

COMMONWEALTH OF PENNSYLVANIA

Carena O. Smith	:	State Civil Service Commission
	:	
v.	:	
	:	
Delaware County	:	
Children and Youth Services	:	Appeal No. 30014
	:	
Seth Patricio Lyons		Kelly S. Sullivan
Attorney for Appellant		Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Carena O. Smith challenging her removal from probationary County Caseworker 2 (Local Government) employment with Delaware County Children and Youth Services. A hearing was held on October 19, 2018, 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 Testimony and exhibits introduced at the hearing. The issue before the Commission is whether appellant has established that her removal was the result of discrimination through mistake of fact.

FINDINGS OF FACT

1. By letter dated August 27, 2018, appellant was removed from her position as County Caseworker 2 (Local Government), probationary status, effective immediately. The appointing authority charged appellant with a “misrepresentation of your criminal history.” Specifically, the letter stated:

It has come to our attention that on your Personnel Data Summary for County Caseworker 2, you replied “No” to the question regarding your criminal history.

On August 24, 2018 we received notification from the Commonwealth of Pennsylvania that you do have a criminal history record. The Personnel Data Summary that you signed states that you “are aware that all statements contained herein will be verified and that willful misrepresentation will result in dismissal.”

This is a misrepresentation of your criminal history and your employment with Delaware County Children and Youth Services is being terminated effective immediately.

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 was hired as a probationary status Caseworker 2 in the Delaware County CYS Department on July 2, 2018. N.T. p. 16; Comm. Ex. D.
4. Appellant would remain in probationary status for six months. Comm. Ex. D.
5. On August 24, 2018, the appointing authority received notification that appellant had pending criminal charges against her. Comm. Ex. A; AA Ex. 4.
6. During appellant's probationary period, the appointing authority discovered that on February 1, 2018, appellant was pulled over by a police officer for having an expired inspection sticker. N.T. pp. 20, 38.
7. During the stop, the police officer looked into the car and saw that appellant possessed drugs. N.T. p. 20.
8. Appellant was criminally charged on February 1, 2018. AA Ex. 4.

9. Prior to the stop on February 1, 2018, appellant has never had any prior involvement with the criminal justice system. N.T. p. 21.
10. On March 2, 2018, appellant had her preliminary arraignment before a magistrate judge. N.T. p. 38; AA Ex. 4.
11. During the preliminary arraignment, the magistrate judge advised appellant of the criminal charges against her and set bail. N.T. p. 38; AA Ex. 4.
12. In applying to enter classified service in the Commonwealth, Appellant was required to complete and execute a personal data summary form [sic] which inquired: “are there any criminal charges pending against you? If yes, please give details.” Comm. Ex. D.
13. Appellant completed and executed the required Personnel Data Summary Form¹ on April 21, 2018 in which appellant answered “no” to the above inquiry[.] Comm. Ex. D.

¹ While the parties’ Joint Stipulation of Fact refers to a “personal data summary form,” we note that the correct title to the referred document is “Personnel Data Summary.” Comm. Ex. D. As such, we shall refer to the document as Personnel Data Summary Form.

14. Pursuant to the Caseworker 2 application process, appellant completed state and federal criminal background checks. N.T. p. 25.
15. According to the Pennsylvania State Police Response for Criminal Record Check, appellant did not have a criminal record as of June 10, 2018. N.T. p. 29; Ap. Ex. 2.
16. The appointing authority reported to appellant that her federal criminal history background check reflected no record exists as of June 6, 2018. N.T. p. 29; Ap. Ex. 2.

DISCUSSION

The current appeal challenges the appointing authority's decision to remove appellant from probationary Country Caseworker 2 (Local Government) employment. Before this Commission, appellant could only bring this challenge through Section 951(b) of the Civil Service Act, as amended, based upon an allegation that the decision to remove her from the position was due to discrimination in violation of Section 905.1 of the Civil Service Act. 71 P.S. §§ 741.905(a), 741.951(b).

At the time of her removal, appellant was a probationary status employee with the appointing authority. A probationary civil service employee does not enjoy the job security afforded to an employee with regular status who can be removed only for just cause. *Norristown State Hospital, Department of Public Welfare v. Bruce*, 69 Pa. Commw. 298, 450 A.2d 1093 (1982).

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 discrimination² 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

² 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.

persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretext. *Id.* at 614-615. Appellant has alleged procedural discrimination, contending her removal was based upon a mistake of fact. Comm. Ex. B.

In support of her appeal, appellant testified on her own behalf. After appellant's cross examination, the appointing authority elected to not present any witnesses.

Appellant argues that her removal from probationary County Caseworker 2 (Local Government) employment was the result of procedural discrimination relating to her pending criminal charges. N.T. p. 34. Appellant was hired as a probationary status Caseworker 2 for the appointing authority on July 2, 2018. Comm. Ex. D; N.T. p. 16. Appellant would remain in probationary status for six months. Comm. Ex. D.

On August 24, 2018 the appointing authority received notification that appellant had pending criminal charges against her. Comm. Ex. A; AA Ex. 4. On February 1, 2018, Appellant was pulled over by a police officer for having an expired inspection sticker. N.T. pp. 20, 38. Appellant testified the police officer looked into her car "and said" I had possession of drugs illegally. N.T. p. 20. Appellant admitted that she possessed marijuana. N.T. p. 20. Appellant was not arrested and was not brought into custody at that time. N.T. p. 21. From Appellant's understanding, she was not criminally charged until July 28, 2018, because that is when she was brought into the station and arraigned. N.T. p. 21. Appellant testified she has never been arrested before and has never been charged before. N.T. pp. 21-22. Appellant explained that at the time she filled out her application, she indicated that she did not have any criminal charges pending because ". . .from my lack of involvement with

the criminal justice system, I felt that I didn't have any criminal charges pending because I wasn't arrested, I wasn't a defendant, I wasn't taken to the station. So, I didn't feel that was an actual arrest." N.T. p. 22. Appellant emphasized that she was not trying to be misleading. N.T. p. 23.

On cross examination, appellant admitted that she saw a magistrate judge on March 2, 2018 relating to her criminal case. N.T. p. 38; AA Ex. 4. On March 2, 2018, appellant was preliminarily arraigned before a magistrate judge. N.T. p. 38; AA Ex. 4. Appellant acknowledged that during the preliminary arraignment, the magistrate judge told her the criminal charges against her. N.T. p. 38. Appellant agreed that on March 2, 2018, the magistrate judge set bail on her criminal case. N.T. p. 38. Appellant admitted that as of March 2, 2018, she was aware of the criminal charges pending against her. N.T. p. 40. Although her Personnel Data Summary Form asked whether there were criminal charges pending against her, appellant answered "no" on April 21, 2018. N.T. p. 41; Ap. Ex. 1.

Appellant asserted she applied for the County Caseworker 2 (Local Government) position in either March or April 2018. N.T. pp. 16-17. On April 21, 2018, appellant signed the completed a Personnel Data Summary Form in conjunction with her application for the Caseworker 2 position. N.T. pp. 18-19; Ap. Ex. 1. Appellant checked off the "no" box next to the following questions:

WERE YOU EVER CONVICTED OF A CRIMINAL OFFENSE OR HAVE YOU EVER FORFEITED BOND OR COLLATERAL IN CONNECTION WITH A CRIMINAL CHARGE? (The term criminal offense is defined as any felony or misdemeanor, including any summary offense. Omit only (1) minor traffic violations and (2) any offense committed before your 18th birthday, which was finally adjudicated in juvenile court or under a

youth offender law.) Conviction of a criminal offense is not a bar to employment in all cases. Each case is considered on its merit. If “Yes,” give details on a separate sheet of paper. Be sure to include your social security number.

ARE THERE ANY CRIMINAL CHARGES PENDING AGAINST YOU? IF “YES” PLEASE GIVE DETAILS.

Comm. Ex. D; N.T. pp. 19-20; Ap. Ex. 1. Appellant stated she has not been convicted of a criminal offense. N.T. p. 19. Appellant asserted that she currently does have a criminal case pending against her. N.T. p. 20.

Pursuant to her application, appellant completed state and federal criminal background checks. N.T. p. 25. According to the Pennsylvania State Police Response for Criminal Record Check, appellant did not have a criminal record as of June 10, 2018. N.T. p. 29; Ap. Ex. 2. The appointing authority reported to appellant that her federal criminal history background check reflected no record exists as of June 6, 2018. N.T. p. 29; Ap. Ex. 2. Appellant clarified that on June 20, 2018, she was fingerprinted. N.T. p. 49. On August 27, 2018, appellant received her removal letter. N.T. p. 30; *See* Finding of Fact 1.

Having reviewed the complete record, the Commission finds that appellant has not met her burden to prove a *prima facie* case of procedural discrimination based upon a mistake of fact. Based upon appellant’s testimony, appellant was criminally charged on February 1, 2018 and then arraigned on March 2, 2018. The magistrate judge informed appellant of the criminal charges against her and set bail during the preliminary arraignment.

Although appellant argued that her state and federal criminal background checks illustrated that she did not have a criminal record during the application process, appellant admitted that on March 2, 2018, she was aware of the criminal charges pending against her. Despite being aware of the pending criminal charges against her, on April 21, 2018, appellant answered “no” to the Personnel Data Summary Form’s question of whether there were any criminal charges pending against her. Since appellant had pending criminal charges against her when she submitted her Personnel Data Summary Form on April 21, 2018, appellant has not established mistake of fact discrimination. *Henderson, supra*. Accordingly, we enter the following:

CONCLUSION OF LAW

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,³ dismisses the appeal of Carena O. Smith challenging her removal from probationary County Caseworker 2 (Local Government) employment with the Delaware County Children and Youth Services and sustains the action of the

³ Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.

Delaware County Children and Youth Services in the removal of Carena O. Smith from probationary County Caseworker 2 (Local Government) employment effective August 27, 2018.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

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