

COMMONWEALTH OF PENNSYLVANIA

Kathy L. Strayer : State Civil Service Commission
: :
v. : :
: :
Somerset County Assistance Office, : :
Department of Human Services : Appeal No. 29929

Kathy L. Strayer Zachariah Rivenbark
Pro Se Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Kathy L. Strayer challenging her non-selection for appointment to Income Maintenance Caseworker employment with the Somerset County Assistance Office, Department of Human Services. A hearing was held on July 31, 2018, at the State Civil Service Commission’s Western Regional Office in Pittsburgh, Pennsylvania, before Commissioner Odelfa Smith Preston.¹

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

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

FINDINGS OF FACT

1. By e-mail dated April 27, 2018, appellant was informed that she was not selected for the position of Income Maintenance Caseworker with the appointing authority. Comm. Ex. A
2. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended.
3. Appellant is not presently employed by the Commonwealth because she is retired. The last position that appellant held with the Commonwealth was Parole Staff Technician with the Pennsylvania Board of Probation and Parole in Harrisburg, Pennsylvania. Appellant held that position from January of 2000 until June of 2004, when she retired. N.T. pp. 29-30.
4. Appellant is a military veteran. N.T. p. 31.
5. The rule of three was followed when determining which candidates on the civil service lists were eligible to be interviewed for the Income Maintenance Caseworker position. N.T. p. 64.

6. The appointing authority used two different civil service lists to select candidates to be interviewed for this position. These were a Code 14 list and a Code 22 list. The appointing authority also obtained a Code 11 list but did not use it to schedule interviews for this vacancy. N.T. p. 91.
7. A Code 22 list is a Veterans' Only certification list. Appellant was selected to be interviewed using this certification. She was the only veteran on the list of the three who resided in Somerset County who asked to be interviewed. AA Ex. 3; N.T. p. 91.
8. A Code 14 list is an Interagency Employer certification list. Persons on this list are already employed in civil service positions in a different classification. After surveying the county residents on this list, four candidates asked to be interviewed, but only those within the rule of three (Durstine, Yoder and Hoover) were interviewed. AA Ex. 4; N.T. pp. 93-94.
9. In addition, two candidates who bid on the job posting (Miller and Berkey) were also interviewed. N.T. pp. 96, 115-116; AA Ex. 9.

10. The appointing authority also had a Code 11 list, which is an Employment certification list with the names of everyone who has taken the test for this position and has indicated availability for employment in Somerset County. However, the appointing authority did not use this list to select any candidates for the interview. N.T. p. 91.

11. The successful candidate selected to fill this position was Sandra Yoder. She was selected using the Code 14 certification list on which she was within the rule of three. There were no veterans within the rule of three on this list. N.T. pp. 65, 100; AA Exs. 4, 5.

DISCUSSION

The issue before the Commission is whether appellant presented sufficient evidence to prove that the appointing authority did not select her for the position of Income Maintenance Caseworker for reasons motivated by discrimination. Appellant alleges that her non-selection was motivated by her age and veteran status and that it violated the Civil Service Act (hereinafter “Act”)² and/or Rules.

² Act of August 5, 1941, P.L. 742, as amended.

Section 905.1 of the Act provides that no officer or employee of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations, because of labor union affiliations, or because of race, national origin or other non-merit factors. 71 P.S. § 741.905a. Under the Act, an employee appealing a non-selection may do so only on the basis of discrimination, as provided by Section 905.1 of the Act, 71 P.S. § 741.905a. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409 (Pa. Commw. 1996). A public employee complaining of employment discrimination must make out a *prima facie* case of discrimination by producing sufficient evidence which, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 39, 594 A.2d 847, 851 (Pa. Commw. 1991). The burden of presenting evidence in support of each allegation of discrimination lies with the appellant. *Price*, 672 A.2d at 413; 71 P.S. § 741.951(b); 4 Pa. Code § 105.16(a).

The Act addresses both “traditional” and “procedural” discrimination, and both are appealable under Section 951(b) of the Act, 71 P.S. § 741.951(b). “Traditional discrimination” encompasses claims of discrimination based on race, national origin, disability and other non-merit factors. *Pronko v. Department of Revenue*, *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 438, 539 A.2d 456, 462 (1988); 71 P.S. § 741.905a. “Procedural discrimination” refers to a technical violation of the Act. *Id.* Appellant has alleged both traditional and procedural discrimination. Comm. Ex. A.

At the hearing, appellant testified on her own behalf and presented the testimony of Bernice Kubas, Michael Holp, Heather Hampton, and Michele Peters. The appointing authority also presented the testimony of Hampton, Holp, and Peters, as well as that of Christina Bieterman.³ During appellant's case in chief, the following testimony was elicited.

Appellant testified she is not presently employed by the Commonwealth because she is retired. N.T. p. 29. The last position appellant held with the Commonwealth was Parole Staff Technician with the Pennsylvania Board of Probation and Parole in Harrisburg, Pennsylvania. N.T. p. 29. Appellant held that position from January 2000 until June 2004, when she retired. N.T. p. 30. Appellant testified she is also a military veteran. N.T. p. 31.

Appellant argues the appointing authority discriminated against her by failing to consider her civil service exam score, her experience, and by failing to call her references. N.T. pp. 30, 32. Appellant testified her civil service exam score was higher than Sandra Yoder, who was selected for the Income Maintenance Caseworker position. N.T. pp. 30-31. Appellant stated she received a score of 103 on the civil service exam, whereas Yoder received a score of 86. N.T. p. 31. Appellant implies that she was more qualified for the position based on her exam score. N.T. p. 31. Appellant also believes that she and Yoder gave similar answers

³ Bieterman is employed by the appointing authority as an Income Maintenance Caseworker Supervisor. N.T. p. 123. Bieterman has held this position for approximately two and a half years. N.T. p. 123. Prior to that, Bieterman worked as an Income Maintenance Caseworker for approximately seven and a half years. N.T. p. 123. Bieterman was one of three panelists who interviewed the candidates for the position that is the subject of the instant appeal. N.T. p. 125.

to the interview questions.⁴ N.T. p. 32. Therefore, appellant argued that the appointing authority discriminated against her by scoring her answers as “average” and “fair” and Yoder’s answers as “outstanding.” N.T. p. 32.

Bernice Kubas is not currently employed by the Commonwealth. N.T. p. 22. Kubas testified she interviewed for an Income Maintenance Caseworker position with the appointing authority on or about April 12, 2017.⁵ N.T. pp. 23-26. Kubas stated that after she interviewed for the position, she received a letter stating that the position was no longer available. N.T. p. 23.

Michael Holp is the appointing authority’s Executive Director. N.T. p. 40. Holp has held this position for approximately eighteen months. N.T. p. 40. Holp testified he was one of three panelists who interviewed appellant and Yoder for the Income Maintenance Caseworker position. N.T. p. 43. Holp explained that, as an interview panelist, he was responsible for determining the best applicant for the Income Maintenance Caseworker position. N.T. p. 43. Holp stated that the candidates’ ages were not considered, nor was age a factor in the selection process for this position. N.T. p. 55.

⁴ During her case in chief, appellant entered into evidence Peters’ and Holp’s interview notes. Ap. Exs. 2 and 4. Upon reviewing these notes, the Commission finds that appellant’s belief is mistaken. Furthermore, Holp and Peters credibly testified Yoder provided better examples than appellant when responding to the interview questions because her examples were related to casework and working with a similar population of clients. N.T. pp. 78, 119, 140-141.

⁵ The interviews for the position that is the subject of the instant appeal occurred on April 2 and 9, 2018. AA Ex. 9. This was approximately one year after the interview in which Kubas participated. Therefore, Kubas did not interview for the position that is the subject of this appeal.

Holp testified he rated appellant's response as "average," and Yoder's response as "outstanding" for Question #5. N.T. pp. 52-53. Question #5 asked: "What factors do you consider when determining your daily work priorities in order to maximize your efficiency and effectiveness." N.T. p. 52; Ap. Ex. 4. Holp testified that, in response to this question, appellant indicated that she prepares for unexpected things that come up, is flexible, and adjusts when the time calls for it. N.T. p. 53. Holp stated that Yoder responded that she looks at the deadlines, makes a list, and prioritizes. N.T. p. 53. Yoder also stated she changes her priorities each day to handle emergencies. N.T. p. 53.

Holp testified no one on the interview panel contacted appellant or Yoder's references. N.T. p. 41. Holp noted that the "HR staff" would know if the references were contacted after the interview panel made its selection. N.T. p. 41.

Michele Peters is employed by the appointing authority as an Income Maintenance Caseworker Supervisor. N.T. p. 68. Peters has held this position since March 2007. N.T. p. 68. Peters noted that she was initially hired by the appointing authority in 2001 as an Income Maintenance Caseworker. N.T. p. 69.

Peters was on the panel that interviewed appellant and Yoder for the Income Maintenance Caseworker position, which is the subject of the instant appeal. Ap. Ex. 2. Peters stated that she did not consider the candidates' ages, nor was age a factor in the selection process for this position. N.T. p. 78.

Peters testified each candidate was asked six questions. N.T. p. 78. Peters explained that, during the interviews, she takes notes and then summarizes those notes on the rating sheets. N.T. pp. 73-74. Peters further explained after the interviewee leaves the room, she reviews the questions and her notes, and then she assesses a rating before the next person is interviewed. N.T. pp. 75-76.

Peters testified both Yoder and appellant provided answers to Question #4 in which they identified complex problems or issues. N.T. p. 78. Peters explained Yoder's answer was better because she related the problem directly to clients and casework, which was more relatable to the Income Maintenance Caseworker job. N.T. p. 78.

Heather Hampton is a Field Human Resource Officer. N.T. p. 58. Hampton has held this position since March 2013. N.T. p. 59. As a Field Human Resource Officer, Hampton handles the HR function for the appointing authority as well as the Cambria and Centre County Assistance Offices. N.T. p. 58.

Hampton testified she is not responsible for selecting the candidate who will fill a vacant position. Hampton stated the interview panelists are responsible for determining who is the best candidate. N.T. p. 60. Hampton explained her role consists of putting together the job posting, requesting civil service lists, and determining which candidates are eligible to be interviewed. N.T. pp. 62-63. Hampton further explained Human Resources checks the selected candidate's references and conducts a background check after the interviews are completed and the candidate has been selected. N.T. p. 60. However, if there is a tie after the interviews are completed, the references of all the tied candidates will be checked to break the tie. N.T. p. 60.

Hampton testified she pulled the Code 22 and Code 14 civil service lists to identify potential candidates for the Income Maintenance Caseworker position. N.T. p. 63. Hampton stated that she followed the rule of three to determine which candidates on these lists were eligible to be interviewed. N.T. p. 64. After identifying the available and eligible candidates, Hampton shared this information with Holp. N.T. p. 64.

Hampton testified that, on the day of the interview, she met with the eligible candidates, collected their paperwork, explained the interview process, and provided them with a copy of the interview questions. N.T. p. 64. Hampton stated she gave each candidate fifteen minutes to review the interview questions, after which she walked the candidate to the interview room and introduced the candidate to the panel. N.T. pp. 64-65. Hampton explained the interview is critical to the selection process because it is the basis for determining which candidate within the rule of three is the best candidate for the position. N.T. pp. 65-66. Hampton further explained hiring decisions are not based on who scored the highest on the civil service exam. N.T. p. 65. Hampton stated Yoder was the highest-rated candidate during the interview process, which is why she was selected by the interview panel. N.T. p. 65.

Hampton testified there is nothing in the Civil Service Rules prohibiting the appointing authority from selecting a non-veteran candidate. N.T. p. 66. Hampton explained that they are only required to indicate the reason why the veteran was not selected on the personnel action form, which is submitted to NEOGOV. N.T. p. 66. Hampton stated, for the hiring action, which is the subject of the instant appeal, the reason provided on the form was that Yoder performed better during the

interview than all of the candidates, including the veteran. N.T. p. 66. Hampton noted that the form proceeded through a review process and Yoder's selection was approved. N.T. p. 67.

At the conclusion of appellant's case in chief, the appointing authority made a Motion to Dismiss this appeal. N.T. p. 81. At hearing, ruling on the Motion was deferred pending review by the full Commission. N.T. p. 82. Following our review, the Motion is hereby granted. The Commission finds appellant has not met her burden of establishing "traditional" or "procedural" discrimination.

The Commission finds that appellant has failed to establish a *prima facie* case of traditional discrimination based on her age and veteran status. An employee, such as appellant, who is claiming disparate treatment must demonstrate that he or she was treated differently than others who were similarly situated. *Nwogwugwu*, 141 Pa. Commw. at 40, 594 A.2d at 851 (1991). In the matter before us, appellant has failed to present any evidence establishing the age of the other candidates who also interviewed.⁶ Appellant also failed to present any evidence establishing that her non-selection was motivated in any way by her age. In fact,

⁶ The only reference to appellant's age is in an e-mail attached to her appeal request. This e-mail is dated August 23, 2017. Comm. Ex. B. In the e-mail, appellant is requesting information from the State Employees' Retirement System regarding the effects of an annuitant in returning to state employment. Comm. Ex. B. In seeking this information, appellant notes that her age at her most recent retirement was forty-seven. Comm. Ex. B.

Holp and Peters both credibly⁷ testified the candidates' ages were not considered, nor was age a factor in the selection process for this position.⁸ N.T. pp. 55, 78. Thus, there is no evidence that appellant was treated differently based on her age.

Likewise, appellant failed to present any evidence establishing that her non-selection was motivated in any way by her veteran status. Indeed, Hampton credibly testified Yoder was selected for the position because she performed better during the interview than all the other candidates.⁹ N.T. p. 66. Hampton's testimony is supported by Holp's and Peters' interview notes, which appellant entered into evidence during her case in chief. Ap. Exs. 2 and 4. For example, on his interview notes, Holp wrote that "[appellant's] answers lacked details in the areas of planning and organization;" whereas "[Yoder's] answers provided examples of outstanding planning and organizational skills." Ap. Ex. 4. Similarly, Peters' noted that appellant provided vague answers in the areas of planning and organization and "did not explain how [she] manages workload." Ap. Ex. 2. In contrast, Peters' noted that Yoder "listed several work items that require deadlines." Ap. Ex. 2. Consequently,

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

⁸ During the appointing authority's case in chief, Bieterman also credibly testified she did not consider the ages of the appellant or Yoder when rating their answers during the interview process. N.T. p. 141.

⁹ The Commission further finds that the appointing authority presented sufficient evidence of a legitimate non-discriminatory reason for selecting Yoder for the position of Income Maintenance Caseworker. Specifically, Holp, Peters, and Bieterman credibly testified Yoder's experience and answers to the interview questions set her apart from appellant. N.T. pp. 119, 121, 128, 131, 140-141. Holp also wrote the reason for selecting Yoder on the personnel action form, which reads as follows:

Sandra Yoder is the top choice for the position. Ms. Yoder's experience and outcome working with the target population of the Assistance Office was outstanding. Through her answers, she demonstrated the professionalism needed to work for DHS. Her answers also provided insight into her ability to make challenging decisions as a professional.

there is no evidence that appellant was treated differently based on her veteran status. Therefore, the Commission finds that appellant has failed to establish a *prima facie* case of traditional discrimination based on age or veteran status.

Additionally, the Commission finds that appellant has failed to establish a *prima facie* case of procedural discrimination. *See Moore v. State Civil Service Commission (Department of Corrections)*, 922 A.2d 80, 85 (Pa. Commw. 2007). There is no evidence that the appointing authority violated the Act or the Civil Service Rules. Hampton credibly testified she followed the rule of three to determine which candidates on the civil service lists were eligible to be interviewed. N.T. p. 64. The testimony of Hampton implying that Veterans' Preference did not apply to the hiring action which is the subject of this appeal is legally correct, but poorly explained. The reason Veterans' Preference does not mandate appellant's selection in this case is because the selection method utilized by the appointing authority was a Code 14 list on which there were no veterans within the rule of three. Yoder's name was on this list, but appellant's name was not. If there had been a veteran within the rule of three or on the Code 14 list, the veteran would have been selected. Since there was not, the Rules on Veterans' Preference did not prevent Yoder's selection using the Code 14 list. Appellant's name was on a Code 22 list (veterans only). This meant appellant had to be interviewed for this position, but the appointing authority was not required to use the Code 22 list to make its final selection. Furthermore, neither the Act nor the Civil Service Rules require the appointing authority to either select the appellant for the Income Maintenance Caseworker position because she had the highest score on the civil service exam or to contact the references of every interviewee.

Based on the foregoing, the Commission finds that appellant did not meet her burden to make out a *prima facie* case of discrimination. Appellant did not present evidence of any conduct by the appointing authority that, if believed and not otherwise explained, could be sufficient to persuade us that it is more likely than not that the appointing authority did not select her for the Income Maintenance Caseworker position 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 show that her non-selection was motivated by discrimination. Accordingly, we enter the following:

CONCLUSION OF LAW

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

ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members,¹⁰ dismisses the appeal of Kathy L. Strayer challenging her non-selection for appointment to Income Maintenance Caseworker employment with the Somerset County Assistance Office, Department of Human Services, and sustains

¹⁰ Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.

the action of the Somerset County Assistance Office, Department of Human Services, in not selecting Kathy L. Strayer for the position of Income Maintenance Caseworker.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

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