ADJUDICATION

This is an appeal by Tiffany A. Riebel challenging an interim Employee Performance Review and her removal from probationary Unemployment Compensation Claims Intermittent Intake Interviewer employment with the Department of Labor and Industry. A hearing was held on May 7, 2019, at the State Civil Service Commission’s Western Regional Office in Pittsburgh, Pennsylvania, before Hearing Officer Odelfa Smith Preston.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Briefs submitted by the parties. The issue before the Commission is whether the interim Employee Performance Review and appellant’s removal from her probationary status position were the result of discrimination violative of Section 905.1 of the Civil Service Act.
FINDINGS OF FACT

1. On February 1, 2019, appellant received an interim Employee Performance Review rating her overall “unsatisfactory” for a period extending from January 14, 2019 to January 29, 2019. Comm. Ex. B.

2. By letter dated February 7, 2019, appellant was advised that her rejection, from her probationary Unemployment Compensation Claims Intermittent Intake Interviewer position, had been confirmed effective February 1, 2019. Comm. Ex. A.

3. The February 7 letter included the following statement:

   This action is in accordance with Section 804 of the Civil Service Act and Article 31 of the Agreement

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1 At hearing, appellant noted that documents she sought had not been presented; appellant acknowledged that her request for the documents had only been received by the Commission the day before the hearing. N.T. p. 18. The appointing authority argued that, under applicable Commission Rule, a subpoena requiring the production of documents must be served “no later than five work days prior to hearing” (4 Pa. Code §105.14a(b)(3)). N.T. p. 19. Accordingly, the Hearing Officer offered appellant the opportunity to request a continuance of the matter; appellant declined, noting that documents were missing but stating “I’d like to work with what we have.” N.T. pp. 19-20, 25-26.

The documents sought by appellant apparently included “a letter from Mr. Cidor [presumably referring to William Cidor, a witness at hearing] on the day [appellant] was rejected . . .” N.T. p. 13. At hearing, an appointing authority manager (Jennifer Walters, also a witness at hearing) indicated that a letter dated February 1, 2019 from Mr. Cidor was present in the hearing room. N.T. pp. 20-21. Although appellant acknowledged that the letter was available (N.T. p. 22), neither she nor the appointing authority placed that document on record.
between SEIU Local 668 and the Commonwealth, and is a result of your unsatisfactory work performance.


4. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended. Comm. Exs. C, D.

5. Appellant was initially employed by the appointing authority as a probationary Intermittent Intake Interviewer in July, 2018; appellant left that position for another employer on or about August 31, 2018. Appellant returned to the appointing authority in October 2018. N.T. pp. 114, 153-154.

6. Intermittent Intake Interviewer employees assist individuals filing claims for unemployment compensation benefits. They provide services by gathering information and pertinent data from claimants and employers using telephone, fax, e-mail and/or postal mail. They advise claimants of their rights and responsibilities under UC law; they answer claimants’ questions. N.T. pp. 118-119; AA Ex. 4, p. 1.
7. Standards established for Unemployment Compensation Interviewers and Intermittent Intake Interviewers require that employees maintain or achieve a 95 percent accuracy in the performance of their duties. N.T. pp. 91-92; AA Ex. 5.

8. Appellant’s job performance during a period extending from November 27, 2018 to January 11, 2019, was rated, by her immediate supervisor (Sara Erb), on an interim Employee Performance Review (hereinafter “EPR”) received by appellant on or about January 15, 2019. N.T. pp. 92-94, 165-166; AA Ex. 6.

9. On the January 15 performance evaluation\(^2\) appellant was rated as follows, on six designated job factors and overall:

<table>
<thead>
<tr>
<th>JOB FACTOR</th>
<th>RATING</th>
</tr>
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<tbody>
<tr>
<td>1) Job Knowledge/Skills</td>
<td>Unsatisfactory</td>
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<tr>
<td>2) Work Results</td>
<td>Unsatisfactory</td>
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<tr>
<td>3) Communications</td>
<td>Unsatisfactory</td>
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<tr>
<td>4) Initiative/Problem Solving</td>
<td>Unsatisfactory</td>
</tr>
<tr>
<td>5) Interpersonal Relations/Equal</td>
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\(^2\) The performance evaluations discussed in this adjudication were prepared using an EPR form; the EPR is a pre-printed form which allows for the insertion of marks rating an employee at any of five designated performance levels—“outstanding,” “commendable,” “satisfactory,” “needs improvement,” “unsatisfactory” (respectively from highest to lowest)—on any of seven individual job factors and overall. The form additionally provides space for the optional inclusion of commentary explaining each rated factor, for comments by a reviewing officer and the employee being evaluated, and for the signatures of the rater, the reviewing officer and the employee.
Employment Opportunity Satisfactory
6) Work Habits Unsatisfactory

Overall Unsatisfactory

N.T. pp. 93-94; AA Ex. 6, pp. 2-4.

10. On the January 15 EPR, appellant was advised:

You still have not developed the necessary skills and knowledge expected from you at this point in your employment. If you do not achieve and maintain a satisfactory level of performance by January 29, 2019 management will recommend a rejection or and extension of your probationary period.

N.T. p. 30; AA Ex. 6, p. 4.3

11. Throughout appellant’s employment, Erb maintained a series of statements recording discussions with appellant regarding her performance. N.T. pp. 35-41; AA Ex. 7. The discussions included:

a. A January 17, 2019 review of appellant’s call log for January 14, 2019 which indicated errors on 6 of 12

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3 During the previously noted discussion regarding appellant’s belated request for documents, appellant contended that a separate letter notifying her of the need to improve her performance was one of the documents sought. N.T. pp. 14-15. At hearing, the previously noted appointing authority manager (Walters) indicated that such a letter did not exist and that the quoted provision was the only written directive instructing appellant to improve her performance within two weeks. N.T. pp. 22-24, 160-161.


e. A January 22, 2019 review of appellant’s call log for January 18, 2019 which indicated errors on 8 of 19 calls—a 42% error rate. N.T. p. 39; AA Ex. 7, pp. 75-76.


h. A January 25, 2019 review of appellant’s call log for January 24, 2019 which indicated errors on 6 of 13 calls—a 46% error rate. N.T. p. 40; AA Ex. 7, pp. 81-82.


12. On February 1, 2019, appellant signed an interim EPR rating her job performance during the two-week period extending from January 14, 2019 to January 29, 2019. During the rated period, appellant’s average error rate on reviewed claims was 48 percent. N.T. pp. 96-98; AA Ex. 8, p. 1.

13. On the February 1 EPR, appellant was rated as follows, on six designated job factors and overall:

<table>
<thead>
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<tbody>
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AA Ex. 8, pp. 2-4.
DISCUSSION

The current appeal challenges the removal of appellant from probationary status Unemployment Compensation Claims Intermittent Intake Interviewer employment. The appeal was brought under Section 951(b) of the Civil Service Act (71 P.S. § 741.951(b)) based upon an allegation that the removal was taken in violation of the Act’s prohibition of discrimination (71 P.S. § 741.905a). Comm. Ex. B. As an appeal brought under Section 951(b), the burden was placed upon the appellant to present evidence in support of her allegations. 4 Pa. Code § 105.16. Accordingly, the sole question before this Commission is whether appellant has presented evidence sufficient to establish that her removal was imposed due to considerations violative of the prohibition against discrimination.

Actions brought under Section 951(b) can be addressed under either of two general types of discrimination—“traditional discrimination” which relates to claims of intentional discrimination based on labor union affiliation, race, gender, national origin or other non-merit factors or “technical discrimination” which involves a violation of procedures required pursuant to the Act or related Rules. Price v. Luzerne/Wyoming Counties Area Agency on Aging, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996), citing Pronko v. Commonwealth, Department of Revenue, 114 Pa. Commw. 428, 539 A.2d 462 (1988). The appeal request and statement submitted to initiate the current appeal alleges traditional discrimination, contending that

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4 The relevant events at issue in this appeal all occurred prior to March 28, 2019. On that date, Act 71 of 2018, P.L. 460, No. 71, codified as 71 Pa.C.S. §§ 2101-3304, was fully implemented. Consequently, the substantive provisions of the Civil Service Act (Act 286 of 1941, P.L. 752, No. 286, 71 P.S. §§ 741.1-741.1005) and implementing regulations apply to the present appeal because that was the law in effect at the time this appeal was filed.
appellant’s removal was due to disability and other non-merit factors. Comm. Ex. C. In support of her claims, appellant personally testified at hearing and presented three witnesses—Sara Erb, William Cidor and Teresa Haag; Jennifer Walters was the only witness introduced by the appointing authority.

Sara Erb is employed as an Unemployment Compensation Claims Supervisor. N.T. p. 28. Erb testified that the decision to issue a “two-week notice” to appellant was based on appellant’s performance throughout her probationary period. N.T. p. 30. She testified that after training sessions with appellant, she would type a record of what was discussed and when. N.T. p. 35; AA Ex. 7. Erb discussed several “Records of Discussion” noting appellant’s daily error rates from January 14 to 26, 2019 and stating error rates ranging from twenty-five to sixty-nine percent. N.T. pp. 38-41; AA Ex. 7, pp. 65-85.

When asked to discuss how she determined mistakes, Erb stated the following:

What we do is we review each claim for the day. And if there's one error or if there's multiple errors, it is counted as one occurrence.

N.T. p. 41. Erb testified that this was her standard grading practice. N.T. p. 41. Erb testified that until the final EPR was issued to appellant, showing that her error rate had not improved, she did not discuss removing appellant with her superiors. N.T. pp. 88-89.

Erb supervised appellant. N.T. p. 90. Erb testified that under the performance standards applicable to Unemployment Compensation Interviewers and Intermittent Intake Interviewers, employees are expected to demonstrate job
knowledge or skill by maintaining or achieving a 95 percent accuracy in the work reviewed by supervisors. N.T. pp. 91-92. When asked to explain the ratings assigned appellant, Erb testified:

[Appellant] lacked the basic job knowledge and skills regarding policies and procedures needed to perform at a satisfactory level.

She had an average error rate of 51 percent during her claim reviews. And for her call monitoring, 52 percent of her calls were rated as unsatisfactory, and 48 percent of her calls were rated as needs improvement.

[Appellant] failed to process claims correctly, resulting in redundant work having to be done by other employees or herself. Or the Claimant having to be called back because the issue was not addressed while they were on the phone.

N.T. pp. 93-94.

Erb maintained a record of the discussions between herself and appellant, during which she would review appellant’s work. N.T. pp. 94-96; AA Ex. 7. Erb testified that, in training appellant, she would meet with appellant “either daily or every other day to review the call logs and the errors.” N.T. p. 95. When asked to explain what their discussions entailed, Erb responded:

for each call log, daily call log, they are reviewed for any errors that are made. And then we have to track the errors. So each error that is marked on this record of discussion also has a corresponding social security number . . .

I would sit down with [appellant] either daily or every other day to review the call logs and the errors. And we would look at the computer screen, go over the errors, because I wanted her to see in real time, when she’s on a call, this is what you’re looking for. And we would sit and go over each error and how she could correct them.

N.T. pp. 95-96.
Erb prepared the February 1, 2019 EPR. N.T. p. 97. When asked to explain the ratings stated on the EPR, she testified:

[appellant], again, lacked the basic job knowledge and skills regarding policies and procedures needed to perform at a satisfactory level.

During this period, her average error rate of claims reviews was 48 percent. Thirty (30) percent of her monitored calls were rated satisfactory, 40 percent of her calls were rated as needs improvement while 30 percent of her calls were rated unsatisfactory.

[appellant] failed to process claims correctly, resulting in redundant work having to be done by other employees or herself.

Ineffective listening had led to her repeatedly making the same mistakes after intensive reviewing and counseling with supervisors.

N.T. pp. 98-99. Erb testified that she recommended that appellant be rejected from her probationary period. N.T. p. 100.

William Cidor, the Site Administrator at the appointing authority’s Indiana Unemployment Compensation Service Center, when asked to describe his understanding of how errors are calculated, stated:

when reviewing your work, we look at one claim. And once there's an error, we count that as an error. If we detect more errors within that same claim, it's just one error.

. . . so you're not penalized for making more than one error

. . .

N.T. p. 106. Cidor testified that errors are not assigned different degrees, saying “[a]n error is an error.” N.T. p. 106. Cidor testified that at the time of her removal,
he was not aware that appellant was applying for other positions; he denied speaking with anyone at OVR about hiring her and testified that he did not give any consideration to the effect her removal might have on the possibility of her being hired elsewhere. N.T. p. 110.

Cidor testified that he showed appellant how to initiate a request for accommodation under the Americans with Disabilities Act through the appointing authority’s website. N.T. p. 115. Subsequently,

What I did was I instructed with Sara Erb and her supervisors that when — when we need training room, the intermittent intake interviewers were all stationed at a permanent seat inside the training room. However, when we leave the training room, we have to move the intermittent intake interviewers out.

So if we were going to be using the training room, the previous day, we would assign [appellant] a seat out on the floor. Where she can move to that seat when she comes in the following day, go to that seat and stay there the entire day without having to move back.

We would also have her pack up her materials, her reference material, with her the night before. So that way, she would not have — she could just report directly to that workstation.


When asked to briefly describe the duties performed by an Intermittent Intake Interviewer, Cidor testified:

They conduct interviewers — interviews by phone. They take initial continued additional claims for Workers' Compensation benefits. They use the PC to retrieve material, data, records, to process the claims, identify issues, which would be eligibility issues. Whether they're
conditionally, financially or responsible for — eligible for employment.

They advise the Claimants of their rights and responsibilities for PAUC law. They determine if Claimants meet financial eligibility for unemployment compensation, whether or not they're federal employees, former government employees, ex-service members, regularly employed. It may be Claimants that have wages in multiple states other than Pennsylvania, which we call combined wage Claimants.

They review . . . forms, [prepared] by the Claimants and their employers, and forward their work to the parties that are generally responsible for administrating that work. They answer questions, things of that nature.

N.T. pp. 118-119. According to Cidor, providing accurate information to Claimants is important. N.T. pp. 120-121.

Cidor testified that he received Erb’s recommendation that appellant be rejected during probation. N.T. p. 122. Based on the information he received, he deemed removal consistent with the way other similarly-situated employees had been handled and on that basis, approved the recommendation. N.T. p. 122.

Teresa Haag, an individual responsible for reviewing ADA accommodations, indicated that appellant did not complete the “process of ADA submission paperwork.” N.T. p. 130. Accordingly, there was no way to know whether accommodation would have helped appellant. N.T. p. 130.
Haag testified that she handled three requests for accommodation made by appellant. N.T. p. 140; AA Exs. 1-3. When asked what accommodation had been sought by appellant, Haag responded that, with regard to a previous position held by appellant with the Department of Human Services:

She wanted a — regional one is for — she would prefer to be an ongoing CW caseworker. If she had no choice, must be an intake, she would ask for a separate work area away from where she does interviews.

N.T. p. 142; AA Ex. 1, p.1. On an ADA request made while with the appointing authority, Haag testified:

That was a little bit more — she needed a stable — she was requesting a stable desk position. A quiet area with less distractions. Unlimited duration of employment to perfect her 95 percent grading. Concerning sensitivity to her anxiety and forgetfulness, and understanding for her emotional needs at any call offs or late ins.

N.T. pp. 143-144; AA Ex. 2, p. 1. With regard to a second request submitted by appellant while with the appointing authority, Haag testified:

She wanted a stable desk cubicle, a necessity for the desk to file papers, a comfortable, high back chair, increased employment time to perfect and master the work, and sensitivity for her anxiety, depression and forgetfulness.

N.T. pp. 146-147; AA Ex. 3, p. 1. Additional medical documentation in support of the request was not submitted. N.T. pp. 147, 151.

At hearing, appellant testified as follows regarding an evaluation prepared by Erb:

included case calls outside of the time frame of that evaluation. And that was a frequent occurrence. That she
would roll things forward to continue the appearance how utterly horrible I was doing.

N.T. pp. 155-156. Appellant also testified

There was no intensive one on one training. Every two to three days, we reviewed the evaluations. She would make minor comments like — she did occasionally take a note, piece of notepaper and, you know, write this to that, that to that. But that was the most intensive one-on-one training I got. And it was for five minutes.

N.T. pp. 156-157. With regard to the Records of Discussion (AA Ex. 3), appellant stated:

A number of the tallying is wrong. It's excessively harsh, and things were carried forward outside of the time frame of the evaluation. And these are not the evaluations.

While they may be her personal notes, they are not the evaluations, and some of these open with the same line from one discussion to the next a number of times. She just had a mindset that I'm not going to do a good job.

N.T. pp. 157-158. Appellant additionally testified that Erb would have conversations about her with co-workers. N.T. p. 158.

Jennifer Walters, an Administrative Officer employed with the appointing authority, testified that her responsibilities include “provid[ing] guidance to the managers and supervisors related to employee discipline, rejection on probation, contract negotiation — contract interpretation.” N.T. p. 163. Walters testified Cidor contacted her to recommend that appellant be rejected while on probation. N.T. p. 164. Following her review of relevant records, she agreed with the recommendation; according to Walters, the recommendation is consistent with how similar probationary employees with unsatisfactory work performance have
been handled. N.T. pp. 165, 168. On cross-examination, Walters acknowledged that at the time of her recommendation, appellant’s ADA request was being considered. N.T. pp. 169-170.

As an action brought under Section 951(b) of the Civil Service Act, the initial burden was placed upon appellant to present evidence that, if believed and otherwise left unexplained, indicates that more likely than not discrimination has occurred. *Henderson v. Commonwealth, Office of the Budget*, 126 Pa. Commw. 607, 614, 560 A.2d 859, 863 (1989). A presumption of discrimination having been thereby established, it would then be incumbent upon the appointing authority to introduce “a non-discriminatory explanation” for the challenged personnel action and for this Commission, in our role as the trier of fact, to determine which party’s explanation of the appointing authority’s motivation it believes. *Henderson*, 126 Pa. Commw. at 615, 560 A.2d at 863. Having thoroughly reviewed the record compiled on this matter, we find that appellant has failed to present evidence sufficient to establish the required *prima facie* case in support of her allegations; instead, the credible evidence introduced at hearing supports the appointing authority’s decision.

At hearing, appellant’s witnesses—Erb, Cidor and Haag presented credible testimony supportive of the decision to remove appellant. Erb, appellant’s immediate supervisor testified regarding her efforts to instruct appellant through several meetings with appellant during the period following the January 15 EPR and its directive that appellant improve her performance by January 29. Cidor, the Site Administrator, testified that appellant’s position was responsible for providing accurate information to Claimants and noted his decision to recommend appellant’s removal was due to his receipt of information from Erb establishing appellant’s inability to do so. Haag’s testimony regarding appellant’s requests for
accommodation failed to present any information contradicting the appointing authority’s decision to remove appellant for inadequate job performance. Appellant, in her testimony, discussed her disagreement with the appointing authority’s training and mathematic conclusions and expressed her belief that Erb sought to dismiss her; she did not however present any affirmative factual evidence, in support of her allegations, which if believed and left uncontradicted would show discrimination due to her disability or any other non-merit factor. Accordingly, it is our view that appellant’s presentation failed to establish that her removal was due to any other factor than her own poor job performance and therefore did not violate the Act’s discrimination prohibition. Accordingly, we enter the following:

CONCLUSION OF LAW

Appellant has failed to present evidence establishing that her removal was affected by discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Tiffany A. Riebel challenging her removal from probationary Unemployment Compensation Claims Intermittent Intake Interviewer employment with the Department of Labor and Industry and sustains the action of
the Department of Labor and Industry in the removal of Tiffany A. Riebel from probationary Unemployment Compensation Claims Intermittent Intake Interviewer employment effective February 1, 2019.

State Civil Service Commission

__________________________
Teresa Osborne
Chairman

__________________________
Gregory M. Lane
Commissioner

__________________________
Bryan R. Lentz
Commissioner

Mailed: February 21, 2020