

COMMONWEALTH OF PENNSYLVANIA

Farzin Afrasiabipour : State Civil Service Commission
v. :
Pennsylvania Department :
of Transportation : Appeal No. 29686

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

ADJUDICATION

This is an appeal by Farzin Afrasiabipour challenging his removal from regular Civil Engineer Transportation employment with Pennsylvania Department of Transportation. A hearing was held on October 27, 2017, at the State Civil Service Commission’s Eastern Regional Office in Philadelphia, Pennsylvania before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony¹ and exhibits² introduced at the hearing, as well as the Briefs submitted by the parties. The issues before the Commission are whether there is just cause for removal and whether appellant has established that the disciplinary action was the result of discrimination.

FINDINGS OF FACT

1. By letter dated June 23, 2017, appellant was removed from his position as regular Civil Engineer Transportation, effective close of business June 26, 2017. The appointing authority charged appellant with a violation of Minor Work Rule #6—unsatisfactory work performance. Specifically, the

¹ At the hearing on the instant appeal, the appointing authority requested that the Commission take administrative notice of the transcripts from the prior hearings, which occurred on February 28, 2017 and June 19, 2017. N.T. 10/27/17, pp. 17-18. Appellant did not object to this request. N.T. 10/27/17, p. 22. We hereby take notice of the record in *Farzin Afrasiabipour v. Pennsylvania Department of Transportation*, Appeal Nos. 29123, 29223, and 29616. 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 exhibits, which were admitted into evidence at the hearings on February 28, 2017, June 19, 2017, and October 27, 2017 are identical. Specifically, appointing authority exhibit nos. 3, 8, and 9, which were introduced at the October 27, 2017 hearing respectively correspond to exhibit nos. 3, 8, and 9, which were introduced at the June 19, 2017 hearing, and exhibit nos. 16, 17, and 18, which were introduced at the February 28, 2017 hearing. Likewise, appointing authority exhibit nos. 1 and 2, which were introduced at the June 19, 2017 hearing, respectively correspond to appointing authority exhibit nos. 1 and 3, which were introduced at the February 28, 2017 hearing. Additionally, appellant exhibit no. 4, which was introduced at the October 27, 2017 hearing, corresponds to appellant exhibit no. 2, which was introduced at the February 28, 2017 hearing. To avoid redundancy, the Commission will cite to the number of the exhibit which was introduced at the most recent 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.

appointing 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

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. 10/27/17, pp. 30, 35-36; N.T. 6/19/17, pp. 24, 28-29; N.T. 2/28/17, pp. 39-42, 45; AA Ex. 1 (10/27/17).

³ By Order dated July 19, 2017, the interim EPR portion of appellant’s appeal was denied a hearing because an interim EPR is not a personnel action appealable under the Rules of the Civil Service Commission. N.T. p. 12.

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. 10/27/17, pp. 37, 40-41; 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. 10/27/17, pp. 42-43, 104; N.T. 6/19/17, pp. 37, 164-166; N.T. 2/28/17, pp. 51-52, 219; AA Ex. 2 (10/27/17).
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. 10/27/17, pp. 47-48; N.T. 2/28/17, pp. 55-56, 166; AA Exs. 5 (10/27/17), 2 (6/19/17), 4 (6/19/17), 6 (6/19/17), 4a (2/28/17), 4b (2/28/17), 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* the individual job factors listed in Finding of Fact 9. N.T. 6/19/17, pp. 165; AA Ex. 2 (10/27/17).
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 (10/27/17), 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 (10/27/17), 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 (10/27/17), 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 (10/27/17), 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 (10/27/17), 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 (10/27/17), p. 2.

14. The corrective action plan set forth the following specific standard necessary for satisfactory performance in the area of interpersonal relations/equal employment opportunity:

No incidents come to your supervisor's attention during this evaluation which involves you having demonstrated disruptive behavior of any kind including inappropriate comments, offensive noises, indiscreet or insensitive remarks made to your supervisor, management or to other employees inconsistent with the professional demeanor you are expected to maintain.

AA Ex. 2 (10/27/17), p. 3. This standard was measured as follows:

Zero incidents of disruptive, unprofessional or threatening behavior towards other employees, supervisors

or management. Clearly demonstrate through his actions, the ability to be a team player.

AA Ex. 2 (10/27/17), p. 3.

15. Under the corrective action plan, interim EPRs were issued to appellant. N.T. 10/27/17, p. 43; 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. 5 (10/27/17), 4 (6/19/17), 6 (6/19/17), 4a (2/28/17), 4b (2/28/17), 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 (10/27/17).
17. The overall ratings on each of the interim EPRs issued under the corrective action plan were unsatisfactory. These unsatisfactory EPRs resulted in progressive discipline. After the issuance of each discipline, the corrective action plan was continued. N.T. 10/27/17, pp. 43-46; AA Exs. 5 (10/27/17), 4 (6/19/17), 6 (6/19/17), 4a (2/28/17), 4b (2/28/17), 10 (2/28/17), 14 (2/28/17).

18. The first interim EPR was issued to appellant for the period of December 23, 2015 through February 3, 2016. N.T. 2/28/17, p. 57; AA Ex. 4a (2/28/17).
19. The second interim EPR was issued to appellant for the period of February 4, 2016 through March 17, 2016. N.T. 2/28/17, p. 57; AA Ex. 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. N.T. 2/28/17, pp. 61-62; AA Ex. 7 (2/28/17).
21. A third interim EPR was issued to appellant for rating period March 18, 2016 through June 20, 2016. N.T. 2/28/17, pp. 63-64; 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. A fourth interim EPR was issued to appellant for rating period June 21, 2016 through October 26, 2016. N.T. 2/28/17, pp. 87-88; AA Ex. 14 (2/28/17).
25. 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).
26. Based on the fourth interim EPR, a Level-Two ADLS with final warning, dated November 28, 2016, was issued to appellant for unsatisfactory work performance. N.T. 10/27/17, p. 167; N.T. 6/19/17, pp. 39-40; N.T. 2/28/17, pp. 99-101; AA Ex. 3 (10/27/17).

27. A fifth interim EPR was issued to appellant for the rating period of October 27, 2016 to January 17, 2017. N.T. 6/19/17, pp. 40-41, 168; AA Ex. 4 (6/19/17).
28. A revised fifth interim EPR was issued to appellant for the rating period of November 29, 2016 to January 17, 2017. N.T. 6/19/17, p. 44; AA Ex. 6 (6/19/17).
29. During the rating period for the revised fifth interim EPR, appellant reviewed nine highway occupancy permit 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.
30. Based on the revised fifth interim EPR, a second Level-Two ADLS, with final warning, dated March 22, 2017, was issued to appellant for unsatisfactory work performance. N.T. 10/27/17, pp. 166-168, 226; N.T. 6/19/17, pp. 278-279; AA Ex. 4 (10/27/17).
31. A sixth interim EPR was issued to appellant for the rating period of March 23, 2017 to May 2, 2017. N.T. 10/27/17, pp. 46-47; AA Ex. 5 (10/27/17).

32. During the rating period for the sixth interim EPR, appellant reviewed thirteen highway occupancy permit applications. Five of these applications required major corrections, which amounts to almost forty percent. N.T. 10/27/17, pp. 49-50.
33. On May 2, 2017, appellant's immediate supervisor reviewed the revised interim EPR with appellant. During this meeting, all five applications which required corrections were reviewed with appellant. N.T. 10/27/17, pp. 64, 71-73.
34. On the sixth interim EPR, appellant received unsatisfactory ratings for the following job factors: job knowledge/skills; work results; initiative/problem solving; interpersonal relations/equal employment opportunity; and work habits. Appellant received a needs improvement rating for the communications factor. AA Ex. 5 (10/27/17).
35. Appellant received a needs improvement rating for the communications factor based on his inefficient use of time and lack of coordination during the rating period for the sixth interim EPR. N.T. 10/27/17, pp. 65-66; AA Ex. 5 (10/27/17).

36. Appellant received an unsatisfactory rating for interpersonal relations/equal employment opportunity factor because he exhibited disruptive and threatening behavior during the rating period for the sixth interim EPR. N.T. 10/27/17, pp. 66-68; AA Ex. 5 (10/27/17).
37. Appellant's unsatisfactory rating for the job knowledge/skills factor was based on his deficient review of five applications during the rating period of the sixth interim EPR. Specifically, appellant made critical mistakes on these five applications regarding drainage and roadway design, right-of-way issues, and basic engineering judgement regarding a sequence of construction. N.T. 10/27/17, pp. 48-50, 54, 59, 61; AA Ex. 5 (10/27/17).
38. Appellant's unsatisfactory rating for the work results factor was based on the non-value adding comments that appellant made on five applications during the rating period for the sixth interim EPR. N.T. 10/27/17, p. 65; AA Ex. 5 (10/27/17).
39. Non-value adding comments are comments requesting something that is not necessary or asking something incorrectly. N.T. 10/27/17, p. 65.

“The five applications, which required major corrections during the rating period for the sixth interim EPR included applications for Valley Township, the Borough of West Grove, a winery, a proposed park, as well as an application involving a pipe culvert. N.T. 10/27/17, pp. 51-62.

40. Regarding the application for the proposed park, appellant failed to obtain the “spread of flow” calculation. This calculation was necessary because one of the two driveways for the proposed park was upstream. Appellant made the same mistake during the rating period for the revised fifth interim EPR when reviewing a soccer field application. N.T. 10/27/17, pp. 51-52; N.T. 6/19/17, pp. 54-55.
41. Appellant is responsible for assessing the “spread of flow” that would result from the drainage design and requesting the calculation from the applicant if it is necessary. N.T. 10/27/17, p. 52; N.T. 6/19/17, pp. 54-56.
42. 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. 10/27/17, p. 51; N.T. 6/19/17, pp. 54-55.

43. Regarding the application for Valley Township, appellant failed to address an issue with the roadway design. Specifically, the existing pipe under the driveway needed to be pushed back or extended from its present position to accommodate the proposed expansion of the driveway to two lanes. As proposed, the expanded driveway sat right on top of the edge of the pipe creating a steep drop off into which a car could fall. Appellant failed to address this issue in the comments. N.T. 10/27/17, pp. 56-57.
44. There are mark ups that appellant can provide to the designer through the electronic permit system, which address roadway design issues. N.T. 10/27/17, p. 56.
45. Because appellant failed to appropriately address the roadway design issue for the Valley Township application, appellant's immediate supervisor provided the mark ups to the designer and directed that the pipe be pushed back farther from the state highway. N.T. 10/27/17, pp. 56-57.

46. Regarding the application submitted by the Borough of West Grove, appellant failed to include a comment directing the applicant to provide a temporary construction easement or a right of entry letter. N.T. 10/27/17, pp. 60-61.
47. A temporary construction easement or a right of entry letter is required when work is being done on someone else's property. N.T. 10/27/17, p. 60.
48. The information provided by the engineer for the Borough of West Grove established that an extensive amount of work would be done outside of the legal right-of-way for both the borough and the state. N.T. 10/27/17, p. 60.
49. The Borough of West Grove did not include a temporary construction easement or a right of entry letter. N.T. 10/27/17, p. 62.
50. Regarding the application for the winery, appellant failed to include a comment directing the applicant to provide a sequence of construction. N.T. 10/27/17, p. 62.

51. A sequence of construction is required when the construction cuts into a travel lane of a state highway. The sequence of construction outlines how the applicant is going to accomplish this and what is going to happen during non-working hours so that motorists have safe passage, especially at nighttime. N.T. 10/27/17, pp. 61-62.
52. To build the access to the winery, the applicant needed to cut into part of the travel lane of a state highway because there was no shoulder. N.T. 10/27/17, p. 61.
53. Regarding the application involving the pipe culvert, appellant included an erroneous comment, which stated that the drainage system for the roadway did not have sufficient capacity. N.T. 10/27/17, pp. 53-54.
54. The roadway for the application involving the pipe culvert required a drainage system with a capacity for a 25-year storm. The calculations established that it had capacity for a 100-year storm. N.T. 10/27/17, pp. 53-54.

55. 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. 10/27/17, pp. 102-103; N.T. 6/19/17, p. 163; N.T. 2/28/17, pp. 112-113, 228.
56. 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. 10/27/17, p. 104; N.T. 6/19/17, pp. 163-164.
57. 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. 5 (10/27/17), 2 (6/19/17), 4 (6/19/17), 6 (6/19/17), 4a (2/28/17), 4b (2/28/17), 10 (2/28/17), 14 (2/28/17).

58. On May 12, 2017, a pre-disciplinary conference (hereinafter “PDC”) was held at which appellant’s poor performance as detailed in the sixth interim EPR was discussed. N.T. 10/27/17, pp. 135, 170, 176-177.
59. During the May 12, 2017 PDC, appellant was provided an opportunity to respond. Appellant was also provided an opportunity to bring documentation with him to the PDC and to provide additional documentation within three days after the PDC. N.T. 10/27/17, pp. 135, 177, 180-181; AA Ex. 6 (10/27/17).
60. During all of 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. 10/27/17, p. 133; N.T. 6/19/17, pp. 187-188; N.T. 2/28/17, pp. 271-272, 274.

61. 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.
62. Appellant was encouraged to ask questions of his immediate supervisor before providing his draft comments. N.T. 2/28/17, pp. 253-254.
63. Appellant's immediate supervisor gave appellant instructions on how to fix the problems that he was having when reviewing highway occupancy permits when he met with appellant. N.T. 10/27/17, p. 77.
64. Formal and informal training is provided to all employees. Formal training is provided by the appointing authority's Central Office. N.T. 10/27/17, p. 112.
65. Appellant's second level supervisor informs all employees about trainings that are being offered. N.T. 10/27/17, p. 112.
66. Appellant's second level supervisor has never denied any employee an opportunity to attend training. N.T. 10/27/17, p. 112.
67. 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.

68. Periodic staff meetings are held at which formal policies, regulations, informal policies and directions are reviewed. N.T. 10/27/17, p. 113.
69. Topics discussed at staff meetings include highway occupancy permit applications, new technology, and any updates to the appointing authority's publications. N.T. 10/27/17, p. 76.
70. All employees are required to attend staff meetings, unless there is a legitimate reason for their absence. N.T. 10/27/17, pp. 76, 115.
71. A highway occupancy permit staff policy meeting occurred on March 16, 2017. N.T. 10/27/17, p. 78; AA Ex. 10 (10/27/17).
72. The agenda for the March 16, 2017 meeting included the following directives:

In general, discuss the project with the district supervisor prior to 28 days.

Make all significant comments in the 1st review or 1st review where the information is available.

All comments must be value adding and pertain to the project that is being reviewed...If [you] are not sure about making a comment discuss [it] with [your] supervisor or meet well before 30 days.

AA Ex. 10 (10/27/17).

73. Appellant attended the March 16, 2016 meeting. N.T. 10/27/17, p. 78.
74. Central Office presented a three-day highway occupancy permit training in October 2016. N.T. 10/27/17, pp. 79-80, 114-115.
75. A handbook was provided to persons who attended the October 2016 training. N.T. 10/27/17, pp. 79-80; AA Ex. 11 (10/27/17).⁴
76. Appellant received and retained a copy of the handbook that was provided at the October 2016 training. N.T. 10/27/17, pp. 79-80, 316-317; AA Ex. 11 (10/27/17).

⁴ By correspondence received November 3, 2017, appellant requested that Commissioner Lane be recused from the present appeal and that the decision made to admit appointing authority exhibits 11 and 12 be reversed and the exhibits removed from the record. By letter dated December 20, 2017, both requests were denied.

77. The appointing authority's employees utilize the following regulations and manuals when determining whether the applicant's plan is compliant: the Pa. Code, Title 67, Chapter 441; Publication 13, which is the appointing authority's design manual; Publication 72M, which is the appointing authority's roadway construction standards; and Publication 282, which is the appointing authority's highway occupancy permit manual. All employees and the public have access to these regulations and manuals through the appointing authority's website. N.T. 10/27/17, pp. 38-40.
78. Appellant is familiar with the appointing authority's regulations, the Pennsylvania Design Manual, and the Construction Manual. N.T. 10/27/17, pp. 316-317.
79. 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 (10/27/17).

80. 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. 10/27/17, pp. 168-169; N.T. 6/19/17, p. 218; N.T. 2/28/17, pp. 279-280; AA Ex. 9 (10/27/17).
81. The meeting on May 2, 2017 was scheduled through Microsoft Outlook. The email invitation scheduling this meeting is only accessible by the persons to whom the email is sent. N.T. 10/27/17, pp. 263-264; Ap. Ex. 2 (10/27/17), p. 1.
82. On appellant's calendar, the reservation for the May 2, 2017 meeting reads: "2:15 p.m. HOP Review; Room 419; Otten, John." N.T. 10/27/17, p. 266; Ap. Ex. 2 (10/27/17), p. 2.
83. Prior to May 5, 2017, appellant did not inform anyone that his religion prohibited him from being disturbed during his mealtimes. N.T. 10/27/17, p. 280-282.

DISCUSSION

The issues before the Commission are: (1) whether the appointing authority established just cause for appellant's removal from his regular status position of 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 removed due to his "violation of Minor Work Rule #6: Unsatisfactory work performance," in that he received an overall "unsatisfactory" EPR. Comm. Ex. A. The appointing authority also noted in its removal letter that appellant received the following prior related discipline: a written reprimand issued April 12, 2016; a Level-One ADLS issued August 15, 2016; a Level-Two ADLS with a final warning issued November 28, 2016; and a second Level-Two ADLS with a final warning issued March 22, 2017. Comm. Ex. A.

In an appeal challenging the removal of a regular status employee, the appointing authority has the burden of establishing just cause for the personnel action. *Mihok v. Department of Public Welfare, Woodville State Hospital*, 147 Pa. Commw. 344, 348, 607 A.2d 846, 848 (1992); 71 P.S. §§ 741.807, 741.951(a); 4 Pa. Code § 105.15. Just cause must be job related and in some manner rationally and logically touch upon the employee's competency and ability to perform. *Mihok*, 147 Pa. Commw. at 348, 607 A.2d at 848.

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

discrimination⁵ under Section 905.1 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 P.S. § 741.951(b); 4 Pa. Code § 105.16; *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Once a *prima facie* case of discrimination has 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 religious opinions/affiliations, national origin, 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 and appeals with the Commission. Comm. Ex. B.

⁵ 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.

In support of its charges, the appointing authority presented the testimony of John Otten, Francis Hanney, Louis Belmonte, 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. 10/27/17, p. 27; N.T. 6/19/17, p. 20; N.T. 2/28/17, p. 36. Otten has worked for the appointing authority for approximately twenty-four years. N.T. 10/27/17, p. 28. Otten has held his current supervisory position since 2003. N.T. 10/27/17, p. 29; 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 of 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. 10/27/17, p. 29; 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. 10/27/17, p. 30; 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 duty is to review highway occupancy permit applications. N.T. 10/27/17, p. 30; 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. 10/27/17, pp. 32-33; 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. 10/27/17, pp. 32-33; 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. 10/27/17, p. 34; 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. 10/27/17, p. 34; 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. 10/27/17, p. 35; N.T. 6/19/17, pp. 26-27; N.T. 2/28/17, p. 41. Otten noted that low and medium line driveways would be assigned to his subordinates and high line driveways would be assigned to consultants. N.T. 10/27/17, pp. 35-36.

If the application was assigned to appellant, appellant would be responsible for reviewing the application and its attachments⁶ to determine whether it complies with the appointing authority's regulations and policies. N.T. 10/27/17,

⁶ 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.

p. 36; N.T. 6/19/17, pp. 28-29; N.T. 2/28/17, p. 41. 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. 10/27/17, p. 36; N.T. 6/19/17, p. 28. After appellant reviews the documents and conducts the site visit, appellant is responsible for generating comments in the electronic permitting system, which notate any deficiencies in the application and attachments. N.T. 10/27/17, p. 37; N.T. 6/19/17, p. 29; N.T. 2/28/17, pp. 41-42.

Otten explained the following regulations and manuals are utilized by the appointing authority's employees when determining whether the applicant's plan is compliant: Chapter 441 of the appointing authority's regulations;⁷ Publication 13, which is the appointing authority's design manual; Publication 72M, which is the appointing authority's roadway construction standards; and Publication 282, which is the appointing authority's highway occupancy permit manual. N.T. 10/27/17, p. 38. Otten stated all employees and the public have access to these regulations and manuals, either through the appointing authority's website or in hard copy form. N.T. 10/27/17, pp. 38-40. Otten further stated these regulations and manuals are on the appointing authority's website so that consultants and engineers who work for the applicant can easily reference the information. N.T. 10/27/17, p. 40.

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. 10/27/17, p. 40; 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

⁷ Chapter 441 is the chapter of the appointing authority's regulations that addresses access to and occupancy of highways by driveways and local roads. *See* 67 Pa. Code § 441.1 *et seq.*

his corrections and discusses the corrections with appellant. N.T. 10/27/17, pp. 40-41; N.T. 2/28/17, p. 42. Otten explained both of his subordinate employees and the consultants are expected to follow this procedure. N.T. 10/27/17, p. 41.

Once Otten and Hanney are satisfied with the comments, a letter is generated in the electronic system and it is forwarded to the permits office for processing. N.T. 10/27/17, p. 37; N.T. 6/19/17, pp. 29-30; N.T. 2/28/17, pp. 42-43. The letter is then sent to the applicant electronically. N.T. 10/27/17, p. 37; 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. 10/27/17, p. 37; 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.

Otten testified that appellant's job duties are set forth in his position description. N.T. 10/27/17, p. 31; N.T. 6/19/17, pp. 34-35; N.T. 2/28/17, p. 44; AA Ex. 1 (10/27/17). 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. 10/27/17, pp. 35; 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 preparing EPRs on an annual basis. N.T. 10/27/17, p. 41; N.T. 6/19/17, p. 35; N.T.

2/28/17, p. 46. Otten stated that, as a result of appellant's unsatisfactory annual EPR for rating period October 1, 2014 to October 1, 2015,⁸ a corrective action plan was presented to appellant on December 23, 2015. N.T. 10/27/17, pp. 42-43; N.T. 6/19/17, p. 37; N.T. 2/28/17, p. 52; AA Ex. 2 (10/27/17). 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 and mirrored the factors on the interim EPRs. N.T. 2/28/17, pp. 52, 56.

Otten further indicated that, under the corrective action plan, interim EPRs were conducted. N.T. 10/27/17, p. 43; N.T. 6/19/17, pp. 37-39; N.T. 2/28/17, pp. 56-57. Otten stated appellant received unsatisfactory ratings on each of the interim EPRs, which resulted in progressive discipline. N.T. 10/27/17, pp. 43-46. Appellant received a written reprimand based on the unsatisfactory ratings on his first and second interim EPRs. N.T. 2/28/17, pp. 57-58, 61-62; AA Exs. 4a (2/28/17), 4b (2/28/17), 7 (2/28/17). The unsatisfactory rating on his third interim EPR resulted in the issuance of a Level-One ADLS to appellant. N.T. 2/28/17, pp. 63-64; AA Exs. 10 (2/28/17), 13 (2/28/17). A Level-Two ADLS with final warning was issued to appellant based on his unsatisfactory fourth interim EPR. N.T. 6/19/17, pp. 39-40; N.T. 2/28/17, pp. 87-89, 99-101; AA Exs. 3 (10/27/17), 14 (2/28/17). A second Level-Two ADLS with final warning was issued to appellant based on his unsatisfactory revised fifth interim EPR. N.T. 6/19/17, pp. 49, 68-69; AA Exs. 4 (10/27/17), 6 (6/19/17). After the issuance of each discipline, the corrective action plan was continued. N.T. 10/27/17, pp. 43, 45-46. Otten noted the

⁸ The unsatisfactory rating on appellant's annual EPR was based on his poor performance in reviewing the highway occupancy permits, his failure to abide by the appointing authority's policies and regulation, and his unwillingness to function as a team player. N.T. 2/28/17, p. 48, 54; AA Ex. 2 (2/28/17). Otten noted appellant's poor work performance began prior to the annual EPR for rating period October 1, 2014 to October 1, 2015. N.T. 2/28/17, p. 49.

corrective action plan was still in place when appellant was issued his sixth interim EPR for rating period March 23, 2017 through May 2, 2017. N.T. 10/27/17, p. 45; AA Ex. 5 (10/27/17).

Otten testified each interim EPR was based upon the following six job factors: (1) job knowledge/skills; (2) work results; (3) communications; (4) initiative/problem solving; (5) interpersonal relations/equal employment opportunity; and (6) work habits. N.T. 10/27/17, pp. 47-48. Otten further testified that, on the sixth interim EPR, appellant received an unsatisfactory rating for each factor, except the communications factor. N.T. 10/27/17, pp. 48, 65-66; AA Ex. 5 (10/27/17). For the communications factor, appellant was rated needs improvement. N.T. 10/27/17, pp. 65-66; AA Ex. 5 (10/27/17). Otten stated appellant's overall rating on the sixth interim EPR was unsatisfactory. N.T. 10/27/17, p. 70.

Otten testified that appellant reviewed thirteen application during the review period for the sixth interim EPR. N.T. 10/27/17, pp. 49-50. Otten stated five of these applications required extensive corrections. N.T. 10/27/17, pp. 50. Otten stated appellant received an unsatisfactory rating for the job knowledge/skills factor based on his deficient review of these five applications. N.T. 10/27/17, pp. 48-49. Otten stated appellant made critical mistakes regarding drainage and roadway design, right-of-way issues, and basic engineering judgement regarding a sequence of construction. N.T. 10/27/17, pp. 50, 54, 59, 61.

Otten testified appellant failed to address a drainage issue with an application for a proposed park. N.T. 10/27/17, p. 51. Otten stated the proposed park had two driveways, one of which was upstream; however, appellant failed to

obtain the “spread of flow” calculation.⁹ N.T. 10/27/17, pp. 51-52. Otten explained the “spread of flow” measures the amount of water coming down the shoulder and crossing into the driveway. N.T. 10/27/17, p. 51; N.T. 6/19/17, pp. 54-55. Otten stated a “spread of flow” greater than eight feet is unacceptable and creates a safety issue because the vehicle would have to traverse through rushing water to exit. N.T. 10/27/17, p. 51. Otten stated appellant was responsible for assessing the “spread of flow” that would result from the drainage design. N.T. 10/27/17, p. 52.

Otten stated appellant also failed to properly address a drainage design issue with an application that involved a pipe culvert, which is a pipe that crosses the state highway. N.T. 10/27/17, p. 53. Otten explained this roadway required capacity for a twenty-five-year storm. N.T. 10/27/17, p. 53. Otten stated the calculations submitted by the applicant’s engineer established that the pipe had capacity for a one hundred-year storm, which was more than sufficient capacity. N.T. 10/27/17, pp. 53-54. However, appellant included a comment stating that the system did not have sufficient capacity, which Otten stated was erroneous based on his review of the calculations. N.T. 10/27/17, pp. 53-54. Otten further stated that he explained this to appellant, but appellant responded that he was not convinced. N.T. 10/27/17, p. 54.

Otten testified appellant failed to appropriately address a deficiency with the roadway design for an application submitted by Valley Township to expand their existing driveway to two lanes. N.T. 10/27/17, pp. 55-56. Otten explained the existing pipe under the driveway, which conveys water from west to east, was not

⁹ Appellant made the same mistake during the rating period for the revised fifth interim EPR. During that rating period, appellant failed to obtain the “spread of flow calculation” when reviewing a soccer field application. N.T. 6/19/17, pp. 54-55.

long enough to accommodate the new, wider driveway. N.T. 10/27/17, p. 55. Otten stated the plans showed that the new driveway sat right on top of the edge of the pipe creating a steep drop off into which a car could fall. N.T. 10/27/17, pp. 55-56. Otten stated that this is not safe, nor is it the correct way to design it according to Chapter 441 of the appointing authority's regulations. N.T. 10/27/17, p. 55. Otten explained to remedy this issue, the pipe would need to be pushed back and extended or extended from its present position. N.T. 10/27/17, pp. 56-57. Otten stated appellant's comments should have addressed this issue, and he noted there are mark ups that can be provided to the designer through the electronic permitting system. N.T. 10/27/17, p. 56. Otten stated because appellant failed to appropriately address this issue with the roadway design, he provided the mark ups to the designer and directed that the pipe be pushed back farther from the state highway for safety reason and to extend the length of the pipe so that there was ample distance from the end of the pipe to the edge of the driveway. N.T. 10/27/17, pp. 56-57.

Otten testified there was another application on which appellant failed to appropriately address a right-of-way issue. N.T. 10/27/17, p. 59. Otten stated the Borough of West Grove submitted a highway occupancy permit application to enlarge the radius of a corner for a T-intersection where a state highway and borough street intersected. N.T. 10/27/17, pp. 59-60. Otten explained that the information provided by the Borough's engineer established that an extensive amount of work would be done outside of the legal right-of-way for both the borough and the state. N.T. 10/27/17, p. 60. Otten explained when work is going to be done on someone else's property, such as here, the applicant is required to provide documentation in the form of a temporary construction easement or a right of entry letter. N.T. 10/27/17, p. 60. Appellant failed to request this documentation in his comments. N.T. 10/27/17, pp. 60-61.

Otten testified appellant failed to use basic engineering judgment to address a deficiency with an application in Bucks County for a small road access to a winery. N.T. 10/27/17, pp. 61-62. Otten explained to build the access, the applicant needed to cut into part of the travel lane of a state highway because there was no shoulder. N.T. 10/27/17, p. 61. Otten stated in situations such this, the applicant needs to provide a sequence of construction outlining how they are going to accomplish this and what is going to happen during non-working hours so that motorists have safe passage, especially at nighttime. N.T. 10/27/17, pp. 61-62. Otten stated the applicant for the winery failed to provide the sequence of construction, and appellant failed to include a comment addressing it. N.T. 10/27/17, p. 62.

Otten testified that after appellant submitted his comments for each of the above applications, he reviewed the errors with appellant. N.T. 10/27/17, pp. 63-64. Otten stated that appellant argued with him about the corrections but did make the corrections. N.T. 10/27/17, p. 63. Otten further stated that, unlike other employees, appellant does not learn from his mistakes. N.T. 10/27/17, p. 63.

Otten further testified that the five reviews contained non-value adding comments, which resulted in an unsatisfactory rating for the work results factor. N.T. 10/27/17, p. 65; AA Ex. 5. Otten explained non-value adding comments are comments requesting something that is not necessary or asking something incorrectly. N.T. 10/27/17, p. 65. Otten stated non-value adding comments make the appointing authority look “foolish” and waste the applicant’s time and money. N.T. 10/27/17, p. 65.

Otten testified appellant received a needs improvement rating for the communications factor based on his inefficient use of time and lack of coordination. N.T. 10/27/17, pp. 65-66. Additionally, Otten testified appellant received an unsatisfactory rating for the interpersonal relations factor because he exhibited disruptive and threatening behavior during the rating period. N.T. 10/27/17, p. 66. Otten recalled he was sitting in his cubicle when he heard a loud bang that sounded like a chair hitting a table.¹⁰ N.T. 10/27/17, p. 67. Otten stated he stood up and looked in the direction from which he heard the sound. N.T. 10/27/17, p. 67. Otten stated he saw appellant standing by a table with his fists clenched and an angry scowl on his face. N.T. 10/27/17, p. 67. Otten stated it looked like appellant was trying to intimidate his co-worker who was standing on the other side of the table. N.T. 10/27/17, p. 67. Otten stated he was concerned and as he started to walk toward the table, appellant walked away. N.T. 10/27/17, pp. 67-68. Otten stated this is not the first time that he has seen this kind of behavior from appellant. N.T. 10/27/17, p. 69. Otten further stated he received complaints from other employees about appellant's behavior. N.T. 10/27/17, p. 70. Otten noted appellant's behavior is not normal conduct for an office place and it makes himself and the other employees uncomfortable and fearful. N.T. 10/27/17, pp. 68, 70.

Otten testified he met with appellant regarding the sixth interim EPR on May 2, 2017. N.T. 10/27/17, pp. 64, 71. Otten stated Hanney, Belmonte, and Babiarez were also present at this meeting. N.T. 10/27/17, p. 71. Otten stated that, during this meeting, he reviewed each of the job factors with appellant and explained to him why he was being rated as less than satisfactory on each factor. N.T. 10/27/17, p. 72. Otten stated he also reviewed each of the five projects discussed

¹⁰ Otten could not remember the date on which this incident occurred. N.T. 10/27/17, p. 67.

above with appellant. N.T. 10/27/17, p. 70. Otten recalled that during the review he provided the physical documentation to appellant, along with his corrections to appellant's comments. N.T. 10/27/17, pp. 72-73. Otten stated he explained each of the deficiencies to appellant and used the physical documentation as a visual aid. N.T. 10/27/17, p. 73. Otten noted appellant did not respond favorably to the critique, accused the group of harassing him, and said generally to the group, "You are really pissing me off." N.T. 10/27/17, p. 74.

Otten stated that, at the conclusion of the May 2, 2017 meeting, appellant was provided an opportunity to indicate on the EPR whether he agreed with the rating and write comments. N.T. 10/27/17, p. 75. Otten stated appellant refused to do either and he also refused to sign the EPR. N.T. 10/27/17, p. 75. Additionally, Otten noted appellant was provided another opportunity to respond to the ratings at the PDC, which was held on May 12, 2017. N.T. 10/27/17, p. 81.

Lastly, Otten testified to the training and instruction offered to appellant. Otten testified the entire staff and the consultant team attend quarterly and semiannual meetings at which they discuss issues pertaining to highway occupancy permit applications, new technology, and any updates to the appointing authority's publications. N.T. 10/27/17, p. 76. Otten stated attendance at these meetings is mandatory for employees, and he noted appellant was in attendance at these meetings. N.T. 10/27/17, p. 76. Otten stated the agenda for the meetings is presented in advance and employees are invited to suggest topics for discussion and ask questions during the meetings. N.T. 10/27/17, pp. 76-77. Otten noted the most recent meeting occurred on March 16, 2017, at which appellant was in attendance. N.T. 10/27/17, pp. 76, 78; AA Ex. 10 (10/27/17).

Otten testified that, in addition to the staff meetings, other types of training are provided throughout the year. N.T. 10/27/17, p. 79. Otten stated that in October 2016, the appointing authority's Central Office presented a three-day training on highway occupancy permits which the staff attended. N.T. 10/27/17, pp. 79-80. Otten noted at this training a handbook was provided to the attendees, a copy of which appellant had in his cubicle. N.T. 10/27/17, pp. 79-80; AA Ex. 11 (10/27/17). Otten further noted that when he met with appellant, he gave him instructions on how to fix the problems that he was having when reviewing highway occupancy permit applications. N.T. 10/27/17, p. 77.

On cross examination, Otten confirmed for appellant that he and Hanney signed the sixth interim EPR prior to presenting it to appellant. N.T. 10/27/17, pp. 82, 87. Otten also acknowledged that he and Hanney discussed the EPR and agreed upon the ratings prior to meeting with appellant. N.T. 10/27/17, p. 87.

B. Francis Hanney's Testimony

Hanney is employed by the appointing authority as the Senior Traffic Services Manager for District 6. N.T. 10/27/17, p. 96; 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. 10/27/17, p. 96; 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. 10/27/17, p. 98; 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. 10/27/17, p. 99; N.T. 6/19/17, p. 162; N.T. 2/28/17, p. 217. Hanney stated Otten began supervising appellant in 2008. N.T. 6/19/17, p. 163; N.T. 2/28/17, p. 217. Prior to that, LaPenta was appellant's immediate supervisor. N.T. 10/27/17, pp. 99-100; 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 take direction from her and stated he could not work for a woman supervisor. N.T. 10/27/17, p. 100; 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. 10/27/17, pp. 100-101; N.T. 6/19/17, p. 163. Hanney stated appellant's job responsibilities are accurately depicted in his position description. N.T. 10/27/17, p. 99; N.T. 6/19/17, p. 162; AA Ex. 1 (10/27/17). Hanney also noted Otten accurately explained appellant's job responsibilities during his testimony at the October 27, 2017 hearing on the instant appeal. N.T. 10/27/17, p. 99.

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. 10/27/17, p. 101; 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. 10/27/17, p. 102; 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. 10/27/17, p. 102; 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. 10/27/17, p. 102; N.T. 2/28/17, p. 228. Hanney noted both he and the immediate supervisor sign the EPR prior to presenting it to the employee. N.T. 10/27/17, p. 103.

Hanney further noted there are boxes on the last page of the EPR form that the employee can check to indicate whether he or she agrees or disagrees with the rating. N.T. 10/27/17, pp. 102-103. Hanney stated the employee can also indicate on the form whether he or she wishes to discuss the rating further. N.T. 10/27/17, p. 103. Hanney stated appellant was provided an opportunity at the May 2, 2017 meeting to fill in these boxes on the form. N.T. 10/27/17, p. 103. Hanney added all of appellant's EPR reviews have been conducted in a similar manner. N.T. 10/27/17, p. 104.

Hanney testified as a result of appellant's annual EPR for rating period October 1, 2014 to October 1, 2015, a corrective action plan was instituted in December 2015. N.T. 10/27/17, p. 104; N.T. 6/19/17, pp. 164-166; N.T. 2/28/17, p. 219; AA Ex. 2 (10/27/17). Hanney stated the purpose of the corrective action plan was to improve appellant's performance. N.T. 10/27/17, p. 104; N.T. 6/19/17, p. 165; N.T. 2/28/17, pp. 219, 235. It was explained to appellant that the corrective action plan would remain in place until his 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 stated that, as of the date of the hearing on the instant matter, the corrective action plan was in place for more than eighteen months, but appellant's performance and behavior did not improve. N.T. 10/27/17, pp. 104-105.

Hanney testified that, after instituting the corrective action plan, appellant received interim EPRs and attended meetings at which the interim EPRs were discussed with him. N.T. 6/19/17, pp. 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. 10/27/17, p. 108; N.T. 6/19/17, p. 166. Hanney stated 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 he met with appellant on May 2, 2017 to discuss his sixth interim EPR. N.T. 10/27/17, p. 105. Hanney stated that, during this meeting, each of the job factors on which appellant was being rated were discussed with him. N.T. 10/27/17, p. 105. Hanney noted appellant received less than satisfactory ratings for each job factor. N.T. 10/27/17, p. 106. Hanney indicated he agreed with the ratings because appellant has continuously failed to improve in the areas identified in the corrective action plan. N.T. 10/27/17, p. 107.

Hanney stated Otten prepared the sixth interim EPR and he reviewed it. N.T. 10/27/17, p. 106. Hanney could not recall if he made any edits to this EPR, but noted that, as the reviewing officer, he has the authority to do so. N.T. 10/27/17, p. 106. Hanney further noted there is a box on the third page of the EPR form where he can add comments as the reviewer. N.T. 10/27/17, p. 106. Hanney stated that, on appellant's sixth interim EPR, he added a comment indicated that he was disappointed that this interim EPR still showed instances where appellant was not meeting the goals of the corrective action plan. N.T. 10/27/17, pp. 106-107; AA Ex. 5 (10/27/17). Hanney explained appellant continues to make the same mistakes that have been identified and discussed in detail during the prior EPR meetings. N.T.

10/27/17, p. 108. Hanney further indicated that appellant's continued pattern of unprofessional, disrespectful, and sometimes threatening behavior has created a hostile work environment for the staff, who have indicated to him that "they feel tremendous anxiety and are afraid to come into the office at times." N.T. 10/27/17, p. 109.

Hanney testified he provided a PDC notice to appellant for a PDC which was scheduled for May 12, 2017. N.T. 10/27/17, pp. 110-111; AA Ex. 6 (10/27/17). Hanney could not recall whether he attended the May 12, 2017 PDC. N.T. 10/27/17, p. 111. Hanney stated that, after he delivers the PDC notice, the matter is taken over by Human Resources. N.T. 10/27/17, p. 112. Hanney testified that he did not discriminate against appellant based on his national origin or background. N.T. 10/27/17, p. 110. Hanney added that there is a lot of diversity in the office and it is welcomed. N.T. 10/27/17, p. 110.

Lastly, Hanney testified about training opportunities. Hanney testified both formal and informal training is provided to the employees in his unit. N.T. 10/27/17, p. 112. Hanney explained formal training is provided by the Central Office. N.T. 10/27/17, p. 112. 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. 10/27/17, p. 112; N.T. 6/19/17, p. 179; N.T. 2/28/17, p. 241. Hanney also stated he has never denied any employee an opportunity to attend trainings. N.T. 10/27/17, p. 112; N.T. 2/28/17, p. 241.

Hanney testified periodic staff meetings are also held at which formal policies, regulations, and informal policies and directions are reviewed. N.T. 10/27/17, p. 113. Hanney stated these staff meetings are attended by all employees

in his unit, as well as other units and sometimes consultants. N.T. 10/27/17, p. 113. Hanney explained the purpose of the staff meetings are to educate and inform the staff, including appellant. N.T. 10/27/17, p. 114. Hanney noted that at the staff meetings, employees are encouraged to ask questions and there is usually an item on the agenda for group discussion. N.T. 10/27/17, p. 116.

Hanney testified there was a highway occupancy permit staff meeting on March 16, 2017.¹¹ N.T. 10/27/17, p. 113; AA Ex. 10 (10/27/17). Hanney stated the topics discussed at this staff meeting also had been discussed at prior staff meetings. N.T. 10/27/17, p. 114. Hanney also noted the Central Office presented a three-day highway occupancy permit training in October 2016. N.T. 10/27/17, pp. 114-115. Hanney stated this was the second time this training was provided at District 6 since 2004. N.T. 10/27/17, p. 115.

Hanney testified the staff is required to attend staff meetings, unless there is a legitimate reason for their absence. N.T. 10/27/17, p. 115. Hanney stated the staff is also encouraged to attend the permit training and any other available training, but it is not mandatory. N.T. 10/27/17, p. 115.

C. Louis Belmonte's Testimony

Belmonte is employed by the appointing authority as the Assistant District Executive for Services. N.T. 10/27/17, p. 125. Belmonte has held this position for approximately eighteen months and worked for the Commonwealth since 1988. N.T. 10/27/17, pp. 125-126. Prior to being promoted to the position of

¹¹ The agenda for the March 16, 2017 meeting was entered into evidence. AA Ex. 10 (10/27/17). Hanney stated the bullet points listed on this agenda were discussed at the meeting. N.T. 10/27/17, p. 113.

Assistant District Executive for Services, Belmonte served as the acting Assistant District Executive for Services for approximately eighteen months and worked as the District Traffic Engineer since 2000. N.T. 10/27/17, p. 126. Belmonte is presently Hanney's direct supervisor. N.T. 10/27/17, p. 126.

Belmonte testified he does not have a direct role in the EPR development. N.T. 10/27/17, p. 128. Belmonte explained the immediate supervisor and the manager issue the EPRs. N.T. 10/27/17, p. 128. However, Belmonte noted he attended most of appellant's interim EPR meetings because appellant was on a corrective action plan. N.T. 10/27/17, pp. 128-130. Belmonte noted the corrective action plan was issued in December 2015 and remained in place through June 2017. N.T. 10/27/17, p. 129.

Belmonte testified he attended the May 2, 2017 EPR meeting at which five applications reviewed by appellant were discussed. N.T. 10/27/17, pp. 130-131. Belmonte concurred with Otten's explanations regarding the errors made by appellant when reviewing those application and Otten's critique of those errors. N.T. 10/27/17, pp. 132-133. Belmonte also agreed that appellant's errors violated the appointing authority's standard procedures. N.T. 10/27/17, p. 132. Belmonte noted that, during each of the EPR meetings, Otten explained to appellant, in detail, what was done incorrectly and what the expectation was. N.T. 10/27/17, p. 133. Belmonte described Otten's demeanor as professional; however, he noted appellant resisted Otten's instruction and claimed others were wrong, not him. N.T. 10/27/17, pp. 133-134.

Belmonte testified he attended the May 12, 2017 PDC. N.T. 10/27/17, p. 135. Belmonte stated that, at this PDC, Fletcher reviewed each of the job factors with appellant, as well as the comments on the sixth interim EPR. N.T. 10/27/17, p. 135. Belmonte stated Fletcher also gave appellant an opportunity to respond to each of the contentions on the EPR. N.T. 10/27/17, p. 135. Belmonte stated appellant's responses were extremely vague. N.T. 10/27/17, p. 135.

Belmonte further stated he agrees with the decision to remove appellant based on appellant's poor performance and threatening behavior. N.T. 10/27/17, pp. 136-138. Belmonte noted appellant has had a history of disciplinary issues, including behavioral problems. N.T. 10/27/17, pp. 130-131. Belmonte noted that he escorted appellant from the building several times. N.T. 10/27/17, pp. 131, 138.

D. Cheryl Babiarz's Testimony

Babiarz is employed by the appointing authority as a Human Resource Analyst. N.T. 10/27/17, p. 142; 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 eight EPR meetings regarding appellant's performance. N.T. 10/27/17, p. 144. Babiarz explained her role at these meetings was to serve as a neutral party and ensure that the meetings were conducted appropriately. N.T. 10/27/17, pp. 144-145; N.T. 6/19/17, p. 202; N.T. 2/28/17, p. 269. Babiarz noted the entire EPR was reviewed at all the EPR meetings, except for

one. N.T. 10/27/17, p. 144. Babiarz explained one of the meetings was brief because the purpose was merely to inform appellant the start date of the rating period on one of the EPRs was revised.¹² N.T. 10/27/17, p. 144.

Babiarz testified the last EPR meeting occurred on May 2, 2017. N.T. 10/27/17, p. 144. Babiarz stated she attended this meeting along with Hanney, Otten and Belmonte. N.T. 10/27/17, p. 145. Babiarz explained this meeting was conducted in the same manner as the other EPR meetings. N.T. 10/27/17, p. 145. Babiarz stated Hanney, as the chair for this meeting, indicated the purpose of the meeting. N.T. 10/27/17, p. 145. Babiarz also noted Hanney expressed to appellant that he was disappointed in the lack of progress, before turning it over to Otten, who reviewed appellant's deficiencies with respect to five projects. N.T. 10/27/17, pp. 145-146, 148. Babiarz stated that, in reviewing the projects, Otten physically referenced each of the highway occupancy plans as he explained the deficiencies. N.T. 10/27/17, pp. 146-147.

Babiarz further stated that, during the review, appellant was provided an opportunity to explain. N.T. 10/27/17, p. 146. Babiarz characterized appellant's responses as inappropriate and unprofessional. N.T. 10/27/17, p. 148. Specifically, Babiarz stated appellant responded as follows: (1) "You're just nit-picking and trying to agitate me;" (2) "What? Are you going to shoot me for this;" and (3) "You're pissing me off and nobody will discuss this." N.T. 10/27/17, p. 148. Babiarz also recalled appellant asked Otten if he was charging overtime for the

¹² 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.

constant review of his work. N.T. 10/27/17, p. 148. Babiarz noted appellant's responses surprised her because she could not understand why he would respond to supervision and management in that manner. N.T. 10/27/17, p. 150.

During cross-examination, Babiarz confirmed that she does not have an engineering background. N.T. 10/27/17, p. 155; 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. 10/27/17, pp. 155-156; N.T. 6/19/17, p. 211; N.T. 2/28/17, pp. 272-275.

Additionally, when asked by appellant whether training was mentioned at the EPR meetings, Babiarz recalled hearing about the staff meetings. N.T. 10/27/17, p. 156. However, Babiarz could not recall whether there was a discussion about field meetings or field trainings. N.T. 10/27/17, p. 157.

D. Sharion Fletcher's Testimony

Fletcher is employed by the appointing authority as a Human Resource Analyst.¹³ N.T. 10/27/17, p. 159. The working title for her position is Labor Relations Coordinator.¹⁴ N.T. 10/27/17, p. 161; N.T. 2/28/17, p. 278. In that capacity, Fletcher assists management in filing union grievances and addressing disciplinary issues. N.T. 10/27/17, p. 161; N.T. 6/19/17, p. 215. Fletcher is also

¹³ At the June 19, 2017 hearing, Fletcher testified she is employed by the appointing authority as a Human Resource Analyst III. N.T. 6/19/17, p. 214. It is unclear from the testimony whether Fletcher is still an Analyst III.

¹⁴ At the June 19, 2017 hearing, Fletcher testified the working title for her position is Regulations Coordinator. N.T. 6/19/17, p. 215. During the hearing on the instant matter, Fletcher stated that this was incorrectly noted and clarified her working title is Labor Relations Coordinator. N.T. 10/27/17, pp. 161-162.

responsible for conducting investigations and pre-disciplinary conferences, as well as presenting documentation from such conferences to her supervisors. N.T. 6/19/17, p. 215. Fletcher has worked for the appointing authority for nineteen years. N.T. 10/27/17, p. 160; N.T. 2/28/17, p. 276.

Fletcher testified the appointing authority has written work rules that all employees are expected that follow. N.T. 10/27/17, pp. 169; N.T. 6/19/17, p. 217, N.T. 2/28/17, p. 279; AA Ex. 8 (10/27/17). 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. 10/27/17, p. 169; 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. 10/27/17, pp. 168-169; N.T. 6/19/17, p. 218; N.T. 2/28/17, pp. 279-280; AA Ex. 9 (10/27/17).

Fletcher further testified as to the standard procedure for discipline based upon an unsatisfactory performance review. N.T. 10/27/17, pp. 162-164. 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. 10/27/17, p. 162; 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. 10/27/17, p. 163; 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. 10/27/17, p. 163; N.T. 6/19/17, p. 216; N.T. 2/28/17, pp. 280-281. If there is no improvement, a PDC is held and, based on the outcome of the PDC, discipline may be issued, which is typically in the form of a written reprimand. N.T. 10/27/17, p. 163.

Fletcher stated that, after the issuance of the written reprimand, the corrective action plan is continued for another sixty days, at the conclusion of which another interim EPR is issued. N.T. 10/27/17, p. 163; 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, another PDC is held, the outcome of which is typically a Level-One ADLS. N.T. 10/27/17, pp. 163-164; N.T. 6/19/17, p. 216; N.T. 2/28/17, p. 281. Additionally, the corrective action plan is continued for another thirty days. N.T. 10/27/17, p. 164; N.T. 6/19/17, p. 216; N.T. 2/28/17, p. 281.

Fletcher stated if the employee fails to improve during the thirty days, a Level-Two ADLS with final warning is typically issued and the corrective action plan is continued for another thirty days. N.T. 10/27/17, p. 165. If the employee again fails to comply with the corrective action plan, termination is normally the result. N.T. 10/27/17, p. 165. However, rather than being terminated at this point, a second Level-Two ADLS with final warning was issued to appellant, and he was provided another thirty days to achieve a satisfactory level under the corrective action plan. N.T. 10/27/17, pp. 166-168; AA Ex. 4 (10/27/17).

Fletcher testified that, based on the unsatisfactory interim EPR issued after the second Level-Two ADLS, a PDC was scheduled. N.T. 10/27/17, p. 170. Fletcher stated notice of the PDC was provided to appellant by letter dated May 8,

2017. N.T. 10/27/17, pp. 166-167, 170-171; AA Ex. 6 (10/27/17). Fletcher stated the PDC occurred on May 12, 2017 as scheduled. N.T. 10/27/17, p. 170. In attendance at this PDC were appellant, Fletcher, Otten, and Belmonte. N.T. 10/27/17, p. 173. Fletcher could not recall if Hanney was present; however, she noted appellant was represented at the PDC. N.T. 10/27/17, p. 173. Fletcher added appellant has been represented at every PDC. N.T. 10/27/17, p. 173.

Fletcher further testified the May 8, 2017 notice set forth the following three charges: (1) unsatisfactory work performance based on the overall unsatisfactory interim EPR; (2) inappropriate behavior which occurred on April 12, 2017; and (3) a time and attendance violation for failing to call off or report to work on March 14, 2017. N.T. 10/27/17, pp. 171-172. Regarding the unsatisfactory performance charge, Fletcher explained that, at the PDC, she read each of the job factors to appellant and read to him each of the remarks listed in the interim EPR. N.T. 10/27/17, pp. 176-177. Fletcher stated she then gave appellant an opportunity to respond, but he was unable to satisfactorily explained his behavior. N.T. 10/27/17, p. 177. Fletcher explained appellant did not respond to the behavior set forth in the EPR; rather, he challenged the direction given by his supervisors, in that he claimed his supervisors did not know what they were doing and were “nit-picking.” N.T. 10/27/17, p. 178. However, Fletcher noted appellant acknowledged Otten spent time with him explaining each of the ratings. N.T. 10/27/17, p. 179.

Additionally, Fletcher noted appellant was provided an opportunity to bring documents with him to the PDC. N.T. 10/27/17, p. 180. Fletcher stated the PDC notice advised appellant that he may bring documentation. N.T. 10/27/17, p. 180; AA Ex. 6 (10/27/17). Fletcher also noted that, at the conclusion of the PDC, he was advised that he could provide additional documentation to support his

position within three days. N.T. 10/27/17, p. 180. Fletcher stated appellant did not bring any documentation to the PDC; however, he submitted documentation after the PDC. N.T. 10/27/17, pp. 180-181. Fletcher noted this documentation consisted of written notations challenging the engineering principles set forth by Otten on the plans. N.T. 10/27/17, pp. 181-182. Fletcher stated this did not influence her ultimate recommendation because the corrections by appellant's supervisor were based on appellant's performance, and appellant continuously had performance issues. N.T. 10/27/17, p. 183.

Regarding the inappropriate behavior charge, Fletcher stated this charge was for the same conduct about which Otten previously testified. N.T. 10/27/17, p. 172. Fletcher explained that, since this incident was included in appellant's EPR, he was not disciplined for it separately. N.T. 10/27/17, pp. 175-176. Likewise, Fletcher stated appellant was not disciplined for the time and attendance charge because it was unfounded. N.T. 10/27/17, p. 174. Fletcher explained the time and attendance issue arose because appellant provided a document to the Harrisburg office with an incorrect date, which caused confusion as to whether he was at work on March 14, 2017. N.T. 10/27/17, p. 174. Fletcher stated it was determined after listening to appellant's explanation at the PDC that the date on the document was incorrect and appellant had indeed been at work on March 14, 2017. N.T. 10/27/17, pp. 174-175. Thus, Fletcher stated no discipline was taken based on this charge. N.T. 10/27/17, pp. 174-175.

Fletcher stated that, after the PDC concluded and after appellant submitted his documentation, she submitted her recommendation to Karen Brown,¹⁵ along with appellant's documentation, the PDC notes and minutes, and the supporting documentation from the investigation. N.T. 10/27/17, p. 183. Fletcher stated she recommended that appellant be terminated, and Brown agreed. N.T. 10/27/17, p. 184. Fletcher explained appellant was given ample opportunity to improve his work performance and failed to do so. N.T. 10/27/17, p. 184. Fletcher further explained termination was the next step in progressive discipline because appellant's prior discipline was a Level-Two ADLS with final warning. N.T. 10/27/17, p. 184.

Fletcher stated this recommendation was submitted to Anthony Reda, who is the Labor Relations liaison in Harrisburg. N.T. 10/27/17, pp. 184-185. Fletcher stated Reda approved the recommendation and a letter of termination, dated June 23, 2017, was subsequently issued to appellant. N.T. 10/27/17, pp. 166-167, 185; AA Ex. 7 (10/27/17). Fletcher noted that, prior to the progression of discipline based on appellant's poor work performance, which began in December 2015, she did not receive any complaints of discrimination or harassment from appellant against a supervisor. N.T. 10/27/17, p. 186.

On cross-examination, Fletcher explained the PDC is part of the investigative process, but prior to the PDC, documentation is also gathered, which may include witness statements, EPRs, or other documentation pertinent to the charges. N.T. 10/27/17, pp. 187-188. Fletcher acknowledged that she does not have an engineering background. N.T. 10/27/17, p. 189. Fletcher explained appellant's

¹⁵ Brown is Fletcher's immediate supervisor. N.T. 10/27/17, p. 183.

managers and supervisors are responsible for providing direction to appellant about his work because they have more knowledge. N.T. 10/27/17, p. 189. Fletcher further explained she determined appellant's responses challenging Otten's directions were not satisfactory based on the knowledge and skills of appellant's managers and supervisors. N.T. 10/27/17, p. 191. Fletcher denied she was aware of an EEOC complaint that appellant claimed he filed on January 20, 2015. N.T. 10/27/17, pp. 197-198.

E. Karen Brown's Testimony

Karen Brown is a Field Human Resource Officer III with the appointing authority. N.T. 10/27/17, p. 202; N.T. 6/19/17, p. 249; N.T. 2/28/17, p. 301. Brown has worked for the Commonwealth for thirty-three years in Human Resources. N.T. 10/27/17, p. 202. 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 6 and the five counties within that district. N.T. 10/27/17, p. 203; 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. 10/27/17, p. 203; 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. 10/27/17, p. 203; 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 in Harrisburg. N.T. 10/27/17, p. 204; N.T. 6/19/17, p. 250.

Brown agreed with Fletcher's testimony regarding the progressive disciplinary procedures for unsatisfactory performance reviews. N.T. 10/27/17, pp. 204-205; N.T. 6/19/17, p. 251. Brown stated the progressive discipline issued to appellant deviated from this standard procedure in that the Level-Two ADLS was repeated based on the advice from Bureau of Human Resources' Central Office. N.T. 10/27/17, p. 205. Brown further explained the Level-Two ADLS was repeated to provide appellant another opportunity to improve because he was a long-term employee. N.T. 10/27/17, p. 205.

Regarding the discipline, which is the subject of the present appeal, Brown testified she met with Fletcher, reviewed the disciplinary packet, and recommended termination. N.T. 10/27/17, pp. 205-206. Brown stated her review included the documents appellant submitted with his explanation; however, these documents did not cause her to alter her recommendation. N.T. 10/27/17, pp. 206-207. Brown explained appellant's job performance was repeatedly unsatisfactory during the corrective action plan which began in December 2015, which is why she recommended termination. N.T. 10/27/17, p. 208. Brown stated she prepared the removal letter indicating that appellant was removed for violating minor work rule number six—unsatisfactory work performance. N.T. 10/27/17, pp. 208-209; AA Ex. 7 (10/27/17). Brown explained this was the next step of progressive discipline based on appellant's repeated violations of this work rule. N.T. 10/27/17, pp. 209-210. Brown noted this discipline is consistent with disciplines previously issued for this type of violation. N.T. 10/27/17, p. 210. Brown stated this discipline was not imposed for discriminatory reasons, such as appellant's national origin. N.T. 10/27/17, p. 210.

Brown noted she was present when the removal letter was served on appellant by Belmonte. N.T. 10/27/17, p. 210. Brown also noted that she signed the removal letter on behalf of Kenneth McClain who is the District Executive. N.T. 10/27/17, pp. 210-211. Brown explained McClain was unavailable and stated she is authorized to sign all discipline letters for District 6. N.T. 10/27/17, pp. 210-211.

On cross-examination, Brown again explained the decision to remove appellant was based upon her review of the information provided by management and appellant, which established appellant did not meet the standards outlined in the corrective action plan. N.T. 10/27/17, pp. 212-215. Brown also noted that progressive discipline was applied when determining the level of discipline. N.T. 10/27/17, p. 212.

F. Anthony Reda's Testimony

Anthony Reda is employed by the appointing authority as Human Resource Analyst IV. N.T. 10/27/17, p. 218; 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. 10/27/17, p. 218; 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.

10/27/17, pp. 220-221; N.T. 6/19/17, pp. 274-275; N.T. 2/28/17, p. 316. Reda is also responsible for reviewing disciplines above a one-day suspension or Level-One ADLS that are sent to the Central Office by District 6. N.T. 10/27/17, p. 219; 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 6. N.T. 10/27/17, p. 221; N.T. 6/19/17, p. 276; N.T. 2/28/17, p. 317.

Reda testified he is familiar with the prior disciplines issued to appellant, as well as appellant's corrective action plan. N.T. 10/27/17, pp. 222-223; N.T. 6/19/17, p. 275; N.T. 2/28/17, p. 317. Reda explained that, whenever an employee receives a less than satisfactory EPR, the employee is placed on a corrective action plan, the purpose of which is to help the employee achieve a satisfactory level of performance. N.T. 10/27/17, pp. 223-224. Reda explained that, upon implementing a corrective action plan, the employee is generally given ninety days to improve, after which an interim performance evaluation is issued. N.T. 10/27/17, p. 224. If employee's performance is unsatisfactory during the ninety days, a PDC is held and discipline is issued, ordinarily in the form of a written reprimand. N.T. 10/27/17, pp. 224-225. Reda stated the corrective action plan is then continued for another sixty days, at the conclusion of which another interim EPR is issued. N.T. 10/27/17, p. 225. If the employee still does not improve, another PDC is held, a Level-One ADLS is issued, and the corrective action plan is continued for another thirty days. N.T. 10/27/17, p. 225. At the end of the thirty days, another interim EPR is issued, and if the employee's performance remains unsatisfactory, a Level-Two ADLS with final warning is issued, and the corrective action plan is continued for an additional thirty days. N.T. 10/27/17, p. 225. Reda stated failure to satisfactorily perform during this second thirty-day interval ordinarily results in

termination. N.T. 10/27/17, pp. 225-226. However, Reda noted that, if at any time during the process, the employee improves to a satisfactory level, the employee will be taken off of the corrective action plan. N.T. 10/27/17, p. 225.

Reda testified that, after the second thirty-day interval, appellant was issued a second Level-Two ADLS with final warning and the corrective action plan was continued for another thirty days to provide appellant with another opportunity to improve since he was a long-term employee. N.T. 10/27/17, p. 226; N.T. 6/19/17, pp. 278-279. Reda stated appellant's performance did not improve to a satisfactory level during the additional thirty-day period, which resulted in termination. N.T. 10/27/17, pp. 226-227. Additionally, Reda testified that the proper procedure was followed by appellant's supervisors when issuing and reviewing interim EPRs with appellant under the corrective action plan. N.T. 10/27/17, pp. 227-229. Reda stated that the only deviation from the standard procedure was issuing appellant the second Level-Two ADLS, which Reda described as an "extra courtesy." N.T. 10/27/17, p. 229.

Reda noted he received a recommendation and disciplinary packet from Karen Brown. N.T. 10/27/17, pp. 229-230. Reda stated the disciplinary packet included the rebuttal that appellant submitted after the PDC. N.T. 10/27/17, p. 230. Reda stated that, in the rebuttal, appellant indicated that he spoke with an individual about whether he was instructed to write a witness statement against appellant. N.T. 10/27/17, p. 230. Reda stated he asked appellant to obtain a witness statement from this individual, but the witness statement, which was subsequently provided, did not corroborate appellant's claims. N.T. 10/27/17, p. 230.

Reda explained the approval process for terminating an employee. N.T. 10/27/17, pp. 231-232. Reda stated he or one of his analysts writes a justification for the dismissal, which is forwarded to the Division Chief. N.T. 10/27/17, p. 231. Reda noted if the analyst writes the justification, he (Reda) reviews it before forwarding it to the Division Chief. N.T. 10/27/17, p. 231. Reda stated if the Division Chief does not have any questions, the justification is sent to the HR Director. N.T. 10/27/17, p. 231. If the HR Director does not have any questions, it is forwarded to the Deputy Secretary of Administration. N.T. 10/27/17, p. 231. Reda stated that, in this case, everyone approved the dismissal. N.T. 10/27/17, p. 232.

Reda noted that two of the three charges addressed at the PDC were not included as reasons for the termination. N.T. 10/27/17, pp. 232-233. Reda stated the charge regarding an absence on March 14, 2017, was not included because it was the wrong date. N.T. 10/27/17, pp. 232-233. Reda also noted appellant's inappropriate behavior toward his co-worker was not included as a separate charge on the termination letter because it was part of the unsatisfactory interim EPR. N.T. 10/27/17, pp. 233-234. Reda further explained the main reason for appellant's termination was his failure to complete his work as instructed by management. N.T. 10/27/17, p. 234.

On cross-examination, Reda reiterated that appellant is unwilling or unable to perform the work as instructed by management. N.T. 10/27/17, p. 236. Reda further indicated 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. 10/27/17, pp. 239-340.

Additionally, Reda acknowledged he was aware that appellant filed several EEO complaints but stated he did not know the status of those complaints. N.T. 10/27/17, p. 243. Regarding a PHRC complaint that appellant dual filed with the EEOC in 2016, Reda stated this complaint was dismissed. N.T. 10/27/17, pp. 244-247; Ap. Ex. 5 (10/27/17).

II. The Appellant's Evidence

Regarding his disability claim, appellant testified that on November 18, 2015, he was found unfit for duty and suspended.¹⁶ N.T. 10/27/17, p. 251; N.T. 2/28/17, pp. 20, 342-343; Ap. Ex. 1 (2/28/17). Appellant argues this disciplinary matter “is connected to physical, mental, or both physical and mental illness, which is connected to disability.”¹⁷ 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. 10/27/17, pp. 251-252; N.T. 2/28/17, p. 22. However, appellant acknowledged that he has never been diagnosed with a disability, nor has he notified the appointing authority that he was suffering from any kind of medical disability. N.T. 10/27/17, pp. 292-293.

¹⁶ 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). At the June 19, 2017 hearing, 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 noted this term addresses work performance, not disability. N.T. 6/19/17, pp. 263-264.

¹⁷ 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).

Additionally, appellant argues the meeting regarding his sixth interim EPR was scheduled in a discriminatory and retaliatory manner because the public had access to the corrective action plan and interim EPRs, which he claims is an invasion of his privacy. N.T. 10/27/17, pp. 257, 260, 270, 273; Ap. Ex. 2 (10/27/17). Appellant testified the public can click on the calendar and see the corrective action plan.¹⁸ N.T. 10/27/17, pp. 257-258, 260, 265. Appellant explained that, when he double clicked on the Microsoft Outlook calendar entry for May 2, 2017, which reads “2:15 p.m. HOP Review; Room 419; Otten, John,” the corrective action plan appears. N.T. 10/27/17, pp. 267-268, 271-272; Ap. Ex. 2 (10/27/17), p. 2. However, appellant acknowledged that he only attempted to access the calendar from his computer and did not attempt to access it from his co-worker’s computer. N.T. 10/27/17, p. 268. Appellant also acknowledged the email invitation scheduling the May 2, 2017 meeting was only sent to the persons in attendance at that meeting—appellant, Hanney, Babiarz, and Belmonte. N.T. 10/27/17, pp. 263-264; Ap. Ex. 2 (10/27/17), p. 1. Appellant argues he could have been notified of the EPR meeting in person or another way rather than through Microsoft Outlook.¹⁹ N.T. 10/27/17, p. 274.

Appellant testified he filed discrimination complaints in January and May 2016 after he was put on the corrective action plan. N.T. 10/27/17, pp. 284-286. Appellant stated he also filed many other EEO complaints prior to the

¹⁸ At the June 19, 2017 hearing, Otten testified only the person to whom the email invitation is sent is able to see it. N.T. 6/19/17, pp. 135-136. 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.

¹⁹ At the June 19, 2017 hearing, Otten testified he sends the meeting invitations 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.

January 2016 complaint, all of which were dismissed.²⁰ N.T. 10/27/17, pp. 286-287, 289. Appellant stated he only appealed the last EEO complaint that he filed, and it was dismissed. N.T. 10/27/17, p. 288.

Appellant further 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 discriminatory. N.T. 10/27/17, pp. 276-277, 279; N.T. 6/19/17, pp. 317-318. Appellant explained it is against his religion to be disrupted during breakfast, lunch, or dinner. N.T. 10/27/17, pp. 276, 282; N.T. 6/19/17, pp. 318-319. However, appellant acknowledged that he did not make anyone aware of this religious restriction until May 5, 2017. N.T. 10/27/17, pp. 280-282; N.T. 6/19/17, pp. 319-320. Appellant stated he sent an email on May 5, 2017 stating it is against his religion to be disrupted while eating. N.T. 10/27/17, pp. 276, 280-281; Ap. Ex. 3 (10/27/17).

Additionally, appellant argues that the appointing authority did not present any engineering project documents to support the discipline. N.T. 10/27/17, p. 303. However, appellant 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. 10/27/17, pp. 293-294, 305-306. Appellant stated he wrote comments on each of the reviews explaining why he was correct and his supervisor was wrong

²⁰ The appointing authority stipulated that appellant filed internal EEO complaints. N.T. 10/27/17, p. 289. However, the appointing authority did not indicate when these complaints were filed or how many complaints were filed by appellant.

and provided that information to Fletcher within five days after the PDC. N.T. 10/27/17, pp. 294-295, 305, 311-312; AA Ex. 5 (10/27/17). Appellant also acknowledged that these projects were discussed at his EPR meeting. N.T. 10/27/17, pp. 296-297.

Finally, appellant acknowledged he received and retained a copy of a manual provided by the appointing authority at a three-day training session in October 2016. N.T. 10/27/17, pp. 316-317; AA Ex. 11 (10/27/17). Appellant agreed this was the same manual that Otten referred to during his testimony. N.T. 10/27/17, p. 316; AA Ex. 11 (10/27/17). Appellant also acknowledged that he is familiar with the appointing authority's regulations, the Pennsylvania Design Manual, and the Construction Manual. N.T. 10/27/17, pp. 316-317.

III. Just Cause for Removal

Having carefully reviewed the evidence, we find that the appointing authority has established the charge against appellant and established just cause for the removal. In support of our conclusion, we find credible²¹ 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

²¹ 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).

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 37-55. As a result, appellant was issued an overall rating of “unsatisfactory” on his sixth interim EPR for rating period March 23, 2017 through May 2, 2017. *See* Finding of Fact 17. This unsatisfactory interim EPR was the basis for appellant’s removal. Comm. Ex. A.

The appointing authority’s Working Rules establish that unsatisfactory work performance is a minor rule violation. *See* Finding of Fact 80. 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 80. Prior his removal, appellant received a written reprimand, a Level-One ADLS, and two Level-Two ADLS with final warning for similar misconduct—unsatisfactory work performance. *See* Findings of Fact 20, 23, 26, 30. 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 17. Appellant failed to improve, and as a result, he was removed. *See* Findings of Fact 1, 37-55.

Appellant’s failure to satisfactorily discharge his duty to enter comments into the electronic permitting system clearly reflects negatively upon his competence and ability to perform his job duties. *See Mihok*, 147 Pa. Commw. at 348, 607 A.2d at 848 (holding that just cause must be job related and in some manner rationally and logically touch upon the employee’s competency and ability to perform). Thus, the appointing authority established just cause for the removal.

Nevertheless, appellant argues that (1) the evidence presented by the appointing authority was insufficient to establish just cause; (2) his supervisors are wrong in their assessment of his performance; (3) he was not provided adequate training; and (4) there is no physical documentation to support the testimony of the appointing authority's witnesses. Comm. Ex. B; Ap. Brief. The Commission is not persuaded by these arguments.

Regarding the sufficiency of the evidence, appellant asserts that the allegations in the sixth interim EPR are unjustified and fabricated. Comm. Ex. B; Ap. Brief, pp. 3, 6-7. 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 almost forty 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 32. We further find that the appointing authority provided credible evidence detailing corrections that were made to appellant's comments for these applications. *See* Findings of Fact 37-55. 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 included non-value adding comments, failed to appropriately address drainage and roadway design deficiencies, and request necessary documentation or information for five applications during the review period. *See* Findings of Fact 37-55. Appellant's

failure to address these issues was in contravention of basic policies and routine engineering judgment. *See* Findings of Fact 42-45, 48, 52. 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. *See* Finding of Fact 35. 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. The employee is also required to maintain a regular dialogue with his supervisor and follow all directions given by his supervisor. *See* Finding of Fact 13. The appointing authority presented credible evidence that appellant failed to include applicable comments on five highway occupancy permits that he reviewed. *See* Findings of Fact 37-55. There was also credible evidence establishing that appellant failed to coordinate with his supervisor during the rating period. *See* Finding of Fact 35. This is sufficient to establish appellant's unsatisfactory performance in the area of communication.

Further, the appointing authority presented credible evidence of appellant's unprofessional behavior, which is sufficient to establish his unsatisfactory performance in the area of interpersonal relations. Regarding this factor, appellant had been informed that there would be zero tolerance for disrespectful, terse, or inflammatory communications, as well as disruptive, unprofessional, or threatening behavior. Finding of Fact 14. However, despite this instruction, appellant engaged in disruptive and threatening behavior. Finding of Fact 36. Thus, there is sufficient credible evidence to establish appellant's unsatisfactory performance in the area of interpersonal relations.

Moreover, the credible evidence detailed above clearly establishes that appellant has failed to achieve an overall satisfactory performance under the corrective action plan. To achieve an 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 interpersonal relations. Appellant's poor performance in these areas is sufficient to establish appellant's overall "unsatisfactory" performance under the corrective action plan, which was documented on the sixth interim EPR for rating period March 23, 2017 to May 2, 2017. Therefore, we reject appellant's claim that the evidence presented by the appointing authority was insufficient to establish just cause.

Furthermore, we are not persuaded by appellant's claim that his supervisors are wrong in their assessment of his performance. *Ap. Brief*, p. 2. We find that the appointing authority presented credible testimony regarding the deficiencies with appellant's comments. *See* Findings of Fact 37-55. Nonetheless, appellant suggests this credible testimony is undermined by Human Resources' lack of technical engineering knowledge. *Ap. Brief*, pp. 1-2, 4-5. We are not persuaded by this argument; nor do we accept appellant's argument that a third-party independent review of his work was necessary for Human Resources to determine that his performance was unsatisfactory. *Ap. Brief*, p. 5. We find the instruction given to appellant by his supervisors was clear and appellant simply disregarded this instruction.

Moreover, 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, 64-68. Policies were also discussed at the staff meetings, which appellant attended. *See* Findings of Fact 69-74. Additionally, 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 62. Indeed, appellant was encouraged to ask questions of his immediate supervisor before providing his draft comments. *See* Finding of Fact 63. Furthermore, appellant attended a three-day highway occupancy permit training in October 2016, at which he was provided a handbook. *See* Findings of Fact 75-77. Thus, we 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 refused to listen to the instruction with which he was provided.

Lastly, 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. Ap. Brief, pp. 1-4, 9. Contrary to appellant's claim, the appointing authority entered into evidence a copy of the rebuttal that appellant submitted after the PDC.²² N.T. 10/27/17, p. 312; AA Ex. 12 (10/27/17). This rebuttal contains copies of appellant's deficient comments about which the appointing authority's witnesses testified. AA Ex. 12 (10/27/17). Nevertheless, we do not need this documentation to determine credibility. Appellant does not assert that any of the witnesses misrepresented the contents of his comments

²² Appellant argues appointing authority exhibit no. 12 should not have been entered into evidence at the October 27, 2017 hearing because it was not provided to him prior to the hearing. Ap. Brief, p. 5. However, appellant does not dispute this is the document that he submitted after his PDC on the removal action. N.T. 10/27/17, p. 312. Thus, there was no prejudice in permitting the appointing authority to cross-examine appellant on this document.

or the applications. Rather, appellant takes issue with his supervisor's instructions, which he asserts were wrong. AA Ex. 12 (10/27/17). 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.

Based on the above, we find that the appointing authority had just cause to remove appellant. 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 of March 23, 2017 to May 2, 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 reflected negatively upon his competence and ability to perform his duties as a Civil Engineer Transportation, thereby providing just cause for the removal. *Mihok, supra*.

IV. Appellant's Discrimination Claims

Appellant alleged discrimination based upon national origin, disability, religion, and other non-merit factors. Comm. Ex. B; Ap. Brief, pp. 6-9. Specifically, appellant alleged a non-merit factor based on retaliation for filing equal employment opportunity complaints and civil service appeals. Comm. Ex. B; Ap. Brief, pp. 7-8. Having carefully reviewed the evidence, the Commission finds that appellant has not met his burden of establishing discrimination based on any of these allegations.

Appellant presented no evidence as to his national origin 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. 9. 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 national origin and disability is too vague to show that it is more likely than not that the appointing authority removed him for those reasons.

Appellant has also failed to present credible evidence establishing a temporal connection between his discrimination complaints, prior civil service appeals,²³ and his removal. “[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 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,

²³ Appellant subsequently appealed three of the disciplinary actions which resulted from his poor performance. *See Farzin Afrasiabipour v. Pennsylvania Department of Transportation*, Appeal Nos. 29123, 29223, and 29616.

appellant received seven unsatisfactory interim EPRs. *See* Findings of Facts 17-19, 21, 24, 27-28, 31. These unsatisfactory interim EPRs resulted in progressive discipline for appellant's continued poor performance. *See* Finding of Fact 17.

Further, there is no credible evidence of discrimination based on appellant's following assertions: (1) the procedure for issuing EPRs defies common sense; (2) Microsoft Outlook should not be used when scheduling EPR meetings; (3) he was disrupted while eating lunch at his desk which is against his religion; and (4) a Caucasian employee was permitted to work flexible hours. Ap. Brief, pp. 3, 6-9. 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; Ap. Brief, p. 3. 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 56. 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 the appointing authority's testimony credible that the email invitation scheduling appellant's sixth interim EPR meeting was not accessible by the public. *See* Finding of Fact 82. Only the person to whom the email invitation is sent can see it. *See* Finding of Fact 82. There is nothing discriminatory about the calendar reservation

the appointing authority made for the May 2, 2017 meeting. This reservation does not in any way indicate that the meeting is about appellant's interim EPR. *See* Finding of Fact 83.

Regarding the disruptions during appellant's lunch, appellant acknowledged that, prior to May 5, 2017, he did not make anyone aware of the religious restriction regarding his mealtimes. *See* Finding of Fact 84. 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 Caucasian employees were permitted to work flexible hours. *Ap. Brief*, pp. 7-8. In fact, appellant acknowledged that there are no complaints on his EPR regarding his hours. *N.T. 6/19/17*, p. 324. Furthermore, during his testimony, appellant only specified one Caucasian employee was working flexible hours. *N.T. 6/19/17*, pp. 322-323. Contrary to appellant's claim, Otten credibly testified that the Caucasian employee does not work flexible hours but may be out of the office 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.

Considering the above, the Commission finds that appellant's evidence of discrimination related to his national origin, disability, religion, and retaliation is too vague to show that it is more likely than not that the appointing authority removed him 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 removed 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 he received was more likely than not motivated by discrimination.

Furthermore, the appointing authority established that there were legitimate non-discriminatory reasons for his discipline.²⁴ Extensive credible evidence was presented by the appointing authority establishing that the removal was based upon appellant's work performance. Also, there is no evidence of disparate treatment. Accordingly, we enter the following:

CONCLUSIONS OF LAW

1. The appointing authority has presented evidence establishing just cause for removal under Section 807 of the Civil Service Act, as amended.

²⁴ 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.

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,²⁵ dismisses the appeal of Farzin Afrasiabipour challenging his removal from regular Civil Engineer Transportation employment with the Pennsylvania Department of Transportation and sustains the action of the Pennsylvania Department of Transportation in the removal of Farzin Afrasiabipour from regular Civil Engineer Transportation employment.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Officially Mailed: August 22, 2019
Emailed: August 22, 2019

²⁵ Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.