

COMMONWEALTH OF PENNSYLVANIA

Donald H. Stettner : State Civil Service Commission
: :
v. : :
: :
Allegheny County Department of : :
Human Services : Appeal No. 29877

Donald H. Stettner : Jake S. Lifson
Pro Se : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Donald H. Stettner challenging the removal of his name from the eligible lists certified to the Allegheny County Department of Human Services for the position of County Caseworker 2 (Local Government). A hearing was held on May 22, 2018, at the State Civil Service Commission’s Western Regional Office in Pittsburgh, Pennsylvania before Commissioner Odelfa Smith Preston.¹

¹ Commissioner Odelfa Smith Preston resigned from the Commission effective March 21, 2019, before this adjudication was issued.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission² is whether appellant has established that the removal of his name from the eligible list was the result of discrimination.

FINDINGS OF FACT

1. By submission dated February 12, 2018, the appointing authority initiated a request to have appellant's name removed from the lists of candidates certified by the SCSC as eligible for consideration for County Caseworker 2 (Local Government) employment. Comm. Ex. A. This submission was received by SCSC's Executive Office on February 23, 2018. Comm. Ex. A.
2. As justification for its request, the February 12, 2018 submission stated:

Mr. Stettner was arrested on August 19, 2003 for CPSL prohibited Title 18 offenses of endangering the welfare of children, indecent assault and corruption of minors and we are unable to confirm the disposition of these charges.

Comm. Ex. A.

² To avoid confusion, "Commission" will be used to refer to the adjudicatory branch of the State Civil Service Commission and "SCSC" will be used to indicate the administrative branch.

3. By letter dated March 15, 2018, the SCSC notified appellant that his name would be removed:

from any and all eligible lists certified to the Department of Human Services, Allegheny County for the position of County Caseworker 2 (Classification Code L0624) for a period of two (2) years retroactive to February 12, 2018, the date the [appointing authority] submitted its request to the SCSC.

Comm. Ex. D.

4. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended.
5. The criminal charges, which were listed by the appointing authority in its removal request, were withdrawn as part of a negotiated plea deal. N.T. p. 74.
6. Pursuant to the negotiated plea deal, on or about August 4, 2013, appellant plead guilty to summary harassment, under section 2709(a)(1) of the Crimes Code, 18 Pa.C.S.A. § 2709(a)(1). The factual basis for this conviction was that appellant pushed his foster child, who was a minor. N.T. pp. 74-76; Ap. Ex. 25.

7. The summary harassment conviction was the final disposition of the charges listed by the appointing authority in its removal request. N.T. pp. 74-75; Ap. Ex. 25.
8. The summary harassment conviction has not been expunged from appellant's criminal record. N.T. pp. 56, 60; Ap. Ex. 18.
9. The class specification for County Caseworker 2 (Classification Code L0624) indicates that "[e]mployees in this class provide a full range of social and case management services to children, youth and families, people who are mentally disabled, people who are physically challenged, and others to assist them in attaining a more satisfactory social, economic, emotional, or physical adjustment."³ One example of the type of work that County Caseworker 2 employees perform is providing protective and supportive services for abused or neglected children, as well as adults.

³ We hereby take notice of the class specification for County Caseworker 2 (Classification Code L0624), as adopted by the Executive Board. *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) (holding that an 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). Under the Civil Service Act, the Executive Board is responsible for adopting class specifications. *See* 4 Pa. Code § 95.14.

DISCUSSION

The current appeal is a challenge to a decision made by the SCSC Executive Director to grant the appointing authority's request to have appellant's name removed from the lists of candidates eligible for appointment to County Caseworker 2 (Local Government) employment with the appointing authority. Before the Commission, appellant could only bring this challenge through Section 951(b) of the Civil Service Act (hereinafter "the Act") based upon an allegation that the decision to remove his name was due to discrimination in violation of Section 905.1 of the Act; at hearing, the burden of presenting evidence in support of such claim lay with the appellant. *Nosko v. Somerset State Hospital*, 139 Pa. Commw. 367, 370-371, 590 A.2d 844, 846 (1991); 71 P.S. §§ 741.905a, 741.951(b); 4 Pa. Code § 105.16. Accordingly, the sole question for determination by this Commission is whether appellant has presented evidence sufficient to establish his claim that the removal of his name was due to improper discrimination. Here, appellant testified in support of his appeal and argued that he was discriminated against because the appointing authority requested a list removal based on his criminal record. In response, the appointing authority presented the testimony of James Regan.

Appellant testified that he is currently self-employed and has contracts through numerous school districts. N.T. p. 28. Appellant stated that he primarily services Children and Youth. N.T. p. 28. Appellant noted that over the past ten years, he was involved in some criminal litigation; however, he stated that he never lost his credentials, license, or any of his Board certifications. N.T. p. 29. Appellant further stated that, once the criminal charges were expunged, he continued to work with Children and Youth and for numerous school districts. N.T. p. 29.

Appellant testified that he holds doctoral degrees in psychology and education. N.T. p. 29. Appellant stated that he also has a master's level special education degree and a bachelor's degree in administration. N.T. pp. 29-30. Appellant explained that he “designed a major with a combination of education, criminology, police work and so forth.” N.T. p. 30. Appellant noted that this was a liberal arts type of degree. N.T. p. 30.

Appellant testified that the appointing authority solicited him for an interview based upon his résumé on ZipRecruiter. N.T. pp. 36-38; Ap. Exs. 2, 3. Appellant stated that after he decided to interview, he had to take a civil service test. N.T. p. 39. Appellant stated that he had the second highest score on the civil service test for the job titles of County Caseworker 1 and County Caseworker 2.⁴ N.T. p. 39; Ap. Ex. 5. Appellant noted that there were one hundred applicants for the County Caseworker 1 position and twenty-four applicants for the County Caseworker 2 position.⁵ N.T. p. 40; Ap. Ex. 5.

⁴ Appellant stated that his scores were valid until November 2019. N.T. p. 40; Ap. Ex. 5. However, appellant noted that he subsequently received a letter indicating that the “applicant processing system” had changed. N.T. p. 63. Appellant stated that he believes any civil service tests that he took prior to April 2018 will no longer be valid. N.T. pp. 63-64; Ap. Ex. 27. Therefore, appellant believes he, and everyone else, will need to retake the civil service tests. N.T. p. 64. Appellant’s claims regarding the changes to the application process were not raised in his present appeal request. Comm. Ex. E. Furthermore, appellant does not allege, nor is there any evidence to suggest, that the changes to the application process were related to or in any way affected the list removal, which is the subject of the instant appeal. Indeed, the changes to the application process occurred after the appointing authority requested the list removal. Accordingly, we will not address the changes to the application process, as this issue has not been properly raised.

⁵ Appellant’s exhibit 5, indicates appellant’s civil service test results for the job titles of County Caseworker 1 and County Caseworker 2, as well as the number of persons who scored higher, lower, and the same as appellant. Ap. Ex. 5. Therefore, upon review of this exhibit, the Commission believes that appellant misspoke when he stated that the statistics on this exhibit indicated the number of applicants for each position. Contrary to appellant’s claim, this exhibit establishes the number of persons who took the civil service tests for the job titles of County Caseworker 1 and County Caseworker 2, not the number of applicants for a particular position. According to appellant’s exhibit 5, ninety-eight people took the civil service test for the job title of County Caseworker 1 and twenty-six people took the civil service test for the job title of County Caseworker 2. Ap. Ex. 5.

Appellant testified that based upon his score, James Regan sent him a letter dated January 22, 2018, which invited him to interview.⁶ N.T. p. 40; Ap. Ex. 6. Appellant noted that he also received an Availability Survey/Interview Notice for each job title, which listed the salary. N.T. pp. 40-42; Ap. Exs. 7, 8. The starting salaries for the County Caseworker 1 and County Caseworker 2 job titles were \$28,815.96 and \$30,332.64, respectively. N.T. p. 41; Ap. Exs. 7, 8.

Appellant testified that after the interview he was happy and felt that he “hit it off” with the interviewers. N.T. p. 43. Appellant stated that they “really clicked” and he felt “very good about the outcome.” N.T. p. 43. Appellant also noted that he sent a thank you note to the interviewers. N.T. p. 43; Ap. Ex. 9.

Appellant stated that after the interview, Regan called him and informed him that he was going to recommend that appellant’s name be removed from the civil service list because of criminal charges. N.T. p. 44. Appellant stated that he became “a little irate” with Regan and argued that his criminal record was expunged and should not be used against him to remove him from the list. N.T. pp. 44-45. Appellant noted that he felt “really bad” about the way he treated Regan during this phone conversation and sent him an apology letter. N.T. p. 45; Ap. Ex. 10. Appellant stated that, in response, he received a letter from Regan indicating that he formally recommended that appellant be removed from the civil service list.

⁶ The letter dated January 22, 2018 from Regan scheduled appellant for an interview on Monday, February 5, 2018 at 10:00 a.m. This letter also directed appellant to a link where he could view a video, which would be discussed during the interview, and instructed him to bring a copy of his résumé provided that he had not submitted it with his application. Ap. Ex. 6.

N.T. pp. 45-46; Ap. Ex. 11. Appellant testified that he sent a three-page letter responding to Regan's letter, in which he indicated that he intended to send Regan certified copies of the expungements and requested that Regan provide the documents to the SCSC. N.T. pp. 46, 49-50; Ap. Exs. 12, 13, 14.

Appellant claimed that Regan removed him from the list before receiving the three-page letter but notes that Regan forwarded to the SCSC the information that he provided. N.T. pp. 46, 50. Appellant further claimed that it is not possible to conduct a preliminary background check without obtaining "legitimate information" as to the crimes on a person's criminal record. N.T. p. 47. Appellant notes that at the bottom of Regan's letter, it mentions that a preliminary background check was done. N.T. p. 47. Appellant argues that, if a preliminary background check was done, only a summary harassment would have appeared on his criminal record because the other charges were expunged.⁷ N.T. pp. 47-48.

Appellant testified that exhibit 17 establishes that all of his charges, except for the summary harassment, were expunged on May 14, 2013.⁸ N.T. p. 53; Ap. Ex. 17. Appellant also noted that he received a letter from the Allegheny County

⁷ Appellant argues that reporting agencies are required to comply with expungement orders and destroy such records. N.T. pp. 50-51; Ap. Ex. 15. Appellant claimed that Allegheny County failed to destroy his criminal records after the expungement order was issued. N.T. pp. 50-51. The Commission does not have jurisdiction to address whether Allegheny County complied with the expungement order. The present issue before the Commission is whether appellant has established that the removal of his name from the eligible list was the result of discrimination.

⁸ Contrary to appellant's testimony, exhibit 17 does not indicate the date on which appellant's records were expunged by the keepers of the records. Appellant's exhibit 17 is a copy of a Partial Expungement Order. While this Order was issued on March 14, 2013, it does not indicate when the records were expunged. Rather, this Order and the accompanying attachment merely direct the listed keepers of the records to expunge the charges of Indecent Assault, Endangering Welfare of Child, and Corruption of Minors. The summary harassment, to which appellant pled guilty, was to remain on appellant's record. Ap. Exs. 17, 18.

Criminal Court indicating that his record had been expunged.⁹ N.T. p. 52; Ap. Ex. 16. Appellant stated that the only charge which remained on his record was a summary harassment to which he pled guilty. N.T. p. 56; Ap. Ex. 18. Appellant explained that the following charges were expunged: Indecent Assault, Endangering Welfare of Child, and Corruption of Minors. N.T. p. 56; Ap. Ex. 18.

Appellant testified that he obtained a copy of his criminal record. N.T. p. 61; Ap. Exs. 24, 25. Appellant explained that he “did the access and review,” which assesses “every little nook and cranny” of a person’s life. N.T. p. 61; Ap. Ex. 24. Appellant noted that the only charge on his criminal record is one summary offense to which he pled guilty. N.T. p. 62; Ap. Ex. 25. Therefore, appellant argues that Regan discriminated against him by considering misdemeanor and felony offenses that were expunged from appellant’s criminal record. N.T. pp. 62-63; Ap. Ex. 26.

Appellant further argued that people get expungements because they want employment opportunities. N.T. p. 57; Ap. Ex. 20. Appellant stated that he was previously rejected for an employment opportunity based on his charges. N.T. p. 58; Ap. Ex. 21. Appellant explained that, four years ago, he applied for a correctional officer position and was third on the civil service list; however, he was told, “these charges are here; so, we’re not going to hire you.” N.T. p. 58. Appellant

⁹ The heading on the letter indicates that it is from the Criminal Division of the Allegheny County Department of Court Records, not the Allegheny County Criminal Court. Ap. Ex. 16. Furthermore, contrary to appellant’s testimony, this letter merely provided him with a copy of the expungement Order and indicated that a copy of the Order was served on the proper agencies. The letter specifically stated that its purpose was to inform appellant that the Court granted his Petition for Expungement and that the process had been initiated. The letter also noted that it cannot predict when total compliance will occur. Ap. Ex. 16.

stated that the decision not to hire him for the correctional officer position was made by Ms. Pastor, against whom he subsequently filed complaints. N.T. pp. 58-59. Appellant explained that he filed complaints against Ms. Pastor because, during the time that he was incarcerated, Ms. Pastor's husband was his correctional officer. N.T. p. 58; Ap. Ex. 21. Appellant argued that, because Ms. Pastor's husband was his correctional officer, it was a conflict of interest for Ms. Pastor to make a hiring decision that involved him.¹⁰ N.T. p. 59.

Appellant testified that he has a concealed weapon permit. N.T. p. 57; Ap. Ex. 20. Appellant argued: "I can't be too much of a criminal if they're giving me concealed weapon permits." N.T. p. 20. Additionally, appellant testified that a month prior to the hearing on the instant appeal, he filed a petition requesting that the Court remove the summary harassment conviction from his record.¹¹ N.T. p. 60; Ap. Ex. 23.

During cross-examination, appellant explained in more detail the circumstances underlying his arrest and his subsequent guilty plea to the harassment charge. Appellant testified that he was initially arrested on January 13, 2003, based on abuse allegations by his stepson. N.T. p. 73. Appellant stated that while he was litigating this arrest, he was arrested again in April 2003 based on an abuse allegation

¹⁰ Appellant did not challenge the hiring decision made by Ms. Pastor when he filed the present appeal. Nevertheless, assuming that the corrections officer position was a civil service position over which this Commission has appellate jurisdiction, an appeal regarding the non-selection would be untimely because it occurred, by appellant's own admission, four years ago. An appeal challenging a non-selection must be filed "within twenty (20) calendar days of the alleged violation." 71 P.S. § 741.951(b). The twenty-day requirement is mandatory. *Ellis v Commonwealth Dept. of Transportation*, 33 Pa. Commw. 354, 359, 381 A.2d 1325, 1328 (1978). Therefore, the Commission is without jurisdiction to hear an appeal regarding the hiring decision made by Ms. Pastor.

¹¹ No evidence was presented which would establish that appellant's summary offense has been expunged.

by one of his foster children. N.T. p. 73. Appellant further stated that he was arrested three times in the course of one year, but all of the charges except the harassment charge were nolle prossed. N.T. pp. 73-74. Appellant explained that he pled guilty to the reduced charge of summary harassment, and then the other charges were withdrawn as part of a negotiated plea deal. N.T. pp. 74-75. Appellant stated that, specifically, he plead guilty to pushing his foster child when she was going to jump out in front of traffic. N.T. pp. 75-76. Appellant explained that the charges surfaced when the foster child was a minor, but that she was an adult by the time he entered into the guilty plea. N.T. p. 75.

James Regan is the Human Resources Administrator for the appointing authority. N.T. p. 81. Regan has held this position for over ten years. N.T. p. 81. Regan testified that as the Human Resources Administrator, he is responsible for all functions performed by the Department of Human Resources. N.T. p. 106.

Regan testified that, to fill a vacant County Caseworker 2 position, the appointing authority requests an eligibility list from the SCSC. N.T. p. 82. Upon receipt of the eligibility list, the appointing authority sends out availability surveys to the persons on the list. N.T. p. 82. Regan stated that the interviews are scheduled for those persons who indicate on the surveys that they are available. N.T. p. 82. After the interviews are conducted, recommendations are made, and based on those recommendations, the paperwork is processed. N.T. pp. 82-83. If the candidate is not selected for the position, the candidate would be eligible to be interviewed, provided that the candidate's name appears on an eligibility list that is pulled for that position. N.T. pp. 114-115.

Regan testified that appellant was on the eligibility list provided by the SCSC to the appointing authority in late 2017 or early 2018. N.T. p. 83. Regan stated that appellant applied for two County Caseworker 2 positions. N.T. p. 83. One of the positions was with the Office of Children, Youth, and Families, and the other position was with the Office of Behavioral Health. N.T. p. 83. Regan explained that the same list was used to fill both of these positions. N.T. p. 84. Regan testified that appellant interviewed for both of the County Caseworker 2 positions. N.T. pp. 84-85; AA Exs. 1, 2.

On January 26, 2018, appellant interviewed for the County Caseworker 2 position with the Office of Behavioral Health. N.T. p. 86; AA Ex. 2. Regan stated that appellant was not selected for this position based on: (1) potential conflicts of interest with his former clients, which could be numerous; and (2) concerns that he would not be able to separate his role as a long time therapist from his role as a delegate, which is very different. N.T. pp. 85-86; AA Ex. 1. Regan explained that a delegate is responsible for interviewing persons over the telephone and determining whether they qualify for “a warrant under 302,” or whether they are willing to be voluntarily committed. N.T. pp. 102-103.

On February 5, 2018, appellant interviewed for the County Caseworker 2 position with the Office of Children, Youth, and Families.¹² N.T. p. 87; AA Ex. 2. Regan stated that appellant was not selected for this position. N.T. p. 87. The Interview Assessment Form indicated that appellant was not selected because he had difficulty applying his experience to work performed by the Office

¹² The Interview Assessment Form for the County Caseworker 2 position with the Office of Children, Youth, and Families is misdated. Regan testified that the date listed on the form is a typographical error and should read February 5, 2018, not 2017. N.T. p. 90; AA Ex. 2.

of Children, Youth, and Families. AA Ex. 2. There was also concern that appellant would not be able to prioritize the County Caseworker 2 job over his clinical practice. AA Ex. 2.

Regan testified that a preliminary background check is conducted on all of the candidates who apply for the County Caseworker 2 position. N.T. pp. 87-88. Regan explained that the Office of Children, Youth, and Families has a Criminal Investigation Unit. N.T. p. 87. This Unit is responsible for conducting the preliminary background checks on the candidates. N.T. p. 88; AA Ex. 3. Regan stated that the Criminal Investigation Unit conducted a background check on the appellant but was unable to confirm the dispositions on the charges of Indecent Assault and Corruption of Minors. N.T. pp. 89, 108, 124-125; AA Ex. 3. This investigation was completed on February 5, 2018, which was after appellant's January 26, 2018 interview with the Office of Behavioral Health and on the same day as appellant's interview with the Office of Children, Youth, and Families. N.T. pp. 89-90; AA Ex. 3. However, the documentation of the investigation was not generated until the day after appellant's February 5, 2018 interview. N.T. p. 90; AA Ex. 3. Thus, Regan noted that the interviewers would not have had the results of the background check at the time that they were conducting the interviews. N.T. p. 91.

Regan testified that upon receiving the documentation from the Criminal Investigation Unit, he initiated the process to request that appellant be removed from the civil service list because the disposition of his charges was unknown. N.T. p. 91. Regan explained that these charges would have precluded appellant's employment with the appointing authority. N.T. p. 91. Regan stated that by letter dated February 12, 2018, appellant was informed that the appointing authority would be requesting removal of his name from the County Caseworker 2

employment certification. N.T. p. 92; AA Ex. 4. This letter also invited appellant to respond by February 23, 2018 with any information that he wished to submit. N.T. pp. 92-93, 116; AA Ex. 4.

Regan testified that he did not request removal of appellant's name from the list at the time he wrote the February 12, 2018 letter, nor did he request the removal of appellant's name at any time prior to receiving documentation from appellant. N.T. p. 93. Regan stated that he received a written response from appellant, which was dated February 17, 2018. N.T. pp. 93-94; AA Ex. 5. Regan testified appellant's February 17, 2018 letter contained several false allegations accusing Regan of engaging in conduct that never occurred. N.T. pp. 94-97; AA Ex. 5.

In the first paragraph of the February 17, 2018 letter, appellant claimed that he was offered two positions by the appointing authority. AA Ex. 5. Appellant reiterated this claim in the first numbered allegation under paragraph two. AA Ex. 5. Regan testified that this claim was false. N.T. pp. 94-95. Regan stated that appellant was not offered any positions with the appointing authority. N.T. pp. 94-95. Regan stated that appellant was interviewed for two positions but was ultimately rejected as the candidate. N.T. p. 95.

In the second numbered allegation under paragraph two, appellant claimed that Regan advised his HR staff not to speak with him. AA Ex. 5. Regan testified that he never directed the HR staff not to speak with appellant. N.T. p. 96.

In the third numbered allegation under paragraph two, appellant accused Regan of violating a court order by conducting the preliminary background check. AA Ex. 5. Regan testified that his office never received a court order regarding appellant, nor did the Criminal Investigation Unit alert him that there was any such court order.¹³ N.T. p. 96

Appellant also claimed several times in the February 17, 2018 letter, that Regan took action to remove him prior to receiving his response. AA Ex. 5. Regan testified that this claim was false.¹⁴ N.T. pp. 95, 98. Regan stated that, he indicated to appellant in his February 12, 2018 letter that he would be requesting the removal and was awaiting appellant's response. N.T. p. 95; AA Ex. 4.

At the end of the February 17, 2018 letter, appellant wrote that he looked forward to hearing from Regan. N.T. p. 97; AA Ex. 5. Regan testified that he followed-up with appellant by telephone. N.T. p. 97. Regan stated that during this telephone conversation, he informed appellant that he was calling in response to appellant's February 17, 2018 letter because appellant had indicated in the letter that he looked forward to hearing from him. N.T. p. 97. Regan recalled that appellant repeated, in an agitated and argumentative tone, the false allegations from the letter, and accused him of being aware of court orders. N.T. p. 97. Regan stated that he

¹³ The Partial Expungement Order directed the Department of Court Records to serve a certified copy of the Order upon the following: (1) Allegheny County District Attorney; (2) Allegheny County Pre-Trial Services; (3) Magisterial District Judge 05-0-01; (4) "Arresting Agency: Pgh PD;" (5) Pennsylvania State Police Central Repository; (6) Administrative Offices of Pennsylvania Courts; (7) Allegheny Department of Adult Probation; and (8) Allegheny County Jail. Ap. Ex. 17. Nowhere in the Order does it indicate that a copy is to be served on the appointing authority. Ap. Ex. 17.

¹⁴ The time stamp on the appointing authority's request for removal establishes that it was received by the SCSC's Executive Offices on February 23, 2018. Comm. Ex. A.

“had no idea what [appellant] was speaking about.” N.T. p. 97. Subsequently, Regan received a letter from appellant apologizing for his tone during the telephone conversation. N.T. p. 98; AA Ex. 6.

Regan testified that on February 23, 2018, the request to remove appellant’s name from the civil service list was submitted to the SCSC. N.T. p. 98. Regan stated that this request was not submitted before February 23, 2018, because appellant may have wanted to submit additional information, and this was his deadline for doing so. N.T. p. 98. Regan explained that upon reviewing the contents of the response letter submitted by appellant, and the numerous inaccuracies therein, he felt that it was still appropriate to submit the request to the SCSC. N.T. pp. 120, 122, 125. Regan testified that his assistant emailed the form requesting the removal of appellant’s name from the civil service list, along with a copy of the letter sent to appellant and appellant’s response, to the SCSC. N.T. pp. 99-100; AA Exs. 7, 8. Regan further noted that everything he had available to him was submitted to the SCSC. N.T. p. 110. Regan stated that the SCSC subsequently removed appellant from the civil service list. N.T. pp. 101-102, 125.

An employee challenging such a list removal before this Commission may do so only on the basis of a claim that it was affected by discrimination in violation of Section 905.1 of the Act. *Frankowski v. State Civil Service Commission (Department of Labor and Industry)*, 68 A.3d 1020, 1026 (Pa. Commw. Ct. 2013); 71 P.S. § 741.905a. In an appeal alleging discrimination, appellant bears the burden of establishing that the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989), *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990). In analyzing claims

of discrimination¹⁵ 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.

The Commission, having reviewed the record as a whole, finds that the evidence presented by appellant is not sufficient to establish his claim that the removal of his name from the civil service list for the County Caseworker 2 was based on non-merit factors merely because his charges of Indecent Assault,

¹⁵ The Act addresses both “traditional” and “procedural” discrimination. “Traditional discrimination” encompasses only those claims of discrimination based on race, sex, national origin, or other non-merit factors. “Procedural discrimination” refers to a technical violation of the Act. In a case where an employee alleges a technical violation, no showing of intent is required. There must be evidence, however, to show that the employee was harmed by the technical noncompliance or that because of the peculiar nature of procedural impropriety that he or she could have been harmed, but there is no way to prove that for certain. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 461 (1988); 71 P.S. § 741.905a.

Endangering Welfare of Child, and Corruption of Minors were expunged.¹⁶ Furthermore, we find credible¹⁷ the testimony provided by the appointing authority's witness, which advanced a merit-related reason for the list removal.

To be merit-related the conduct in question must be relevant to the proper execution of duties by an employee and be job-related, *i.e.* touching in some logical and rational manner on the person's competency and ability to do the job. *Commonwealth v. Department of Transportation v. Desikachar*, 22 Pa. Commw. 507, 349 A.2d 796 (1976). Here, the appointing authority requested that appellant's name be removed from the civil service list for the County Caseworker 2 position because it could not confirm the disposition of the Indecent Assault, Endangering Welfare of Child, and Corruption of Minors charges. Comm. Ex. A. Regan explained that these charges would have precluded appellant's employment with the

¹⁶ At the conclusion of appellant's case-in-chief, the appointing authority made an oral motion to dismiss the present appeal for failure to join a necessary party. Specifically, the appointing authority argued that appellant's remedy is with the SCSC. N.T. pp. 76-78. While it is true that the Commission's Executive Director has already granted the appointing authority's list removal request administratively, the issue at the Commission's hearing is to review the same request and either grant or deny it. Thus, the issue at the hearing is not simply a review of the Executive Director's decision for error of law or mistake of fact. Rather, it is a *de novo* review of the appointing authority's original request.

Section 97.13 of the Civil Service Rules provides:

An objection to the eligibility for certification or appointment of an eligible whose name appears on a certification shall be promptly raised by the appointing authority using the process established by the Director as set forth in Management Directive 580.34 (as amended) (relating to removal of eligibles for certification or appointment in the classified service). If the objection is sustained by *the Director or Commission*, the appointing authority need not consider the eligible for appointment.

4 Pa. Code § 97.13 (*emphasis added*); *see also* Management Directive 580.34 Amended, § 5(a). Thus, the appointing authority is responsible for initiating a list removal request, not the SCSC. Furthermore, pursuant to the process set forth in Management Directive 580.34 Amended, the appointing authority is also responsible for providing notice to the eligible of the request for removal and identifying the underlying basis for the request, as well as including all supporting documents that it has relied upon in determining that the eligible's name should be removed from the list. Management Directive 580.34 Amended, §§ 7(a)(1)-(2). Based on these responsibilities, the appointing is the real party at interest if a hearing is subsequently granted, not the SCSC. Accordingly, we deny the appointing authority's motion.

¹⁷ 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).

appointing authority. N.T. p. 91. The Request for Removal of Eligible Form submitted by the appointing authority further notes that these charges are prohibited offenses under the Child Protective Services Law. AA Ex. 8. Specifically, Section 6344(c) of the Child Protective Services Law prohibits an administrator, such as the appointing authority, from hiring an applicant if he or she has been convicted of Indecent Assault, Endangering Welfare of Child, or Corruption of Minors. 23 Pa.C.S.A. § 6344(c). Thus, these charges touch upon appellant's ability to do the job, because if it was later confirmed that appellant was convicted of these charges, he would have been statutorily precluded from holding the position of County Caseworker 2.

Ultimately, it was established, at the hearing for the present appeal, that the above charges were withdrawn in exchange for appellant's guilty plea to the reduced charge of summary harassment. N.T. pp. 74-75; Ap. Ex. 18. Appellant plead guilty to summary harassment under section 2709(a)(1) of the Crimes Code, 18 Pa.C.S.A. § 2709(a)(1). Ap. Exs. 18, 25. Pursuant to this section, "a person commits the crime of harassment when, with the intent to harass, annoy or alarm another, the person...strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same." 18 Pa.C.S.A. § 2709(a)(1). Appellant credibly testified the factual basis of his summary harassment conviction was that he pushed his foster child, who was a minor at the time.¹⁸ N.T. pp. 75-76. This misconduct is related to the work performed by the County Caseworker 2 classification, which is set forth in the class specification.

¹⁸ We do not find credible, appellant's claim that his foster child was going to jump out in front of traffic at the time that he pushed her. N.T. pp. 75-76. Appellant's attempt to explain his conduct as if it was something he did to benefit the child is contradicted by his own admission of guilt to having committed a crime under Pennsylvania law.

Class specifications “constitute a primary basis and source of authority for the content and level of difficulty of the examinations for the class and for the evaluation of the qualifications of applicants for examinations.” 4 Pa. Code § 95.14. To that end, class specifications define the work to be performed by a particular class, such as County Caseworker 2. The class specification for County Caseworker 2 indicates that “[e]mployees in this class provide a full range of social and case management services to children, youth and families, people who are mentally disabled, people who are physically challenged, and others to assist them in attaining a more satisfactory social, economic, emotional, or physical adjustment.” One example of the type of work that County Caseworker 2 employees perform is providing protective and supportive services for abused or neglected children, as well as adults. Here, there is credible evidence that appellant was convicted of pushing a minor child, who was his foster child. N.T. pp. 75-76, Ap. Ex. 25. Clearly such behavior touches upon appellant’s ability to provide protective services to abused or neglected children.

Furthermore, appellant does not provide any evidence that the summary harassment conviction, which was the final disposition of the charges listed by the appointing authority in its removal request, is a non-merit factor. Also, there is no evidence which would establish that the harassment conviction had been expunged from appellant’s record prior to the appointing authority’s request that appellant be removed from the County Caseworker 2 civil service list. To the contrary, appellant testified he only made such a request about a month prior to the hearing on the instant appeal. N.T. p. 60; Ap. Ex. 23.

Based on the foregoing, the Commission finds appellant did not meet his burden to make out a *prima facie* case of discrimination. Appellant did not present evidence of any conduct by the appointing authority that, if believed and not otherwise explained, could be sufficient to persuade us that it is more likely than not that the removal of appellant's name from the eligible list was the result of discrimination. In fact, appellant acknowledged that he was convicted of harassment for pushing his minor foster child. N.T. pp. 75-76; Ap. Ex. 25. This conviction was the final disposition of the charges listed by the appointing authority in its removal request and is clearly related to the duties of a County Caseworker 2, which include providing protective and supportive services for abused or neglected children. N.T. pp. 74-75; Ap. Ex. 25.

While the Commission recognizes that the burden of establishing a *prima facie* case cannot be an onerous one, *Nwogwugwu, supra.*, in this matter, appellant's evidence is not enough to show that appointing authority relied on a non-merit factor when it requested the list removal. Moreover, the appointing authority introduced credible evidence sufficient to refute appellant's unsubstantiated assertion of discrimination. Accordingly, we enter the following:

CONCLUSIONS OF LAW

1. The appellant has not presented evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

2. The appointing authority's request is properly based on merit-related criterion adequate to support the request.

ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members,¹⁹ dismisses the appeal of Donald H. Stettner challenging the removal of his name from the eligible lists certified to the Allegheny County Department of Human Services for the position of County Caseworker 2 (Local Government), and sustains the removal of Donald H. Stettner's name from the County Caseworker 2 (Local Government) eligible lists certified to the Allegheny County Department of Human Services effective for a period of two years retroactive to February 12, 2018.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

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

¹⁹ Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.