledge/skills; work results; communications; and initiative/problem solving. N.T. 6/19/17, pp. 49, 65-

⁹ It is unclear how many applications were reviewed by appellant in total during the review period for the fifth interim EPR.

¹⁰ The preceding discipline was a Level-Two ADLS dated November 28, 2016. AA Ex. 3 (6/19/17).

66. Otten stated appellant received a needs improvement rating for the work habits factor, and a satisfactory rating for the interpersonal relations factor. N.T. 6/19/17, pp. 67-68.

Regarding the job knowledge/skills and work result factors, Otten stated appellant received an unsatisfactory rating for these factors based on the five applications that required major corrections. N.T. 6/19/17, pp. 49, 65. Otten stated the appellant's incorrect comments on these applications demonstrated that appellant still lacked proficiency in accurately assessing sight distance values and drainage design. N.T. 6/19/17, pp. 50-51. Otten stated sight distance is the most important engineering element for highway occupancy permits because it determines whether or not there is safe access to a location through the driveway or local roads. N.T. 6/19/17, p. 51. Otten explained drivers need to be able to see on-coming vehicles before turning onto a state highway, and when a driver stops to make a left turn off the state highway, the vehicles behind the driver need to be able to see the driver stop. N.T. 6/19/17, pp. 51-52. Otten stated the sight distance required is based on the speed of the roadway and the grade of the road, meaning whether the road is flat or steep. N.T. 6/19/17, p. 52. Otten stated more distance is needed for higher speeds and higher grades because it takes longer for a vehicle to stop on wet pavement. N.T. 6/19/17, p. 52.

Otten provided an example of a mistake involving sight distance that appellant made when reviewing an application for a soccer field. N.T. 6/19/17, pp. 52-53. Otten stated the driveway for the soccer field was situated within a section of state highway with a speed limit of forty-five miles per hour. N.T. 6/19/17, p. 53. Otten stated the applicant's plans inaccurately depicted the speed limit as thirty-five miles per hour. N.T. 6/19/17, p. 53. Otten stated that appellant failed to notate this

discrepancy in his comments. N.T. 6/19/17, p. 53. Otten explained it is important to accurately notate the speed limit because if the wrong speed is used, then the computed values for the site distance needed will be erroneous. N.T. 6/19/17, p. 53. Otten stated appellant is responsible for checking the speed limit for accuracy on such applications. N.T. 6/19/17, pp. 53-54. Otten explained appellant should check this on his field visit to the location. N.T. 6/19/17, p. 54. Otten further explained that there are documents in the office that identify the speed limit perimeters for this section of roadway as forty-five miles per hour. N.T. 6/19/17, p. 54.

In addition to the sight distance error, Otten stated appellant also failed to address a drainage issue with the soccer field application. N.T. 6/19/17, p. 54. Otten stated that, on this application, the access to the state highway slopes toward the state highway, rather than away from it, which creates a drainage ditch or swale along the edge of the road's shoulder. N.T. 6/19/17, p. 54. Otten explained appellant was responsible for assessing the "spread of flow" that would result from the drainage design. N.T. 6/19/17, pp. 54-55. Otten further explained the "spread of flow" measures the amount of water coming down the swale and crossing into the driveway. N.T. 6/19/17, pp. 54-55. Otten stated if the "spread" is greater than eight feet, it is unacceptable because this means that the vehicle would have to traverse an eight-foot-wide swath of water coming down from the shoulder. N.T. 6/19/17, p. 55. To remedy this, the applicant would need to put a pipe under the project; or, if there is a curve, the applicant would need to construct inlets to intercept the water and divert it under the state highway. N.T. 6/19/17, p. 55. Otten explained that these measures are taken to prevent hydroplaning, which is a safety issue. N.T. 6/19/17, p. 55.

Otten stated the applicant is responsible for providing the “spread of flow” calculation. N.T. 6/19/17, p. 56. If this data is not provided, appellant is responsible for requesting it. N.T. 6/19/17, p. 56. Otten testified the applicant for the soccer field did not provide the “spread of flow” calculation, and appellant failed to request it. N.T. 6/19/17, p. 56.

Otten stated that, on another application for a townhouse development with two driveways, appellant asked for a “spread of flow” calculation when it was not necessary. N.T. 6/19/17, pp. 56, 58-59. Otten stated this could be determined from a field visit, along with a review of the plans, calculations, and Google Earth images. Otten further stated that, by including non-value adding comments such as this, it puts an undue financial burden on the applicant, who would be required to pay their engineer more money to investigate something that is not necessary. N.T. 6/19/17, p. 57. Otten added that this would also increase the number of cycles¹¹ for the application, which can adversely affect deadlines and funding for the project. N.T. 6/19/17, p. 58.

In addition to the errors pertaining to the “spread of flow” calculation, Otten stated appellant also failed to use basic engineering judgment when reviewing the roadway design for the townhouse development application. N.T. 6/19/17, pp. 58-60. Otten explained the two driveways for the townhouse development were not far apart and had a deficiency with the shoulder line. N.T. 6/19/17, p. 60. Otten further explained the proposed driveways create a “pinch point” where they meet the existing roadway, which causes some drivers to feel claustrophobic and hug the

¹¹ The number of cycle reviews indicates how many times the application went back and forth between the applicant and appointing authority. N.T. 2/28/17, pp. 75, 78. Otten explained that Hanney has always instructed that everything should be brought to the applicant’s attention during the first review. N.T. 2/28/17, p. 75. The applicant should not be blindsided on the second or third cycle review. N.T. 2/28/17, p. 75.

centerline of the roadway. N.T. 6/19/17, pp. 59-60. Otten stated appellant failed to include a comment regarding this deficiency. N.T. 6/19/17, p. 60. To remedy this, Otten instructed appellant to include a comment in the draft letter requesting a continuous widening between the two driveways, which would eliminate the “pinch point.” N.T. 6/19/17, p. 60.

Otten testified appellant also failed to appropriately address a road design for an application seeking to convert an old gas station into a Dunkin’ Donuts™. Otten noted the location was on the corner of two state highways and there were two driveways accessing the property. N.T. 6/19/17, p. 61. Otten stated there were issues with the inlets for both driveways. N.T. 6/19/17, pp. 61-62. Otten explained that one of the driveways needed to be converted from a type M inlet to a type C inlet, and the radius of the other driveway conflicted with another existing inlet and utility pole. N.T. 6/19/17, pp. 61-62. Otten stated appellant failed to address both of these issues in his comments. N.T. 6/19/17, p. 62.

Otten testified appellant failed to appropriately address a minor issue with an application for a minor subdivision of a few homes. N.T. 6/19/17, pp. 62-64. Otten explained this application was on its fourth or fifth cycle review. N.T. 6/19/17, p. 62. Otten further explained there were three remaining comments, two of which the applicant had already satisfied. N.T. 6/19/17, p. 62. The last comment required the applicant to dedicate their property fronts to the State. N.T. 6/19/17, p. 62. Otten explained that this could have been accomplished with a conditional permit because the applicant did not need to acquire the right of way from a separate entity or separate property. N.T. 6/19/17, pp. 62-63. Otten stated that, when there

is a minor issue left such as this, the appointing authority wants to issue the permit with a condition so that the applicant can obtain financing and start the process, without undue delay. N.T. 6/19/17, pp. 63-64.

Regarding the errors on the five applications, Otten stated he would not expect this many mistakes from a person with appellant's experience in the position. N.T. 6/19/17, p. 64. Otten also noted other employees he has supervised do not make mistakes of this magnitude. N.T. 6/19/17, pp. 64-65.

Next, Otten testified appellant received an unsatisfactory rating for the communications factor because: (1) there were two instances where appellant failed to communicate; (2) appellant listed unnecessary comments and repeated comments; and (3) appellant failed to coordinate with Otten which resulted in inefficiency. N.T. 6/19/17, p. 66. Otten explained appellant is expected to discuss projects with him prior to submitting draft comments. N.T. 6/19/17, p. 66. Otten stated his other subordinate employees do this, which makes the process easier. N.T. 6/19/17, pp. 66-67. Otten stated that, during the rating period, appellant did not discuss any of his projects with him. N.T. 6/19/17, pp. 66-67.

Otten testified appellant's failure to seek guidance and assistance also earned him an unsatisfactory rating for the factor of initiative/problem solving. N.T. 6/19/17, p. 66. Otten stated he is available to answer questions, if appellant has them. N.T. 6/19/17, p. 71. However, Otten stated appellant continually fails to seek guidance and assistance with resolving issues related to drainage design, sight distance, roadway design, and ADA requirements. N.T. 6/19/17, p. 66.

Likewise, appellant's failure to interact with Otten, Hanney and other employees in a positive manner resulted in a needs improvement rating for the work habits factor. N.T. 6/19/17, p. 68. Otten explained that, although appellant did not violate any work policies pertaining to interpersonal relations, appellant's failure to interact in a positive manner with himself, Hanney, and other employees limited appellant's ability to problem solve and take initiative with his review of the applications. N.T. 6/19/17, p. 68. Otten noted this affects the overall quality of appellant's work and the unit's work, which is detrimental to efficiency. N.T. 6/19/17, p. 68. With that said, Otten noted appellant received a satisfactory rating for the interpersonal relations job factor because he did not exhibit any disruptive behavior during the review period. N.T. 6/19/17, pp. 67-68.

Otten testified the corrective action plan was still in place during this review period. N.T. 6/19/17, p. 69; AA Ex. 2 (6/19/17). Otten stated under the corrective action plan, appellant was required to have a satisfactory rating for each job factor. N.T. 6/19/17, p. 69. Otten explained that appellant's unsatisfactory performance negatively impacted his time and the efficiency of the unit. N.T. 6/19/17, p. 70. Otten stated he has low confidence in appellant's ability to review projects, which results in him spending two to five hours reviewing appellant's work. N.T. 6/19/17, pp. 70-71. Otten stated the time that he spends reviewing appellant's work includes field visits to the sites and meetings with appellant to review the corrections to his draft comments. N.T. 6/19/17, p. 71. Otten stated it is not normal to spend this much time reviewing a subordinate's work. N.T. 6/19/17, p. 71.

Otten stated that, when he met with appellant regarding the fifth interim EPR and the revised interim EPR, he provided appellant an opportunity to write comments and sign the reviews. N.T. 6/19/17, p. 73. Otten noted that appellant did not write any comments on either of these EPRs, nor did he sign the EPRs. N.T. 6/19/17, p. 73.

On cross examination, Otten provided additional information regarding: (1) the review of appellant's unsatisfactory comments; (2) the EPR process; (3) Microsoft Outlook calendar invites pertaining to the corrective action plan; and (4) the recommended training. Regarding the review of appellant's unsatisfactory comments, Otten explained appellant generates the comments and then provides a copy to him, which he reviews and then discusses the deficiencies with appellant. N.T. 6/19/17, p. 154. Otten denied being unavailable to answer appellant's questions and noted appellant has not made any such allegations in the past. N.T. 6/19/17, p. 155. Otten also denied giving appellant inaccurate or incomplete answers. N.T. 6/19/17, p. 156.

Otten provided additional information regarding his review of appellant's draft comments for the soccer field application. N.T. 6/19/17, pp. 86-88. Otten explained he conducted a field visit to verify the sight distance values because he believed appellant used the wrong speed limit when appellant conducted his field visit. N.T. 6/19/17, pp. 86-87, 121-122. Otten explained the posted speed limit was forty-five miles per hour, but the applicant's engineer based his sight distance calculation on a speed limit of thirty-five miles per hour. N.T. 6/19/17, pp. 86-87. Otten confirmed the sight distance calculation was wrong when he visited the

location. N.T. 6/19/17, p. 87. Otten noted he did not ask appellant to accompany him when he visited the location because he did not feel it was necessary since he had previously discussed the mistake with appellant. N.T. 6/19/17, pp. 88, 126.

Additionally, Otten clarified for appellant which comment he was referring to as being non-value adding under the work results factor on the revised interim EPR. N.T. 6/19/17, pp. 92-93; AA Ex. 6 (6/19/17); Ap. Ex. 8 (6/19/17).¹² Otten stated appellant's "spread of flow" comment pertaining to the townhouse development is an example of a non-value adding comment because it was not necessary for appellant to request the "spread of flow" calculation for this particular design plan. N.T. 6/19/17, p. 93.

Otten also clarified for appellant why he indicated on the revised interim EPR that appellant does not interact with him or other employees in a collaborative manner. N.T. 6/19/17, pp. 97-99; AA Ex. 6 (6/19/17); Ap. Ex. 8 (6/19/17). Otten explained that appellant should speak with his supervisor and the employees in his unit to gain their knowledge and expertise. N.T. 6/19/17, p. 98. Otten explained appellant's failure to consult with his colleagues is partly why appellant has so many incorrect comments. N.T. 6/19/17, pp. 98-99.

¹² Appellant exhibit no. 8 and appointing authority exhibit no. 6, which were introduced at the June 19, 2017 hearing, are the same document—appellant's revised interim EPR for rating period November 29, 2016 to January 17, 2017. N.T. 6/19/17, pp. 80-81.

Otten further elaborated on the traffic control measures about which he made a notation on the fifth interim EPR.¹³ N.T. 6/19/17, pp. 104-09; AA Ex. 4 (6/19/17); Ap. Ex. 9 (6/19/17).¹⁴ Otten clarified for appellant that the applicant is not permitted to choose the traffic control measure. N.T. 6/19/17, pp. 108-109. Otten stated his unit instructs the applicant on the traffic control measure to utilize based on the project and type of construction occurring on that particular day. N.T. 6/19/17, p. 109.

In addition to the above clarifications regarding the incorrect comments, Otten explained, on cross-examination, that the time spent on an application is notated in the electronic permitting system by the reviewer. N.T. p. 6/19/17, p. 117. Otten stated there is an entry titled “level of effort,” under which he, appellant, or Hanney can enter the amount of time they spent reviewing and checking the application. N.T. 6/19/17, p. 117. Otten noted these entries are the record of how much time he spent reviewing appellant’s work. N.T. 6/19/17, p. 117. Otten testified, for example, he spent close to five hours reviewing the soccer field application. N.T. 6/19/17, p. 120. Otten stated those five hours included a lengthy discussion with appellant during which he used Google Earth images and the plan

¹³ On the fifth interim EPR, Otten noted: “Employee continues to use the incorrect WZTC figures despite being instructed several times by his supervisor.” AA Ex. 4 (6/19/17); Ap. Ex. 9 (6/19/17). WZTC is an acronym for “work zone traffic control” and refers to traffic control measures, such as “flaggers,” that are used during construction to prevent accidents. N.T. 6/19/17, pp. 75-77. This notation was not on the revised interim EPR. AA Ex. 6 (6/19/17); Ap. Ex. 8 (6/19/17). Otten was uncertain whether this notation was eliminated because the incorrect WZTC comment was on a project that fell outside of the more limited review period for the revised interim EPR. N.T. 6/19/17, p. 105. Since this incorrect comment does not appear on the revised interim EPR, the Commission will not consider it as part of the basis for the Level-Two ADLS, which is the subject of the present appeal.

¹⁴ Appellant exhibit no. 9 and appointing authority exhibit no. 4, which were introduced at the June 19, 2017 hearing, are the same document—appellant’s fifth interim EPR for rating period October 27, 2016 to January 17, 2017. N.T. 6/19/17, pp. 103-104.

submitted by the applicant to explain to appellant what he missed. N.T. 6/19/17, p. 125. Otten noted his other subordinate employee does not make the same significant errors as appellant. N.T. 6/19/17, pp. 127-128.

Regarding the EPR process, Otten testified that he signed the fifth interim EPR prior to reviewing it with appellant. N.T. 6/19/17, p. 112; Ap. Ex. 9 (6/19/17); AA Ex. 4 (6/19/17). Otten stated he is unaware of any rule or guideline requiring him to sign the EPR after reviewing it with appellant instead of before. N.T. 6/19/17, p. 113. Otten further stated that there is nothing in the employee comments section on the EPR, which indicates that he should have waited before signing the EPR. N.T. 6/19/17, p. 115.

Otten also previously testified that, prior to issuing the first three EPRs, he met with Hanney and then made any edits suggested by Hanney. N.T. 2/28/17, pp. 110-112. After meeting with Hanney, Otten met with appellant to discuss the interim EPRs. N.T. 2/28/17, pp. 110-111. Otten explained this is the standard operating procedure when issuing EPRs. N.T. 2/28/17, p. 113. Otten stated he uses the same process when issuing EPRs to his other subordinate employee. N.T. 2/28/17, p. 113.

Regarding the Microsoft Outlook calendar invites, Otten testified only the person to whom the invite is sent is able to see it. N.T. 6/19/17, pp. 135-136; Ap. Exs. 5, 6 (6/19/17). Otten also noted others cannot view meeting notations on his calendar unless they have access to his calendar. N.T. 6/19/17, pp. 134-135. Otten explained his calendar is not public, nor is it accessible by all appointing authority employees. N.T. 6/19/17, pp. 134-135. Otten further testified the reservation for the conference room, where the EPR meeting is conducted, does not

state who's EPR is being reviewed. N.T. 6/19/17, p. 137. For example, on the January 2017 Microsoft Outlook calendar for the District Six conference room, there is a highlighted block which reads: "11:00 am HOP Review; PD, CR_D06_4419; Otten, John." N.T. 6/19/17, pp. 136-137; Ap. Ex. 7 (6/19/17). Otten explained "PD, CR_D06_4419" is a code for "PennDOT conference room District Six, Room 419, Fourth Floor." N.T. 6/19/17, pp. 136-137. Otten stated this entry was for appellant's EPR review, but he entered it on the calendar as "HOP review" to maintain confidentiality.¹⁵ N.T. 6/19/17, p. 140. Otten also noted he marks such entries as private, which means that if a person clicks on the entry, they will not see any other notations about the meeting. N.T. 6/19/17, pp. 138, 140, 159.

Otten stated more information about the meeting is included in the invites that are sent to the attendees. N.T. 6/19/17, pp. 142-143. Otten explained the meeting invite includes more information because the persons attending the meeting need to know what the topic is. N.T. 6/19/17, pp. 142-143. Otten added he sends the meeting invites through Outlook, rather than verbally notifying attendees, because otherwise, he would not be able to reserve the conference room. N.T. 6/19/17, pp. 143-144. Otten explained that, because this meeting is confidential, it is important to reserve the conference room to ensure that it is available. N.T. 6/19/17, p. 140.

¹⁵ On redirect, Otten explained a HOP review is a review of a highway occupancy permit application. N.T. 6/19/17, p. 157. Otten stated that, by referring to the meeting as a HOP review, it protects confidentiality because people who see that calendar entry would assume that it is a meeting with a developer to review comments. N.T. 6/19/17, pp. 157-158.

Lastly, regarding training, Otten testified that appellant was provided training during the time that he supervised appellant. N.T. 6/19/17, p. 151. Further, Otten stated that, on all of appellant's prior interim EPRs, he noted that appellant would benefit from taking courses directly related to the review of highway occupancy permits as well as trainings in co-worker relations and team building. N.T. 2/28/17, pp. 118-119; AA Exs. 4a (2/28/17), 4b (2/28/17), 10 (2/28/17), 14 (2/28/17). Otten could not recall if he also noted this on appellant's annual EPR but stated that he may have.¹⁶ N.T. 2/28/17, p. 119. Otten stated the training was not mandatory. N.T. 2/28/17, pp. 120-121.

B. Francis Hanney's Testimony

Hanney is employed by the appointing authority as the Traffic Services Manager for District Six. N.T. 6/19/17, pp. 160-161; N.T. 2/28/17, p. 215. Hanney has held this position since June 2004 and worked for the Commonwealth since 1997. N.T. 6/19/17, p. 161; N.T. 2/28/17, pp. 216-217. Prior to being employed as the Traffic Services Manager, Hanney was employed as District Permit Manager for District 5. N.T. 6/19/17, pp. 161.

Hanney testified he is Otten's direct supervisor, and Otten is appellant's immediate supervisor. N.T. 2/28/17, p. 162; N.T. 2/28/17, p. 217. Hanney noted appellant has been under his supervision since June 2004. N.T. 6/19/17, p. 162; N.T. 2/28/17, p. 217. Hanney stated Otten began supervising appellant in 2008. N.T.

¹⁶ On the annual EPRs for rating period October 1, 2014 to October 1, 2015, Otten wrote the following under the section titled "Opportunities for Development":

Farzin would benefit from taking courses that directly relate to the review of Highway Occupancy Permits. He could also use training in co-worker relations and team building.

AA Ex. 2 (2/28/17). This same notation is on the fifth interim EPR and the revised interim EPR. Ap. Exs. 8, 9 (6/19/17); AA Exs. 4, 6 (6/19/17).

6/19/17, p. 163; N.T. 2/28/17, p. 217. Prior to that, LaPenta was appellant's immediate supervisor. N.T. 6/19/17, p. 163; N.T. 2/28/17, p. 217. Hanney explained appellant was transferred from LaPenta's supervision because he refused to work for a woman supervisor.¹⁷ N.T. 2/28/17, p. 217.

Hanney testified that, upon being transferred from LaPenta's supervision to Otten's supervision, appellant's job responsibilities remained the same. N.T. 6/19/17, p. 163. Hanney stated appellant's job responsibilities are accurately depicted in his position description. N.T. 6/19/17, p. 162; AA Ex. 1 (6/19/17). Hanney also noted Otten accurately explained appellant's job responsibilities during his testimony at the June 19, 2017 hearing on the instant appeal. N.T. 6/19/17, p. 162.

Hanney stated he is the reviewing officer on the EPRs for the employees, such as appellant, who work for the three supervisors in his unit. N.T. 6/19/17, p. 163; N.T. 2/28/17, p. 218. Hanney explained EPRs are initially drafted by the employee's immediate supervisor. N.T. 6/19/17, p. 163; N.T. 2/28/17, p. 228. The immediate supervisor then presents the draft EPR to the reviewing officer. N.T. 6/19/17, p. 163; N.T. 2/28/17, p. 228. The reviewing officer provides his edits, changes, or observations to the immediate supervisor. N.T. 6/19/17, p. 163; N.T. 2/28/17, p. 228. After the immediate supervisor and reviewing officer agree on the language and rating, a meeting is arranged with the employee and the EPR is presented to the employee. N.T. 2/28/17, p. 228. Hanney stated this is standard

¹⁷ On cross-examination during the February 28, 2017 hearing, Hanney provided additional information regarding the transfer of appellant from LaPenta's supervision. Hanney explained that appellant made it clear to LaPenta that he did not want her as his supervisor for various reasons. N.T. 2/28/17, pp. 242-243. Hanney stated that LaPenta informed him that one of those reasons was because LaPenta is a woman. N.T. 2/28/17, pp. 242-243. Hanney added that there were also witness statements. N.T. 2/28/17, p. 243.

operating procedure when issuing EPRs. N.T. 2/28/17, p. 228. Hanney further stated this procedure was followed when issuing EPRs to appellant during the period of December 2015 through the hearing on June 19, 2017. N.T. 6/19/17, pp. 163-164.

Hanney testified he attended the meeting regarding appellant's annual EPR for rating period October 1, 2014 to October 1, 2015, and he confirmed the information contained in the EPR. N.T. 2/28/17, pp. 218-219; AA Ex. 2 (2/28/17). Hanney stated as a result of this unsatisfactory EPR, a corrective action plan was instituted in December 2015, in which he participated. N.T. 6/19/17, pp. 164-166; N.T. 2/28/17, p. 219; AA Ex. 2 (6/19/17). Hanney stated the purpose of the corrective action plan was to improve appellant's performance to at least a satisfactory level. N.T. 6/19/17, p. 165; N.T. 2/28/17, pp. 219, 235. Hanney stated this was explained to appellant, and appellant was asked to sign the corrective action plan, but he refused. N.T. 6/19/17, p. 167; N.T. 2/28/17, pp. 220, 235. Hanney further stated they explained the corrective action plan to appellant; however, appellant did not agree with it. N.T. 6/19/17, p. 167; N.T. 2/28/17, p. 220. It was also explained to appellant that the corrective action plan would remain in place until appellant's performance ratings reached, at minimum, a satisfactory level for each job factor. N.T. 6/19/17, p. 165; N.T. 2/28/17, pp. 235-236.

Hanney testified that, after instituting the corrective action plan, appellant received interim EPRs and attended the meetings at which the interim EPRs were discussed with him. N.T. 6/19/17, p. 165-166; N.T. 2/28/17, pp. 221, 227-228. Hanney stated the job factors set forth in the corrective action plan directly correlate to the EPR job factors. N.T. 6/19/17, p. 166. Hanney stated that, during these meetings, it was explained to appellant exactly how the rating language relates

to the corrective action plan. N.T. 6/19/17, p. 166; N.T. 2/28/17, pp. 221-222, 228-233.

Hanney testified a fifth interim EPR was completed for rating period October 27, 2016 to January 17, 2017. N.T. 6/19/17, p. 168; AA Ex. 4 (6/19/17). Hanney stated a meeting was held on January 17, 2017 with appellant to review this interim EPR.¹⁸ N.T. 6/19/17, p. 168. Hanney stated this meeting was attended by Otten, Babiarz, and Belmont. N.T. 6/19/17, p. 168. Hanney stated that, during that meeting, examples of appellant's work, which supported the ratings for each job factor, were discussed with appellant, as well as the criteria outlined in the corrective action plan. N.T. 6/19/17, pp. 169, 173. Hanney noted this included the issues about which Otten testified. N.T. 6/19/17, p. 173. Hanney further noted he concurred with Otten's testimony regarding the examples provided and appellant's inability to recognize these problems. N.T. 6/19/17, pp. 169-170.

Hanney testified that, subsequently, the fifth interim EPR was revised so that the rating period correlated with the implementation of the prior discipline. N.T. 6/19/17, pp. 170-171; AA Ex. 6 (6/19/17). Hanney stated the comments on the EPR were also revised to eliminate those incidents that occurred outside of the revised rating period. N.T. 6/19/17, pp. 171-172; AA Ex. 6 (6/19/17). Hanney added that no new incidents were added to the revised EPR. N.T. 6/19/17, p. 172.

Hanney stated he agrees with the ratings contained in the fifth interim EPR and the revised interim EPR, and noted he signed off on both EPRs. N.T.

¹⁸ During his testimony, Hanney misspoke and stated the meeting regarding the fifth interim EPR was held on January 27, 2017. It is clear from Otten's testimony and appointing authority exhibit no. 4 that the meeting occurred on January 17, 2017. N.T. 6/19/17, p. 43-44, 72; AA Ex. 4 (6/19/17).

6/19/17, pp. 173-174. Hanney stated appellant was asked to sign the EPRs at the conclusion of the meetings on these EPRs; however, he refused. N.T. 6/19/17, p. 174. Hanney also stated appellant did not comment on the supporting documentation other than to say that he disagrees he made any mistakes and disagrees with the ratings. N.T. 6/19/17, p. 174.

As a result of the revised interim EPR, a PDC was scheduled and held on January 31, 2017. N.T. 6/19/17, pp. 176-177; AA Ex. 5 (6/19/17). Hanney stated that he was present at this PDC, at which appellant was provided an opportunity to respond to the charges. N.T. 6/19/17, pp. 177-178. Hanney stated that appellant continued to deny there is a problem and refused to accept the criticisms of his work. N.T. 6/19/17, p. 178.

Hanney testified appellant's poor performance has been an ongoing problem for several years, particularly with regard to sight distance and unnecessary comments. N.T. 6/19/17, pp. 174-175. Hanney stated that he expects an engineer with appellant's experience and qualifications to be able to accurately assess sight distance, drainage issues, and design issues. N.T. 6/19/17, pp. 175-176.

Lastly, Hanney testified as to opportunities for training. N.T. 6/18/17, pp. 179-180; N.T. 2/28/17, pp. 240-242. Hanney stated his unit does not control when training is scheduled or offered, nor does he have the ability to send appellant to outside courses unless such courses are approved by the appointing authority and specifically offered. N.T. 6/19/17, p. 179; N.T. 2/28/17, p. 240. Hanney stated that, whenever he learns of a training that is being offered, he informs the employees

about the training and provides them with a fair opportunity to attend the training. N.T. 6/19/17, p. 179; N.T. 2/28/17, p. 241. Hanney also stated he always signs the necessary approvals for employees to attend such trainings. N.T. 2/28/17, p. 241.

Hanney explained they noted on appellant's prior interim EPRs which trainings would be beneficial in the hopes that those particular trainings would arise. N.T. 2/28/17, p. 240. Hanney further stated that, prior to the fifth interim EPR, appellant was offered all available trainings including various webinars and routine trainings, which were transmitted to all employees via their computers. N.T. 2/28/17, pp. 240-241. Hanney stated there have been trainings on drainage, storm water management, and analysis. N.T. 2/28/17, p. 241. Additionally, Hanney noted there are periodic staff meetings, at which informal policies, unit directions, and communications with other units are discussed. N.T. 6/19/17, pp. 179-180.

On cross examination, Hanney provided additional information regarding: (1) the EPR process; (2) the review of appellant's unsatisfactory comments; and (3) sight distance training. Regarding the EPR process, Hanney explained Otten evaluates and rates appellant's performance. N.T. 6/19/17, p. 193. Hanney stated Otten also adds comments which correspond to each job factor. N.T. 6/19/17, p. 193. Hanney stated Otten then provides a draft of the EPR to him, and they discuss it confidentially. N.T. 6/19/17, p. 193. Hanney stated whether he agrees with the EPR depends upon his impressions; however, since the direct supervisor has more one-on-one interaction with appellant, he tends to defer to the direct supervisor. N.T. 6/19/17, p. 193-194. Hanney stated, once everything is satisfactorily completed, he adds his own comments and signs the EPR. N.T. 6/19/17, pp. 193-194. Hanney noted once he signs the EPR, it is ready to be presented to appellant. N.T. 6/19/17, p. 194.

Hanney testified that he signed the revised interim EPR prior to reviewing it with appellant. N.T. 6/19/17, pp. 180-183; Ap. Ex. 8 (6/19/17); AA Ex. 6 (6/19/17). Hanney stated that this was in accordance with district policy. N.T. 6/19/17, pp. 183, 195-196. Hanney further stated that, by signing the EPR, he is not concluding that appellant is guilty or innocent. N.T. 6/19/17, p. 185. Hanney explained “[the EPR is] merely a reflection of the employee’s performance—good, bad, or otherwise.” N.T. 6/19/17, p. 185.

Additionally, Hanney explained that, during the interim EPR meetings and PDC meetings, they reviewed appellant’s unsatisfactory comments and explained the corresponding written and unwritten policies to appellant. N.T. 6/19/17, pp. 187-188. Hanney stated they brought all of appellant’s unsatisfactory projects with them. N.T. 6/19/17, p. 192. Hanney further stated that not every project was reviewed during the meetings; however, they made themselves available to do so if appellant requested it. N.T. 6/19/17, p. 192.

Regarding training, Hanney noted, while there was no formal training offered on sight distance measurements, Otten previously demonstrated to appellant how sight distance should be measured. N.T. 6/19/17, pp. 188-189. However, Hanney clarified that this demonstration did not occur during the timeframe of the revised interim EPR. N.T. 6/19/17, p. 189. Further, on redirect, Hanney noted that as a civil engineer, appellant is expected to understand sight distance. N.T. 6/19/17, p. 199.

C. Cheryl Babiarz's Testimony

Babiarz is employed by the appointing authority as a Human Resource Analyst II. N.T. 6/19/17, p. 201; N.T. 2/28/17, p. 267. Babiarz has held this position since October 2010. N.T. 2/28/17, p. 267. Prior to holding this position, Babiarz was a Human Resource Analyst I. N.T. 2/28/17, p. 267. Babiarz began working for the appointing authority in March 2003. N.T. 2/28/17, p. 267.

Babiarz testified she attended the EPR meetings regarding appellant's performance. N.T. 6/19/17, p. 201; N.T. 2/28/17, p. 269. Babiarz explained her role at these meetings was to serve as a neutral party and ensure that the meetings were conducted appropriately. N.T. 6/19/17, p. 202; N.T. 2/28/17, p. 269. Babiarz stated that, at the first meeting, the reasons for the performance improvement plan were explained and appellant was informed that Otten and Hanney were there to help him. N.T. 2/28/17, p. 269.

Babiarz stated Hanney began the meetings by stating why they were there, noting who was present, and commending appellant for anything he did that was positive; then Otten reviewed the issues with appellant's work and provide examples. N.T. 6/19/17, pp. 204-205; N.T. 2/28/17, p. 270. Babiarz noted Hanney and Otten's critiques were constructive and positive. N.T. 6/19/17, p. 208; N.T. p. 271. Babiarz further noted sight distance and drainage were discussed "quite often" during these meetings. N.T. 6/19/17, p. 205; N.T. 2/28/17, p. 274.

Babiarz stated that, during the discussion, appellant was provided an opportunity to make comments and ask questions. N.T. 6/19/17, pp. 205, 208; N.T. 2/28/17, pp. 270-271. Babiarz stated: "There was always give and take in the

meetings.” N.T. 6/19/17, p. 205; N.T. 2/28/17, p. 271. Babiarz recalled appellant would respond with his explanation, ask questions, or make comments. N.T. 6/19/17, p. 205; N.T. 2/28/17, pp. 270-271. Babiarz also recalled that, at times during the meetings, appellant stated that the criticisms of his work were “nitpicking” and “harassment.” N.T. 6/19/17, p. 208; N.T. p. 271.

Babiarz testified appellant was provided an opportunity to sign the EPR form at each meeting, but he refused. N.T. 6/19/17, p. 208. Babiarz stated appellant did not indicate why he refused to sign the EPR form. N.T. 6/19/17, p. 208. Babiarz recalled appellant saying that “he wasn’t signing anything.” N.T. 6/19/17, p. 208.

Babiarz testified an EPR meeting was held in January 2017, at which Otten discussed with appellant the discrepancies that he detailed during his testimony. N.T. 6/19/17, p. 206. Babiarz stated appellant responded with explanations, but she could not recall specifically what those explanations were. N.T. 6/19/17, p. 206. However, Babiarz did recall that, during a discussion about appellant’s unnecessary comments, appellant responded that “[the plans] looked like garbage and rubbish to him,” and he could not understand the plans. N.T. 6/19/17, p. 207. Babiarz stated Hanney explained to appellant that he should speak to Otten before including such comments. N.T. 6/19/17, p. 207.

Babiarz stated she attended another EPR meeting held in March 2017 regarding the revised interim EPR. N.T. 6/19/17, pp. 208-209. Babiarz recalled this meeting was very brief. N.T. 6/19/17, p. 209. Babiarz stated the primary purpose of this meeting was to discuss the changes to the rating period dates and the difference in number of applications that were reviewed based on that change. N.T. 6/19/17, p. 209. Babiarz recalled that, during the meeting, appellant questioned why

there even had to be a meeting. N.T. 6/19/17, p. 209. Appellant stated the information could have been sent in email. N.T. 6/19/17, p. 209.

During cross-examination, Babiarz confirmed that she does not have an engineering background. N.T. 6/19/17, p. 211; N.T. 2/28/17, p. 272. Babiarz stated that she only has a very basic understanding of the technical issues that were being discussed in the meetings and, because she is not an engineer, she cannot testify as to who was right or wrong. N.T. 6/19/17, p. 211; N.T. 2/28/17, pp. 272-275. Babiarz stated that her role at the meetings was to ensure that everyone had an opportunity to ask and answer questions. N.T. 6/19/17, pp. 210-211; N.T. 2/28/17, p. 273. Babiarz explained the meetings appeared to be constructive and were not adversarial. N.T. 6/19/17, p. 212. Babiarz stated that, during the meetings, information and knowledge were given and shared; however, she did not recall whether policies were handed to appellant. N.T. 6/19/17, p. 212-213. Babiarz also could not recall whether appellant agreed, during these meetings, that he violated any policies. N.T. 6/19/17, p. 213.

D. Sharion Fletcher's Testimony

Fletcher is employed by the appointing authority as a Human Resource Analyst III. N.T. 6/19/17, p. 214. The working title for her position is Regulations Coordinator.¹⁹ N.T. 6/19/17, p. 215. In that capacity, Fletcher assists management in filing union grievances and addressing disciplinary issues. N.T. 6/19/17, p. 215. Fletcher is also responsible for conducting investigations and pre-disciplinary conferences, as well as presenting documentation from such conferences to her

¹⁹ At the February 28, 2017 hearing, Fletcher testified the working title for her position is Labor Relations Coordinator. N.T. 2/28/17, p. 278. It is unclear from the testimony when or why Fletcher's title changed.

supervisors. N.T. 6/19/17, p. 215. Fletcher has worked for the appointing authority for nineteen years and has served as a Human Resource Analyst for the Commonwealth for twenty-six years. N.T. 2/28/17, pp. 276-277.

Fletcher testified the appointing authority has written work rules which all employees are expected to follow. N.T. 6/19/17, p. 217, N.T. 2/28/17, p. 279; AA Ex. 8 (6/19/17). Fletcher explained the appointing authority's work rules are divided into three categories—minor working rules, major working rules, and two major offenses. N.T. 6/19/17, p. 218. Fletcher stated appellant signed an acknowledgement indicating that he received a copy of the work rules on June 2, 2010. N.T. 6/19/17, p. 218; N.T. 2/28/17, pp. 279-280; AA Ex. 9 (6/19/17).

Fletcher testified she is familiar with corrective action plans. N.T. 2/28/17, p. 280. Fletcher explained that, if an employee's work performance is deficient and the employee receives an EPR rating of needs improvement or below, the manager is typically instructed to implement a corrective action plan. N.T. 6/19/17, p. 215; N.T. 2/28/17, p. 280. Fletcher stated, to that end, the employee is given a written document outlining the expectations he or she must meet to attain satisfactory performance. N.T. 6/19/17, pp. 215-216.

Fletcher stated that, upon implementing a corrective action plan, the employee is given ninety days to improve in the deficient areas. N.T. 6/19/17, p. 216; N.T. 2/28/17, p. 280. After ninety days, an interim performance evaluation is issued. N.T. 2/28/17, p. 280. If the employee has improved, the employee may come off the corrective action plan. N.T. 6/19/17, p. 216; N.T. 2/28/17, pp. 280-281. If there is no improvement, the corrective action plan is continued for another sixty days. N.T. 6/19/17, p. 216; N.T. 2/28/17, p. 281. If the employee improves

during this time, the corrective action plan is discontinued; otherwise, the corrective action plan is continued for another thirty days. N.T. 6/19/17, p. 216; N.T. 2/28/17, p. 281. Fletcher explained that, after each interim period, a PDC is held, at which the employee is provided an opportunity to provide his or her explanations. N.T. 6/19/17, p. 216; N.T. 2/28/17, p. 281. After the PDC is held, appropriate discipline is issued. N.T. 6/19/17, p. 216; N.T. 2/28/17, p. 281. Fletcher stated this process is applied consistently to all Commonwealth employees, including appointing authority's employees. N.T. 6/19/17, pp. 216-217.

Fletcher testified she did not assist Otten in preparing appellant's corrective action plan. N.T. 2/28/17, p. 282. Fletcher recalled she received a request for information on how to write a corrective action plan. N.T. 6/19/17, p. 218; N.T. 2/28/17, p. 282. Based on this request, Fletcher stated she provided sample corrective action plans to Otten as well as a document that sets forth the process outlined above. N.T. 6/19/17, p. 218; N.T. 2/28/17, p. 282. Fletcher noted she provided this information to Otten in December 2014. N.T. 6/19/17, p. 218; N.T. 2/28/17, p. 282.

Fletcher stated she is familiar with the corrective action plan that was implemented in December 2015 and noted a Level-Two ADLS was issued to appellant on November 28, 2016. N.T. 6/19/17, p. 219; N.T. 2/28/17, p. 290; AA Ex. 3 (6/19/17). Fletcher stated the Level-Two ADLS contained a final warning, which means the next level of discipline will be termination. N.T. 6/19/17, pp. 219-220. Fletcher further stated the November 28, 2016 Level-Two ADLS was the last discipline issued prior to the discipline which is the subject of the instant appeal. N.T. 6/19/17, p. 219.

Fletcher testified she prepared and distributed the PDC notice for the discipline that is the subject of the instant appeal. N.T. 6/19/17, p. 220; AA Ex. 5 (6/19/17). Fletcher stated she prepared the PDC notice because appellant received an unsatisfactory EPR. N.T. 6/19/17, pp. 220-221. Fletcher stated she conducted the PDC on January 31, 2017, and in attendance were herself, Hanney, Otten, appellant, and appellant's union representative. N.T. 6/19/17, p. 221. Fletcher testified that, at the PDC, she read each job factor and the corresponding comments on the EPR to appellant. N.T. 6/19/17, p. 222. Fletcher stated appellant was provided an opportunity to respond to the criticisms of his work, which he did; however, Fletcher noted appellant's responses were not satisfactory. N.T. 6/19/17, pp. 222-223, 225.

Additionally, Fletcher noted she asked appellant if he had any questions about the corrective action plan, and appellant responded that the corrective action plan was not reviewed with him, but he did not have any questions. N.T. 6/19/17, p. 223. Fletcher stated she proceeded to ask appellant direct questions about the corrective action plan. N.T. 6/19/17, pp. 223-224. Fletcher stated she asked appellant if the corrective action plan was presented to him, to which he responded, "yes." N.T. 6/19/17, p. 223. Fletcher stated appellant also acknowledged that he had a copy of the corrective action plan, signed it, and that each of the criteria on the corrective action plan were explained to him in detail. N.T. 6/19/17, p. 224.

Fletcher further testified that appellant acknowledged that he met with Hanney and Otten about his interim EPRs. N.T. 6/19/17, p. 224. Fletcher stated appellant expressed that he believed Hanney and Otten were "nitpicking and messing with him;" however, appellant acknowledged that Otten would spend up to two hours reviewing a project with him. N.T. 6/19/17, pp. 224-225. Fletcher stated

appellant was “negative” about these interactions with Otten. N.T. 6/19/17, p. 225. Fletcher recalled that appellant told her that Otten would “go on and on” and he sometimes “cut off” Otten, which she described as inappropriate behavior. N.T. 6/19/17, pp. 226, 247. However, Fletcher stated appellant acknowledged that Hanney provided training during this period. N.T. 6/19/17, p. 226.

Fletcher stated she provided appellant with an opportunity to bring documents with him to the PDC. N.T. 6/19/17, p. 227. Fletcher pointed out that the PDC notice dated January 26, 2017 contained a paragraph which read:

At the PDC, you will have an opportunity to provide any documentation which may support your position. Be sure to bring any documentation which you would like considered with you to the conference.

N.T. 6/19/17, p. 227; AA Ex. 5 (6/19/17) (emphasis in original). Fletcher stated appellant did not bring anything with him to the PDC. N.T. 6/19/17, p. 227.

Fletcher noted that, after the PDC, appellant was provided with additional copies of documents that were reviewed because he claimed that he did not receive them. N.T. 6/19/17, p. 228. Fletcher stated several days after the PDC, appellant returned these documents to her, along with his responses. N.T. 6/19/17, pp. 227-228. Fletcher stated she reviewed appellant’s responses, but these responses did not influence her decision. N.T. 6/19/17, pp. 228-229. However, Fletcher noted the person who makes the recommendation for discipline is Karen Brown, not her. N.T. 6/19/17, p. 229. Fletcher stated she presented all of the documents, including the PDC minutes, PDC notice, and EPR, to Brown, and she met with Brown to discuss the matter. N.T. 6/19/17, p. 229. Fletcher stated initially, termination was considered and would have been appropriate. N.T. 6/19/17, pp. 299-230. However,

Fletcher stated a review was done prior to sending the documents to Harrisburg, and it was recommended that another Level-Two ADLS be issued, which was done by letter dated March 22, 2017. N.T. 6/19/17, pp. 299-230; Comm. Ex. A.

On cross-examination, Fletcher provided additional testimony regarding: (1) the EPR process; (2) appellant's PDC relating to the instant appeal; and (3) appellant's written reprimand. Regarding the EPR process, Fletcher explained that unsatisfactory EPRs are brought to the attention of Human Resources. N.T. 2/28/17, pp. 291-292. Fletcher stated that, upon being informed of an unsatisfactory EPR, she contacts the supervisor to discuss the corrective action that the supervisor wishes to take to help the employee reach a satisfactory performance level. N.T. 2/28/17, p. 292. Fletcher stated she does not conduct an independent investigation of the information contained in the EPR and noted that she has never recommended that an EPR be changed. N.T. 6/19/17, pp. 232, 235. However, Fletcher noted that, after management signs the EPR, a copy is given to the employee and the employee is provided an opportunity to reply. N.T. 6/19/17, p. 233.

Regarding the PDC, Fletcher explained a PDC is part of the investigatory process and is scheduled to provide the employee an opportunity to respond to the charges. N.T. 6/19/17, p. 232; N.T. 2/28/17, pp. 293-294. Fletcher clarified the PDC notice is generated by her and signed by the supervisor. N.T. 2/28/17, p. 298. Fletcher denied that she is biased against the employee when she conducts investigations. N.T. 6/19/17, p. 234.

Additionally, Fletcher recalled that, at the PDC pertaining to the instant matter, Hanney asked appellant a question about ADA training that was provided to appellant during the rating period. N.T. 6/19/17, p. 236. Fletcher did not recall any

discussions about sight distance training. N.T. 6/19/17, p. 237. Additionally, Fletcher noted that appellant was not provided any policies or regulations, nor were any projects discussed, at the PDC. N.T. 6/19/17, p. 238. However, Fletcher added the specific projects were discussed at the EPR meeting. N.T. 6/19/17, p. 238.

Fletcher acknowledged that she does not have an engineering degree or background, but stated she has sufficient knowledge to conduct the PDC because she is merely asking general questions about the documents that have been provided. N.T. 6/19/17, pp. 239-240. Fletcher also acknowledged that she received a response to the PDC from appellant and noted that these responses did not change the rating on appellant's EPR. N.T. 6/19/17, pp. 241-242. Fletcher explained appellant's response contained the same documents which were the basis for the rating; and since no new information was provided, the ratings were not changed by appellant's supervisor, who had first-hand knowledge of appellant's performance. N.T. 6/19/17, pp. 243-246. Fletcher stated she did not have any conversations with appellant after reviewing his response. N.T. 6/19/17, p. 246.

Lastly, regarding appellant's written reprimand, Fletcher clarified for appellant that his written reprimand is not "still in process." N.T. 2/28/17, p. 294. Fletcher testified the written reprimand had been issued and was part of appellant's employment record. N.T. 2/28/17, p. 294; AA Ex. 7. Fletcher further clarified that, if there was a pending grievance, it would not preclude the appointing authority from progressing discipline based upon the written reprimand. N.T. 2/28/17, pp. 295-297.

E. Karen Brown's Testimony

Karen Brown is a Field Human Resource Officer III with the appointing authority. N.T. 6/19/17, p. 249; N.T. 2/28/17, p. 301. Brown has worked for the Commonwealth for thirty-two years in Human Resources. N.T. 6/19/17, p. 250; N.T. 2/28/17, p. 301. Brown further noted that, in her capacity as a Field Human Resource Officer III, she is responsible for all aspects of human resources within Engineering District Six and the five counties within that district. N.T. 6/19/17, p. 250; N.T. 2/28/17, p. 302. Brown stated this includes implementing and imposing disciplinary measures for the employees within that district. N.T. 6/19/17, p. 250; N.T. 2/28/17, p. 303. However, Brown noted she is only authorized to issue discipline up to a one-day suspension. N.T. 6/19/17, p. 250. Brown stated if the discipline to be issued exceeds a one-day suspension, she forwards the disciplinary packet to the Bureau of Human Resources' Central Office. N.T. 6/19/17, p. 250.

Brown testified that, since December 2015, she has been responsible for overseeing the progressive discipline issued to appellant. N.T. 6/19/17, pp. 250-251. Additionally, Brown agreed with Fletcher's testimony regarding disciplinary procedures for unsatisfactory EPRs. N.T. 6/19/17, p. 251. Brown also noted she was responsible for issuing the Level-Two ADLS, dated November 28, 2016.²⁰ N.T. 6/19/17, pp. 251-252; N.T. 2/28/17, p. 307; AA Ex. 3 (6/19/17).

²⁰ Brown authenticated her signature on the Level-Two ADLS and explained that she is authorized to sign all discipline letters for Kenneth McClain who is the District Executive. N.T. 6/19/17, p. 252; N.T. 2/28/17, pp. 307-308; AA Ex. 3 (6/19/17). Brown noted that, at the time she issued the November 28, 2016 Level-Two ADLS, McClain was unavailable because he was "out of town." N.T. 6/19/17, p. 252.

Regarding the fifth interim EPR, Brown testified she was aware that this interim EPR was unsatisfactory and that a PDC had been scheduled and held. N.T. 6/19/17, pp. 252-253; AA Ex. 4 (6/19/17). Brown further testified a revised interim EPR was signed in March 2017 at the instruction of Central Office. N.T. 6/19/17, pp. 254-255; AA Ex. 6 (6/19/17). Brown noted the review period on revised interim EPR was changed to more accurately reflect the time frame. N.T. 6/19/17, p. 255. Brown stated Fletcher instructed Hanney to hold another meeting with appellant regarding the change to the review period. N.T. 6/19/17, p. 254. Additionally, Brown stated that, prior to sharing the EPR with the employee, it is Commonwealth policy for the supervisor or manager to sign the EPR. N.T. 6/19/17, p. 255.

Brown testified she met with Fletcher, who prepared a recommendation for discipline, reviewed the disciplinary packet, and made a determination. N.T. 6/19/17, p. 253. Brown stated the disciplinary packet was sent to Reda, and a Level-Two ADLS, with final warning, was issued based on the revised EPR. N.T. 6/19/17, p. 254; AA Ex. 7 (6/19/17). Brown explained termination was the next step of progressive discipline; however, Central Office instructed her to repeat the Level-Two ADLS, which she did. N.T. 6/19/17, pp. 253-254.

On cross-examination, Brown provided additional information regarding: (1) the EPR process; (2) the term “unfit for duty;” and (3) appellant’s written reprimand. Brown testified that it is common practice and in compliance with policy for the supervisor and manager to discuss the EPR, sign it, and then conduct a meeting on it. N.T. 6/19/17, pp. 256-257. Brown stated the employee

comments section of the EPR, under which the employee may indicate that he or she would like to discuss the rating with the reviewing officer, is also consistent with this practice and the policy. N.T. 6/19/17, p. 257.

Brown explained the term “unfit for duty” is used by the appointing authority to mean “inappropriate behavior in the workplace.” N.T. 6/19/17, p. 262. Brown agreed that this term addresses work performance, not disability. N.T. 6/19/17, pp. 263-264. Additionally, regarding the April 12, 2016 written reprimand, Brown explained that this discipline is being held in abeyance and has not been removed from appellant’s file. N.T. 6/19/17, pp. 270-272. Brown further explained that, since it is still part of appellant’s file, it can be used for progressive discipline. N.T. 6/19/17, pp. 271-272.

F. Anthony Reda’s Testimony

Anthony Reda is employed by the appointing authority as Human Resource Analyst IV. N.T. 6/19/17, pp. 273-274; N.T. 2/28/17, p. 315. The working title for this position is Labor Relations Analyst Supervisor. N.T. 2/28/17, p. 315. Reda has been employed by the Commonwealth for approximately sixteen years. N.T. 6/19/17, p. 274. For thirteen of those years, Reda has worked for the appointing authority in Human Resources, and before that, Reda worked for the Department of Human Services. N.T. 6/19/17, p. 274; N.T. 2/28/17, p. 316.

In his capacity as the Labor Relations Analyst Supervisor, Reda supervises the Labor Relations Analysts and ensures that these analysts are properly advising managers and supervisors on how to address employee problems. N.T. 6/19/17, pp. 274-275; N.T. 2/28/17, p. 316. Reda is also responsible for reviewing

disciplinary determinations of less experienced analysts, as well as disciplines that are sent to the Central Office by District Six. N.T. 6/19/17, pp. 275-276; N.T. 2/28/17, p. 317. Reda explained that he is the Labor Relations liaison for District Six. N.T. 6/19/17, p. 276; N.T. 2/28/17, p. 317. Reda testified he receives a copy of every Level-One ADLS and one-day suspension issued by District Six. N.T. 6/19/17, p. 276; N.T. 2/28/17, p. 317. Reda further stated he is responsible for approving all disciplines that impose a three-day suspension, final warning, or more stringent disciplinary action. N.T. 6/19/17, p. 276.

Reda testified he is familiar with the disciplines issued to appellant. N.T. 6/19/17, p. 275; N.T. 2/28/17, p. 317. Reda stated he was aware that appellant was issued a Level-One ADLS. N.T. 2/28/17, pp. 317-318. Reda noted he was also aware that appellant was previously issued a written reprimand for similar misconduct because the written reprimand was referenced in the Level-One ADLS. N.T. 2/28/17, p. 318. Reda stated he approved the Level-Two ADLS, with final warning, dated November 28, 2018, which was based on appellant's continued unsatisfactory work performance. N.T. 2/28/17, pp. 318, 320; AA Ex. 3 (6/19/17).

Reda explained a progressive disciplinary approach is used when employees are placed on corrective action plans. N.T. 6/19/17, p. 277; N.T. 2/28/17, p. 319. Reda stated first a written reprimand is issued, then a Level-One ADLS is issued, and next a Level-Two ADLS with a final warning is issued. N.T. 6/19/17, pp. 277-279; N.T. 2/28/17, p. 319. Reda explained the final warning informs the employee that the next step is termination. N.T. 6/19/17, p. 278; N.T. 2/28/17, p. 319. Reda further explained that appellant was issued a second Level-Two ADLS with final warning, rather than being terminated, because he was a long-term employee and they wanted to provide him with every opportunity to improve his

performance to a satisfactory level. N.T. 6/19/17, pp. 278-279. Reda stated the same consideration would not be given to each employee who was placed on a corrective action plan. N.T. 6/19/17, p. 279.

Reda further stated he and the Labor Relations Division Manager discussed the level of discipline to be imposed and concluded that, based on appellant's long-term service, he should be given every opportunity and every chance to develop to a satisfactory level. N.T. 6/19/17, p. 279. Reda stated he also discussed the matter with District Six and Brown, and they reached an agreement. N.T. 6/19/17, p. 280.

Reda noted he received a disciplinary packet from Brown requesting approval to issue discipline. N.T. 6/19/17, pp. 280-281. Reda stated the disciplinary packet included the rebuttal that appellant submitted after the PDC; however, Reda noted the rebuttal did not have any effect on his decision to approve a second Level-Two ADLS. N.T. 6/19/17, pp. 281-282. Reda explained appellant's rebuttal did not address any of the factors listed in the interim EPR, but rather, merely expressed appellant's disagreement with his manager's instructions. N.T. 6/19/17, p. 281. Reda stated appellant's rebuttal demonstrated that appellant was not willing to acknowledge those things he had done incorrectly and confirmed that he did not follow the instructions given. N.T. 6/19/17, p. 282.

On cross-examination, Reda provided additional information regarding his role in the disciplinary process. Reda explained he reviews the request to approve the discipline and the accompanying information. N.T. 6/19/17, p. 283. Reda stated

if he has any questions, he asks the district for clarification, and based on the answers, he will approve or disapprove the requested discipline. N.T. 6/19/17, pp. 283-284.

Reda stated he does not speak with the employee directly but relies on the information given to him. N.T. 6/19/17, pp. 287-288. Reda explained any discussions with the employee are conducted by the district's human resources people, the supervisors, and the managers. N.T. 6/19/17, p. 288. Reda stated the employee is also provided an opportunity to submit a rebuttal at the PDC, and if no rebuttal is provided, he relies solely on the documentation provided by district human resources. N.T. 6/19/17, p. 288.

Reda testified there have been cases where the investigation resulted in no discipline being issued after the PDC. N.T. 6/19/17, p. 284. Reda added that, ordinarily, in cases where the districts are unsure of the level of discipline that should be imposed, the district contacts him and they discuss the matter, after which the district sends him documentation. N.T. 6/19/17, p. 284. Additionally, Reda noted that he thoroughly reviews the disciplinary determinations of the less experienced analysts who he supervises until he trusts their judgment. N.T. 6/19/17, pp. 286-287.

Regarding the discipline, which is the subject of the instant appeal, Reda explained termination would have been appropriate under most circumstances; however, it was decided, and the district agreed, to repeat the Level-Two ADLS based on appellant's longevity. N.T. 6/19/17, pp. 285-286. Reda further explained appellant's rebuttal did not address any of the factors listed in the interim EPR. N.T. 6/19/17, pp. 288-289. Reda stated appellant merely disagreed with his manager as

to how things should be done. N.T. 6/19/17, p. 289. Reda added this is not appellant's role; management is responsible for determining how things should be done, not appellant. N.T. 6/19/17, p. 289. Reda explained there are only three instances in which an employee can refuse to obey an order—if it is illegal, if it is immoral, and if it is unsafe. N.T. 6/19/17, p. 289. Reda stated the burden of proof is on the employee to establish that the refusal to obey the order was for one of these reasons, and appellant failed to provide any such proof. N.T. 6/19/17, p. 289. Reda further stated examples of appellant's failure to follow his manager's instructions were set forth in the interim EPR. N.T. 6/19/17, pp. 290-292; AA Ex. 6 (6/19/17).

Reda stated he did not review any policies or procedures specific to engineering requirements, and he acknowledged he is not an expert in the field, which is why he relies on the supervisors and managers. N.T. 6/19/17, pp. 292-293. Reda also acknowledged that he did not ask the managers whether sight distance training was provided, nor did he ask the managers whether a field visit was conducted with appellant to discuss sight distance with him on site. N.T. 6/19/17, p. 294.

II. The Appellant's Evidence

Appellant argues that the appointing authority did not present any engineering project documents to support the discipline. N.T. 6/19/17, p. 304-306. Appellant claims that these documents would have established that he did not make calculation errors. N.T. 6/19/17, p. 306. Appellant further stated that he reviewed these documents in the past and had an argument with Otten and Hanney about his mistakes. N.T. 6/19/17, p. 307. Appellant also acknowledged he asked for and received copies of the project reviews from Otten and had an opportunity to respond

in writing to those reviews. N.T. 6/19/17, p. 326-327. Appellant stated he wrote comments on each of the reviews explaining why he was correct, and his supervisor was wrong and provided that information to Fletcher within five days after the PDC. N.T. 6/19/17, pp. 326-327.

Appellant further testified his interim EPRs are not accurate. N.T. 6/19/17, p. 311. Appellant stated he did not make the mistakes or do the things that were described in the EPR. N.T. 6/19/17, pp. 311-312. Appellant also noted he did not receive any training, including sight distance and drainage trainings. N.T. 6/19/17, pp. 314-315. Additionally, appellant argues the statement on his interim EPR that he failed to collaborate with other employees is discriminatory because cultural differences prevent him from doing so. N.T. 6/19/17, p. 321. Appellant testified he has been unable to apply for other jobs or be promoted as a result of the interim EPRs that were issued to him. N.T. 6/19/17, p. 315.

Appellant also took issue with the manner in which his interim EPRs were addressed. Appellant argues common sense requires the supervisor to review and sign the EPR first, and then if the employee disagrees, the employee should discuss the matter with the reviewing officer. N.T. 6/19/17, p. 310. Appellant further testified his fifth interim EPR was addressed publicly through Microsoft Outlook, which he claimed is accessible by all employees. N.T. 6/19/17, pp. 312-313; Ap. Exs. 5 (6/19/17), 6 (6/19/17), 7 (6/19/17). Appellant testified other employees were not treated in this manner, but he did not specify who was treated differently or how. N.T. 6/19/17, p. 312. Appellant argues he could have been notified of the EPR meeting in person rather than through Microsoft Outlook. N.T. 6/19/17, p. 313.

Appellant testified suspension letters, PDC notices, and EPRs are handed to him while he is eating his lunch at his desk, which he described as intimidating and disrespectful. N.T. 6/19/17, pp. 317-318. Appellant explained he is not paid for his lunch time, and it is against his religion to be disrupted while he is eating breakfast, lunch, or dinner. N.T. 6/19/17, pp. 318-319. However, appellant acknowledged that he did not make anyone aware of this religious restriction. N.T. 6/19/17, pp. 319-320.

Appellant testified that he is required to report to work at a specific time, but the Caucasian employee who reports to Otten is permitted to work flexible hours.²¹ N.T. 6/19/17, p. 320. Appellant stated he never sees the employee report to work at 7:30 a.m., which is the employee's regular start time. N.T. 6/19/17, p. 350. Appellant stated the employee comes to work between 9:00 a.m. and 12:00 p.m. N.T. 6/19/17, p. 350. Appellant argues such treatment is discriminatory and isolates him from the other employees. N.T. 6/19/17, p. 320. However, appellant acknowledged that he does not supervise the Caucasian employee and does not know when he is on vacation or when he is working in the field. N.T. 6/19/17, p. 323. Appellant also acknowledged that there are no complaints on his revised interim EPR regarding his hours. N.T. 6/19/17, p. 324.

²¹ On rebuttal, Otten testified the employee identified by appellant does not work flexible hours. N.T. 6/19/17, p. 347. Otten stated this employee's office hours are 7:30 a.m. to 3:30 p.m. N.T. 6/19/17, p. 346. Otten explained that, if the employee is working in the field, he may not be seen by other people. N.T. 6/19/17, pp. 346-347. Otten further explained this employee sometimes chooses to go directly to the project sites from his home. N.T. 6/19/17, p. 347. Otten stated this is more economical than traveling to the office first because the employee lives in the county where the majority of the projects that he reviews are located. N.T. 6/19/17, p. 347. However, Otten noted that more than ninety percent of the time, the employee is in the office at 7:30 a.m. N.T. 6/19/17, p. 348.

Regarding his disability claim, appellant testified that on November 18, 2015, he was found unfit for duty and suspended.²² N.T. 2/28/17, pp. 20, 342-343; Ap. Ex. 1 (2/28/17). Appellant simultaneously argues this discipline was removed from and remains on his employment record. N.T. 2/28/17, p. 342. Appellant argues this discipline remains on his record because he did not receive an official letter indicating that it was removed. N.T. 2/28/17, p. 342. Appellant further claimed this disciplinary matter “is connected to physical, mental, or both physical and mental illness, which is connected to disability.”²³ N.T. 2/28/17, p. 342. Therefore, appellant argues that the appointing authority regarded him as disabled. N.T. 2/28/17, pp. 345-346, 350. Appellant further argues that, because the appointing authority regarded him as disabled, he cannot be suspended for any reason. N.T. 2/28/17, p. 22.

Additionally, appellant testified he filed a discrimination complaint with the appointing authority’s Equal Opportunity Division. N.T. 2/28/17, p. 23. Appellant stated his discrimination complaint was approved on January 20, 2016.²⁴

²² By letter dated December 14, 2015, the appointing authority confirmed that appellant was suspended from November 20, 2015 through December 1, 2015 for being unfit for duty and for inappropriate behavior. Ap. Ex. 1 (2/28/17). The December 14, 2015 letter further explained that on November 18, 2015, appellant was found unfit for duty and on November 20, 2015, appellant engaged in inappropriate behavior. Ap. Ex. 1 (2/28/17).

²³ On rebuttal, Hanney explained appellant was found unfit for duty based on threatening behavior that appellant directed toward him, not a disability. N.T. 2/28/17, pp. 355-357. Hanney noted appellant’s behavior resulted in him being escorted from the building. N.T. 2/28/17, p. 357. Hanney stated a PDC was subsequently held after which the discipline set forth in the December 14, 2015 letter was imposed. N.T. 2/28/17, p. 357; Ap. Ex. 1 (2/28/17).

²⁴ In support of his contention that his discrimination complaint was approved, appellant referred to a letter dated January 20, 2016 from the appointing authority’s Labor Relations and Equal Opportunity Division. N.T. 2/28/17, pp. 22-23; Ap. Ex. 2 (2/28/17). Contrary to appellant’s testimony, the January 20, 2016 letter merely acknowledges receipt of appellant’s complaint and notes that the complaint will be reviewed in accordance with Management Directive 410.10, Amended. Ap. Ex. 2 (2/28/17).

N.T. 2/28/17, p. 23; Ap. Ex. 2. Appellant testified that, after filing the discrimination complaint, he received unsatisfactory interim EPRs, attended PDCs, and was suspended. N.T. 2/28/17, p. 23.

III. Good Cause for Level-Two ADLS

Good cause must relate to an employee's competence and ability to perform his job duties, *Department of Corrections v. Ehnnot*, 110 Pa. Commw. 608, 532 A.2d 1262 (1987), or must result from conduct that hampers or frustrates the execution of the employee's duties. *McCain v. Department of Education*, 71 Pa. Commw. 165, 454 A.2d 667 (1983). Having carefully reviewed the evidence, we find that the appointing authority has established the charge against appellant and established good cause for the Level-Two ADLS. In support of our conclusion, we find credible²⁵ the testimony provided by the appointing authority's witnesses.

As a Civil Engineer in Transportation, appellant's duties include reviewing highway occupancy permit applications and any accompanying attachments that are submitted to the appointing authority. *See* Finding of Fact 3. As part of that review, appellant is responsible for generating comments in the appointing authority's electronic permitting system which detail any deficiencies in the submitted documentation. *See* Finding of Fact 3. Here, the credible testimony of appointing authority's witnesses established that appellant failed to satisfactorily discharge this duty. *See* Findings of Fact 44-54. As a result, appellant was issued an overall rating of "unsatisfactory" on his revised interim EPR for the rating period of November 29, 2016 through January 17, 2017. *See* Finding of Fact 38. This

²⁵ 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. Ct. 1986).

unsatisfactory interim EPR was the basis for the Level-Two ADLS issued to appellant. Comm. Ex. A.

The appointing authority's Working Rules establish that unsatisfactory work performance is a minor rule violation. *See* Finding of Fact 65. Pursuant to the Working Rules, minor rule violations can result in either verbal or written warnings, as well as a suspension or more stringent disciplinary action if such violations continue after verbal and written warnings. *See* Finding of Fact 65. Prior to receiving the Level-Two ADLS, which is the subject of the instant appeal, appellant received a written reprimand, a Level-One ADLS, and a Level-Two ADLS with final warning for similar misconduct—unsatisfactory work performance. *See* Findings of Fact 20, 23, 27. After being issued the prior discipline, appellant was provided with an opportunity to improve his work performance through a corrective action plan. *See* Finding of Fact 28. Appellant failed to improve, and as a result, the Level-Two ADLS, which is the subject of the present appeal, was issued to appellant. *See* Findings of Fact 38-42. Thus, the appointing authority established good cause for the discipline.

Nevertheless, appellant argues that (1) the evidence presented by the appointing authority was insufficient to establish good cause; (2) his supervisors are wrong in their assessment of his performance; and (3) he was not provided, nor was he encouraged or mandated to participate in trainings that address highway occupancy permits or working as a team player. N.T. 2/28/17, pp. 120-121, 294-297; Comm. Ex. B. The Commission is not persuaded by these arguments.

Regarding the sufficiency of the evidence, appellant asserts that his revised interim EPR was unjustified. Comm. Ex. B. Appellant provides no credible testimony to support this claim. Furthermore, contrary to appellant's claim, we find that the appointing authority presented credible evidence that more than fifty percent of the highway occupancy permit applications reviewed by appellant during the applicable review period required major corrections despite prior related instruction being given to appellant. *See* Finding of Fact 36. We further find that the appointing authority provided credible evidence detailing several corrections that were made to four of these applications. *See* Findings of Fact 44-54. These corrections alone are sufficient to establish appellant's unsatisfactory work performance.

Under the corrective action plan, one instance during the rating period where corrections to basic policy or routine engineering judgment are ignored or missed is sufficient to establish that appellant failed to satisfactorily perform in the areas of job knowledge/skills and work results. *See* Findings of Fact 11, 12. The appointing authority presented credible evidence that appellant failed to appropriately address sight distance, drainage, and roadway design deficiencies on four applications during the review period upon which the discipline was based. *See* Findings of Fact 44, 48, 52-54. Appellant's failure to address these issues was in contravention of basic policies and routine engineering judgment. *See* Findings of Fact 45-46, 49-51. Thus, appellant failed to meet the standard for satisfactory performance in the areas of job knowledge/skills and work results.

Appellant also failed to meet the communication standard under the corrective action plan. In the area of communications under the corrective action plan, appellant's "[w]ritten communication must convey information applicable to the assigned project." *See* Finding of Fact 13. Appellant is also required to maintain

a regular dialogue with his supervisor regarding the review process. *See* Finding of Fact 13. The appointing authority presented credible evidence that appellant failed to include applicable comments on four highway occupancy permits that he reviewed. *See* Findings of Fact 44, 48, 52-54. There was also credible evidence establishing that appellant failed to discuss any of his projects with his immediate supervisor during the review period. *See* Finding of Fact 56. This is sufficient to establish appellant's unsatisfactory performance in the area of communication.

Additionally, under the corrective action plan, one instance of non-value adding review comments is sufficient to establish that appellant failed to satisfactorily perform in the area of initiative/problem solving. *See* Finding of Fact 14. Appellant is also required to demonstrate a willingness to work with others in a professional and collaborative manner. *See* Finding of Fact 14. As detailed above, the appointing authority presented credible evidence of more than one instance of non-value adding comments. The comments on half of the applications reviewed by appellant required major corrections. *See* Finding of Fact 36. Indeed, on the soccer field application alone, corrections to more than one comment was necessary. *See* Findings of Fact 44, 48. Also, during the rating period, appellant failed to interact or collaborate with other employees when developing comments pertaining to highway occupancy permits. *See* Finding of Fact 57. Thus, there is sufficient credible evidence to establish appellant's poor performance in the area of initiative/problem solving.

Moreover, the credible evidence detailed above clearly establishes that appellant has failed to achieve an overall satisfactory performance rating under the corrective action plan. To achieve a rating of overall satisfactory performance under the corrective action plan, appellant was required to satisfactorily meet *all* of the

individual job factors. *See* Finding of Fact 10. Here, appellant failed to satisfactorily meet the following job factors: job knowledge/skills; work results; communications; and initiative/problem solving. Appellant's poor performance in these areas is sufficient to establish appellant's overall "unsatisfactory" performance rating under the corrective action plan, which was documented on the revised interim EPR for rating period November 29, 2016 through January 17, 2017. Therefore, we reject appellant's claim that the evidence presented by the appointing authority was insufficient to establish good cause.

Furthermore, we are not persuaded by appellant's claim that his supervisors are wrong in their assessment of his performance. Specifically, appellant claims that he did not make calculation errors. N.T. 6/19/17, p. 306. We find that the appointing authority presented credible testimony regarding appellant's failure to identify the correct speed limit on the soccer field application which resulted in a sight distance calculation error. *See* Findings of Fact 44, 46-47. Likewise, the other errors made by appellant in assessing drainage and roadway design are supported by credible evidence, as discussed above. *See* Findings of Fact 48-54.

Nonetheless, appellant suggests the testimony of the appointing authority's witnesses should be disregarded because the appointing authority did not enter supporting physical documentation into the record. N.T. 6/19/17, pp. 81, 304-306; Ap. Brief, pp. 1, 3-6. Specifically, appellant argues that the appointing authority should have entered into evidence his reviews of the highway occupancy permit applications that formed the basis for the revised interim EPR. We do not need this documentation to determine credibility. Appellant does not assert that any

of the witnesses misrepresented the contents of his comments or the applications. Rather, appellant takes issue with his supervisor's instructions, which he asserts were wrong. N.T. 6/19/17, pp. 281, 326-327; Ap. Brief, p. 11.

Appellant further argues that the testimony of the appointing authority's witnesses should be disregarded because the appointing authority did not enter into the record specific written policies. Ap. Brief, pp. 1, 3, 7. Contrary to appellant's claim, the appointing authority entered into evidence the written Working Rules, which set forth the rule upon which the discipline was based—unsatisfactory work performance. *See* Finding of Fact 65. The appointing authority also entered into evidence the written corrective action plan which listed the specific standards and measures by which appellant's performance would be rated. *See* Findings of Fact 8-14. The ways in which appellant failed to meet these standards was detailed on the written revised interim EPR that was entered into evidence. *See* Findings of Fact 38-42. Furthermore, the appointing authority provided credible testimony detailing the specific engineering principles, such as sight distance, spread of flow and roadway design, that appellant failed to appropriately address in his comments. *See* Findings of Fact 46, 50, 53. As a Civil Engineer Transportation, appellant's duties include providing engineering expertise when assessing whether there are deficiencies with the highway occupancy permits that he reviews. *See* Finding of Fact 3.

Further, the appointing authority presented credible testimony that appellant was offered all available trainings and policies were explained to him during the PDCs and interim EPR meetings. *See* Findings of Fact 61-62. Also, appellant's immediate supervisor was available on a daily basis to answer appellant's questions and assist him with any issues. *See* Finding of Fact 63. Indeed,

appellant was encouraged to ask questions of his immediate supervisor before providing his draft comments. *See* Finding of Fact 64. However, appellant chose not to seek such assistance. *See* Finding of Fact 56. Thus, we are not persuaded by appellant's argument that the testimony of the appointing authority's witnesses should be disregarded for lack of physical documentation and/or written policies. We also reject appellant's assertion that his training was inadequate. N.T. 6/19/17, pp. 314-315. Contrary to appellant's claim, the Commission finds that no progress has been made by appellant because he refuses to listen to the instruction provided by his supervisors.

Based on the above, the Commission is not persuaded by appellant's attempts to shift his responsibility for his deficient performance to others. Misconduct amounting to violation of law, rule, or lawful and reasonable departmental orders can constitute good cause when suspending an employee. 4 Pa. Code. § 101.21 (2004). Here, the appointing authority presented credible evidence that appellant failed to attain the performance standards outlined in the corrective action plan, which resulted in an unsatisfactory interim EPR for rating period November 29, 2016 to January 17, 2017.

It was appellant's responsibility to generate comments in the appointing authority's electronic permitting system detailing deficiencies in highway occupancy permit applications. The credible testimony of appointing authority's witnesses established that appellant failed to satisfactorily discharge this duty. We find that appellant's failure to perform this responsibility hampered and frustrated his duties as a Civil Engineer Transportation, thereby providing good cause for a Level-Two ADLS. *McCain, supra*.

IV. Appellant's Discrimination Claims

Appellant alleged discrimination based upon race, disability, and other non-merit factors. Comm. Ex. B. Specifically, appellant alleged a non-merit factor based on retaliation for filing an equal employment opportunity complaint in January 2016. N.T. 2/28/17, p. 23, Comm. Ex. B. Having carefully reviewed the evidence, the Commission finds that appellant has not met his burden of establishing discrimination based on any of these factors.

Appellant presented no evidence as to his race nor did he present any credible evidence showing that the appointing authority treated him differently from similarly situated employees. Appellant also failed to present any credible evidence that he was disabled or regarded as disabled. Appellant argues that the appointing authority regarded him as disabled because he was found unfit for duty and suspended in 2015. N.T. 6/19/17, pp. 259-261; N.T. 2/28/17, pp. 20, 342-343, 345-346, 350; Ap. Ex. 1 (2/28/17); Ap. Brief, p. 6. There is no credible evidence that the unfit for duty charge is related in any way to a legally protected physical or mental disability. To the contrary, the appointing authority presented credible evidence that the unfit for duty charge was based exclusively on unprofessional behavior. N.T. 2/28/17, pp. 355-358. Therefore, the Commission finds that appellant's evidence of discrimination based on race, national origin, and disability is too vague to show that it is more likely than not that the appointing authority issued the Level-Two ADLS for those reasons.

Appellant has also failed to present credible evidence establishing a temporal connection between the complaint that he filed in January 2016 and the issuance of the Level-Two ADLS, which is the subject of the instant appeal.

“[D]iscrimination cannot be inferred...There must be some affirmative support adduced to sustain the allegations of discrimination.” *Tempero v. Dep’t of Environmental Resources*, 403 A.2d 226, 229 (Pa. Commw. 1979). Here, appellant’s performance problems persisted before he filed the January 2016 complaint. Appellant received his first unsatisfactory EPR in October 2015. *See* Finding of Fact 6. As a result of this unsatisfactory EPR, a corrective action plan was implemented in December 2015. *See* Finding of Fact 7. Based on appellant’s repeated resistance to his supervisors’ instructions under this corrective action plan, appellant received five unsatisfactory interim EPRs, including the revised interim EPR upon which the present discipline is based. *See* Findings of Facts 17-19, 21, 25, 29-30, 35, 38. These unsatisfactory interim EPRs resulted in progressive discipline for appellant’s continued poor performance. *See* Findings of Fact 20, 23, 27.

Further, there is no credible evidence of discrimination based on appellant’s following assertions: (1) the procedure for issuing EPRs defies common sense; (2) Outlook should not be used when scheduling EPR meetings; (3) he was disrupted while eating lunch at his desk which is against his religion; (4) a Caucasian employee was permitted to work flexible hours; and (5) he was required to work with others which is difficult for him based on cultural differences. N.T. 6/19/17, pp. 310, 312-313, 317-321; Ap. Brief, pp. 6-7, 11.

Regarding the procedure for issuing EPRs, appellant asserts common sense requires the immediate supervisor to review and sign the EPR first, and then if the employee disagrees, the employee should discuss the matter with the reviewing officer. N.T. 6/19/17, p. 310. Pursuant to the appointing authority’s standard procedure, both the immediate supervisor and reviewing officer discuss the EPR

prior to presenting it to the employee. *See* Finding of Fact 58. Appellant does not assert and there is no evidence to suggest that this policy was applied disparately. Thus, we are not persuaded by appellant's claim that this procedure is discriminatory.

Additionally, there is no evidence to support appellant's claim that scheduling EPR meetings through Microsoft Outlook is discriminatory. We find Otten's testimony credible that the calendar invites scheduling appellant's fifth interim EPR meeting are not accessible by the public. *See* Finding of Fact 67. Only the person to whom the invite is sent can see it. *See* Finding of Fact 67. Likewise, there is nothing discriminatory about the reservation for the conference room. This reservation does not in any way indicate that the meeting is about appellant's interim EPR and it has been marked private so that others cannot view any additional notations about the meeting. *See* Finding of Fact 68.

Regarding the disruptions during appellant's lunch, appellant acknowledged that he did not make anyone aware of the religious restriction regarding his mealtimes. *See* Finding of Fact 69. Furthermore, there is no connection between this religious restriction and appellant's poor work performance which was the basis for the discipline.

Likewise, there is no credible evidence establishing a connection between the present discipline and appellant's belief that a Caucasian employee was permitted to work flexible hours. In fact, appellant acknowledged that there are no complaints on his EPR regarding his hours. N.T. 6/19/17, p. 324. Furthermore, Otten credibly testified that the Caucasian employee does not work flexible hours but may be out of the office during scheduled work times because he is working in

the field. N.T. 6/19/17, pp. 346-348. Appellant acknowledged that he does not know when the Caucasian employee is on vacation or when he is working in the field. N.T. 6/19/17, p. 323.

Finally, regarding appellant's failure to collaborate with his co-workers, the appointing authority has a reasonable expectation of employee courtesy, cooperation, and professionalism. Appellant offers no evidence or explanation as to when or how "cultural differences" have affected his ability to interact with his co-workers. Appellant also has not alleged and there is no evidence to suggest that appellant's co-workers created a hostile working environment based on his race.

Considering the above, the Commission finds that appellant's evidence of discrimination related to his race, disability, and retaliation is too vague to show that it is more likely than not that the appointing authority issued the Level-Two ADLS for those reasons. The Commission concludes that appellant did not present evidence of any conduct by the appointing authority that would be sufficient to make out a case that he was suspended for discriminatory reasons. 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 meet his burden to show that the discipline was more likely than not motivated by discrimination.

Furthermore, the appointing authority established that there were legitimate non-discriminatory reasons for discipline.²⁶ Extensive credible evidence was presented by the appointing authority establishing that the Level-Two ADLS was based upon appellant's work performance. *See* Findings of Fact 28-37. Also, there is no evidence of disparate treatment. The appointing authority presented credible evidence that the standard procedure was followed when issuing interim EPRs to appellant. *See* Findings of Fact 59. Accordingly, we enter the following:

CONCLUSIONS OF LAW

1. The appointing authority has presented evidence establishing good cause for suspension under Section 803 of the Civil Service Act, as amended.

2. 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,²⁷ dismisses the appeal of Farzin Afrasiabipour challenging his Level-Two Alternative Discipline in Lieu of a three-day suspension from regular

²⁶ When the initial burden of proving a *prima facie* case of employment discrimination is met, the burden of production shifts to the appointing authority to clearly advance a legitimate non-discriminatory reason for the employment action through the introduction of admissible evidence. *Nwogwugwu*, 594 A.2d at 850.

²⁷ Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.

Civil Engineer Transportation employment with the Pennsylvania Department of Transportation and sustains the action of the Pennsylvania Department of Transportation in the Level-Two Alternative Discipline in Lieu of a three-day suspension of Farzin Afrasiabipour from regular Civil Engineer Transportation employment effective March 22, 2017

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Officially Mailed: July 17, 2019
Emailed: July 17, 2019