

COMMONWEALTH OF PENNSYLVANIA

Charmaine L. Bailey : State Civil Service Commission  
v. :  
Department of State : Appeal No. 30227

Charmaine L. Bailey Jason E. McMurry  
*Pro Se* Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Charmaine L. Bailey challenging her removal from probationary Clerk Typist 3 employment with the Department of State (hereinafter “appointing authority”). A hearing was held on June 17, 2019 at the Strawberry Square Complex in Harrisburg, Pennsylvania, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Brief submitted by the appointing authority.<sup>1</sup> The issue before the Commission is whether appellant established the removal was motivated by discrimination.

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<sup>1</sup> While appellant was afforded the opportunity to submit a Brief, she chose not to do so. N.T. p. 304.

## FINDINGS OF FACT

1. By letter dated April 11, 2019, appellant was notified of her removal from her position as a probationary Clerk Typist 3 with the Bureau of Professional and Occupational Affairs, Department of State (hereinafter “appointing authority”), effective April 12, 2019. Comm. Ex. A.
  
2. The appointing authority charged appellant with continued failure to follow procedures, failure to follow instructions, inappropriate conduct, and disruptive behavior. These charges were based on the following behavior:

Specifically, you issued a Non-Resident Pharmacy Permit in error by issuing it prior to receiving the electronic verification from the other state. You also changed the fee status on another application from “complete” to “pending review” which generated an automatic returned check email to the applicant.

In addition, on March 27, 2019, you were directed to begin your lunch period at 12:30; however, you left for lunch at approximately 12:20. On March 26, 2019, you caused a disruption in the workplace when you came out of the conference room and stated in an inappropriate and loud tone about “not working in a place like this.” And finally, you went through

items and removed documents from the Pharmacy Board Administrator's desk without permission while she was not present.

Comm. Ex. A.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018.
4. On January 7, 2019, appellant began her employment as a Clerk Typist 3 with the appointing authority. N.T. p. 159; Comm. Ex. A.
5. Appellant's primary duty was processing non-resident pharmacy applications. Appellant also performed other tasks such as reviewing microfilms, completing name and address changes, answering phones, and providing customer service. N.T. pp. 148-149, 180-182, 186.
6. At the start of her employment, appellant was given a few weeks grace period to read and familiarize herself with training materials. The procedures for processing applications were contained in these materials. N.T. pp. 31, 147, 197.

7. In addition to the procedures set forth in the training materials, appellant received hands-on training from Clerk Typist 3 Denise Bailor, her supervisor, and Melanie Zimmerman, who is the Board Administrator for the State Board of Pharmacy. Appellant also had access to trainings through the Employee Self-Service Center. N.T. pp. 30, 32, 132-133, 148, 194.
8. Appellant failed to follow instructions related to the processing of non-resident pharmacy applications. N.T. pp. 148-149, 151.
9. Failure to properly process non-resident pharmacy applications can result in unqualified persons being issued licenses, which is a serious infraction. N.T. p. 150.
10. Appellant's failure to follow instructions was addressed through counseling sessions, emails, and verbal and written clarifications. N.T. p. 153.
11. Appellant received a Counseling Session Memorandum, dated February 15, 2019, which addressed her internet and telephone misuse,

unprofessional behavior, and improper distribution of an internal notification letter to an applicant. N.T. pp. 47-48; AA Ex. 1.

12. Appellant received a Counseling Session Memorandum, dated February 25, 2019, which addressed her failure to adhere to her scheduled breaks and lunches. N.T. pp. 48-49; AA Ex. 2.
13. On March 11, 2019, appellant was orally reprimanded because she failed to follow procedures when issuing an out-of-state pharmacy license. Specifically, appellant failed to upload proof of a valid permit and letter of good standing from the resident state. N.T. pp. 49-50; AA Ex. 3.
14. On March 27 and April 4, 2019, appellant attended fact-finding interviews at which her continued failure to follow procedures and inappropriate conduct/disruptive behavior were discussed. Comm. Ex. A; AA Exs. 4, 5.
15. At the March 27, 2019 fact-finding interview, the following was discussed: appellant's inappropriate conduct for removing documents from the Pharmacy Board Administrator's desk while she was not present. N.T. p. 50; AA Ex. 4.

16. At the April 4, 2019 fact-finding interview, the following was discussed: appellant's failure to follow proper licensing procedures; failure to follow instructions; and inappropriate conduct/disruptive behavior. N.T. p. 51; AA Ex. 5.
17. Appellant failed to follow proper licensing procedures in that: 1) she issued a non-resident pharmacy permit in error because she issued it prior to receiving the required electronic verification; and 2) she changed a fee status on an application from "complete" to "pending review," which generated an automatic returned check email to the applicant. N.T. pp. 143-145; AA Ex. 5.
18. Appellant failed to follow instructions in that she left for lunch at approximately 12:20 p.m. on March 27, 2019, after she had been directed to begin her lunch period at 12:30 p.m. AA Ex. 5.
19. Appellant caused a disruption in the workplace on March 26, 2019, when she exited the conference room yelling loudly that she needed to see "Lisa" because she was not working in a place like this. AA Ex. 5.

20. Appellant's rejection on probation was solely based on the charges and reasons set forth in the April 11, 2019 letter, which were discussed at the March 27 and April 4, 2019 fact-finding interviews. N.T. pp. 158-160, 168-169, 231; Comm. Ex. A.
21. On April 9, 2019, two days before her removal, appellant filed a complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC"). N.T. p. 301.
22. Human Resource Analyst 2 Theresa Haag is responsible for receiving notice of EEOC complaints filed by employees, such as appellant. N.T. p. 118.
23. Haag was not notified of appellant's EEOC complaint until after appellant was terminated. N.T. pp. 110-111.
24. The only information Haag had prior to appellant's termination was that appellant was going to be speaking with the EEOC. N.T. p. 110; Ap. Ex. 3.
25. Appellant did not submit a discrimination complaint form to Haag. N.T. p. 108.

26. Haag's conversations with appellant were kept confidential. Haag never notified anyone in appellant's chain of command or Human Resources about her interactions with appellant. N.T. pp. 108-109.
27. None of the persons involved in the disciplinary process which resulted in appellant's rejection on probation, including Health and Licensing Division Chief Tammy Dougherty and Human Resource Analyst 3 Krista Drupp, were aware appellant had filed an EEOC complaint. N.T. pp. 159-160, 231, 267-268.
28. Appellant's EEOC complaint was not a factor in her rejection on probation. N.T. pp. 159-160, 231-232, 268.
29. Appellant was not treated differently than other employees. N.T. pp. 161, 227.

### DISCUSSION

The present appeal challenges the appointing authority's decision to remove appellant from probationary status employment as a Clerk Typist 3. Before this Commission, appellant could only bring this challenge through Section

3003(7)(ii) of Act 71 of 2018<sup>2</sup> based upon an allegation the decision to remove her was due to discrimination in violation of Section 2704 of Act 71 of 2018.<sup>3</sup> 71 Pa.C.S.A. §§ 2704, 3003(7)(ii). Specifically, appellant alleges she was retaliated against because she filed a complaint with the Equal Employment Opportunity Commission (hereinafter “EEOC”).<sup>4</sup> Comm. Ex. B.

In an appeal alleging discrimination, the burden of presenting evidence in support of all allegations of discrimination lies with the appellant. *Nosko v. Somerset State Hospital*, 139 Pa. Commw. 367, 370-371, 590 A.2d. 844, 846 (1991). Accordingly, the sole question for determination by this Commission is whether appellant has presented evidence sufficient to establish her claim of discrimination. Section 2704 of Act 71 of 2018 provides:

An officer or employee of the Commonwealth may not discriminate against an individual in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of race, gender, religion, disability or political, partisan or labor union affiliation or other nonmerit factors.

71 Pa.C.S.A. § 2704.<sup>5</sup> The prohibition set forth in this section encompasses two general types of discrimination—“traditional discrimination,” which encompasses

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<sup>2</sup> Act of June 28, 2018, P.L. 460, No. 71, § 1

<sup>3</sup> Full implementation of Act 71 of 2018 occurred on March 28, 2019, the date on which all sections of Act 71 of 2018 went into effect. *See* Act 71 of 2018, Section 3. The removal which is the subject of the instant appeal occurred after the full implementation of Act 71 of 2018, which is codified as 71 Pa.C.S.A. §§ 2101-3304.

<sup>4</sup> The Hearing Notice contains an explanatory note, which provides: “The hearing was granted under section 3003(7)(ii) to determine only whether appellant’s removal was done in retaliation for her filing an EEOC charge.” Comm. Ex. C; N.T. p. 10. Accordingly, appellant was directed to limit the scope of her testimony to the retaliation claim. N.T. pp. 23-24.

<sup>5</sup> The provisions of Section 2704 of Act 71 of 2018 are substantially the same as the provisions in Section 905.1 of Act 286 (71 P.S. § 741.905a), and both sections of the respective acts use virtually the same language.

claims of discrimination based on labor union affiliation, race, sex, national origin or other non-merit factors; and “technical discrimination,” which involves a violation of procedures required pursuant to the Act or related Rules.<sup>6</sup> *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. Ct. 1996), citing *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988). Here, appellant has alleged a traditional discrimination claim based on retaliation. Comm. Ex. B.

In support of her claim, appellant testified on her own behalf and presented the testimony of Human Resource Analyst 3 Krista Drupp,<sup>7</sup> and Health and Licensing Division Chief Tammy Dougherty.<sup>8</sup> The appointing authority also presented testimony from Drupp and Dougherty, as well as Human Resource Analyst 2 Theresa Haag.<sup>9</sup> The evidence presented by the parties has been reviewed by the Commission and is summarized below.

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<sup>6</sup> Upon taking effect on March 28, 2019, Act 71 of 2018 modified the responsibilities and duties of Commission and established within the Commonwealth of Pennsylvania, Governor’s Office of Administration (hereinafter “OA”) duties and responsibilities for civil service employment in Pennsylvania. In accordance with 2203(b) of Act 71 of 2018, OA promulgated temporary regulations, which are referred to as the Merit System Employment Regulations, 4 Pa. Code §§ 601-607. The Commission also maintains its Rules, 4 Pa. Code §§ 91-105.18.

<sup>7</sup> Drupp is employed by the appointing authority as a Human Resource Analyst 3 in Labor Relations. N.T. pp. 222-223. Drupp has approximately twenty-two years of Commonwealth service, all in Human Resources. N.T. pp. 223-224. In her capacity as a Human Resource Analyst 3, Drupp is responsible for conducting disciplinary investigations, fact-findings, and processing grievances. N.T. pp. 225, 275.

<sup>8</sup> At the time of appellant’s removal, Dougherty was employed by the appointing authority as the Health Licensing Division Chief. N.T. pp. 136-137. Dougherty held this position for six years, until she retired on June 14, 2019. N.T. pp. 136-137. Dougherty worked for the Department of State for eighteen years and has a total of thirty-six and a half years of Commonwealth service. N.T. pp. 137-138. Appellant worked in Dougherty’s Division. N.T. p. 140.

<sup>9</sup> Haag is employed as a Human Resource Analyst 2 by the Office of Administration and has eighteen years of Commonwealth service, fifteen of which have been in Human Resources. N.T. pp. 98-100. In her capacity as a Human Resource Analyst 2, Haag is primarily responsible for handling discrimination investigations and accommodation requests. N.T. pp. 101-102.

### *Summary of the Evidence*

On January 7, 2019, appellant began her employment as a Clerk Typist 3 with the appointing authority. N.T. p. 159; Comm. Ex. A. During the time appellant worked for the appointing authority, she was primarily responsible for processing non-resident pharmacy applications. N.T. pp. 148, 186. Appellant also performed other tasks such as reviewing microfilms, completing name and address changes, answering phones, and providing customer service. N.T. pp. 149, 180-182.

At the time of her removal, appellant had not been trained on how to process other types of major applications because she never obtained proficiency in processing the non-resident pharmacy applications. N.T. pp. 148-149. Division Chief Tammy Dougherty explained the processing of applications is a serious matter because mistakes can lead to unqualified persons being issued licenses. N.T. p. 150. Therefore, Dougherty asserted the appointing authority takes great care in ensuring employees process the applications properly. N.T. pp. 149-150.

During her probationary period, appellant failed to follow instructions related to the processing of non-resident pharmacy applications. N.T. p. 151. Appellant's failure to follow instructions was addressed through counseling sessions and emails. N.T. p. 153. Also, verbal and written clarifications were given to appellant. N.T. p. 153.

Appellant acknowledged she received Counseling Session Memoranda, dated February 15 and 25, 2019.<sup>10</sup> N.T. pp. 47-49; AA Exs. 1, 2. The February 15, 2019 Memorandum addressed appellant's internet and telephone misuse, unprofessional behavior, and improper distribution of an internal notification letter to an applicant. AA Ex. 1. The February 25, 2019 Memorandum-a addressed appellant's failure to adhere to her scheduled breaks and lunches. AA Ex. 2.

Appellant also received an oral reprimand on March 11, 2019. N.T. pp. 49-50; AA Ex. 3. The basis for the oral reprimand was appellant's failure to follow procedures. AA Ex. 3. Specifically, when issuing an out-of-state pharmacy license, appellant failed to upload proof of a valid permit and letter of good standing from the resident state. AA Ex. 3.

Following the oral reprimand, appellant attended two fact-finding interviews based on her inappropriate conduct and continued failure to follow procedures. Comm. Ex. A; AA Exs. 4, 5. The first fact-finding interview was scheduled for March 27, 2019 to discuss the following charge: inappropriate conduct for removing documents from the Pharmacy Board Administrator's desk while she was not present. N.T. p. 50; AA Ex. 4. Appellant denied this accusation and asserted the documents were in a place that she had access to and were necessary for her to complete her assigned duties. N.T. p. 25. Appellant also took offense to the manner in which her supervisor, Sandra Bickhart, began this fact-finding interview.

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<sup>10</sup> Appellant asserts the February 15, 2019 counseling session was based on false information because she was using Spotify, not Pandora, to stream music on her work computer. N.T. pp. 42-43. This matter is not presently before the Commission, nor does the Commission have jurisdiction to hear this matter.

Appellant testified Bickhart began the interview by saying, “Don’t get excited.” N.T. pp. 26, 29. Appellant asserted this statement was offensive because it implied she was an excitable person. N.T. pp. 29-30.

The second fact-finding interview was scheduled for April 4, 2019 to discuss appellant’s failure to follow proper licensing procedures, failure to follow instructions, and inappropriate conduct/disruptive behavior. N.T. p. 51; AA Ex. 5. Appellant failed to follow proper licensing procedures in that: 1) she issued a non-resident pharmacy permit in error because she issued it prior to receiving the required electronic verification; and 2) she changed a fee status on an application from “complete” to “pending review,” which generated an automatic returned check email to the applicant. AA Ex. 5. Regarding the non-resident pharmacy permit, appellant failed to obtain a letter of good standing from Illinois as required under the appointing authority’s licensing procedure. N.T. pp. 144-145. Letters of good standing from other states are required for individual licensees and facility licensees. N.T. pp. 143-144. Some states provide these letters electronically via email, while other states either send paper documentation or maintain the documentation on their website. N.T. p. 144. Employees are required to obtain the documentation from the primary source, which for Illinois was electronically via email. N.T. p. 145. Therefore, appellant was required to obtain the documentation in this manner, not by downloading the information from a website. N.T. p. 145.

Appellant disputes that she failed to follow this procedure and asserts she properly obtained the required documentation from the website.<sup>11</sup> N.T. pp. 29, 34. Appellant stated she provided screenshots of the web verification, which she argues should have been sufficient to dispute this charge. N.T. p. 34. Alternatively, appellant argues she should have been counseled for this incident. N.T. pp. 29-30. Appellant asserts she was never instructed on how to avoid such an error and claims she only began reviewing applications seven days prior to this incident. N.T. pp. 30, 33.

Contrary to appellant's claim, Dougherty testified the processing of electronic letters of good standing was discussed with appellant two or three times because she continued to have difficulty understanding the process. N.T. p. 188. Specifically, it was explained to appellant that letters of good standing need to be received directly from the state issuing the letter, not by obtaining it from the website. N.T. p. 188.

Appellant did not discuss the fee status error during her testimony. However, she disputed the remaining two charges of failure to follow instructions and inappropriate conduct/disruptive behavior. N.T. pp. 27, 41. Appellant was charged with failing to follow instructions because she left for lunch at approximately 12:20 p.m. on March 27, 2019, after she had been directed to begin her lunch period at 12:30 p.m. AA Ex. 5. Also, on March 26, 2019, appellant caused

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<sup>11</sup> During her testimony, appellant mistakenly asserts this charge was discussed at her first fact-finding interview. N.T. p. 29. However, the documentation provided by the appointing authority, which appellant does not dispute, establishes the charge of failure to follow proper licensing procedures was part of the second fact-finding interview. AA Ex. 5.

a disruption in the workplace when she exited the conference room yelling loudly that she needed to see “Lisa” because she was not working in a place like this. AA Ex. 5.

Appellant argues her leave abuse violations were explainable and always dismissed. N.T. p. 27. Appellant further stated she “showed up” to work every day and worked overtime almost every time it was offered. N.T. p. 41. Appellant testified she was in the office Monday through Friday from 8:30 a.m. until 8:00 p.m., especially during her last three weeks of employment. N.T. p. 41. Additionally, appellant insinuated her willingness to work overtime should have been factored into her performance reviews. N.T. p. 203.

Contrary to appellant’s assertions, Dougherty explained overtime is voluntary, not mandatory, and appellant voluntarily chose to work overtime. N.T. p. 203. Dougherty also noted there were a few instances where appellant was a couple of minutes late for work. N.T. p. 214. Additionally, Human Resource Analyst Krista Drupp pointed out appellant provided conflicting answers about leaving early for lunch at her fact-finding interview. N.T. p. 242.

Following the fact-finding interviews, appellant was informed, by letter dated April 11, 2019, that she was rejected on probation. Comm Ex. A. Appellant presently challenges her rejection on probation by asserting: 1) she did not receive adequate instruction or training; 2) she was subjected to a hostile work environment; and 3) the appointing authority retaliated against her because she filed an EEOC complaint. Each of appellant’s claims and the appointing authority’s responses are detailed below.

*Instruction and Training*

Appellant testified the training materials provided to her were antiquated and not in logical formation. N.T. pp. 24, 31. While appellant acknowledged she was given a few weeks grace period to read and familiarize herself with the training materials, she noted she was not provided a written instruction manual for the PALS system. N.T. pp. 24, 31-32. Appellant stated the only training she received on the PALS system was hands-on training from Clerk Typist 3 Denise Bailor, which appellant described as a “two-week informal process.” N.T. pp. 30, 32. Appellant noted Bailor was being transferred to a different position and had a “hectic schedule” which she had to work around. N.T. pp. 30-31. Appellant stated it was her understanding that she was to inherit Bailor’s work and asserted, after “a day or two,” she began doing tasks on her own. N.T. pp. 31-33.

Additionally, appellant claimed there were two written policies which she did not receive during her training or orientation. N.T. pp. 90-91; Ap. Exs. 8, 9. The first of these two policies provided general information to all employees regarding attendance, leave policies, cell phone and computer usage, press and legislative inquiries, as well as other miscellaneous reminders. Ap. Ex. 8. The second policy provided information regarding the phone system and customer service. Ap. Ex. 9. Appellant stated she received these policies after her two fact-finding meetings. N.T. p. 91. Appellant did not explain how these policies relate to her retaliation claim.

In response to the above claims, Dougherty explained the PALS system is a new system for which the appointing authority is currently developing training manuals. N.T. pp. 147, 195. Dougherty further stated, while this a new system, the

manner in which applications are processed is the same and this procedure is set forth in the training manuals for the old system. N.T. pp. 147, 197. Dougherty also noted, in addition to the hands-on training provided by Bailor, appellant received training from her supervisor and Melanie Zimmerman, who is the Board Administrator for the State Board of Pharmacy. N.T. pp. 145, 148, 194. Appellant could also access training through the Employee Self-Service Center (hereinafter “ESS”). N.T. pp. 132-133.

### *Hostile Work Environment*

Appellant argues her work environment was hostile. N.T. p. 24. As evidence of this claim appellant asserted: 1) she was assigned more work than other employees; 2) she was not permitted to take leave when her 106-year-old great-grandmother was dying; 3) she suffered microaggressions from her co-worker, Thomas Zurkan,<sup>12</sup> and Zimmerman; 4) other employees were found to be more credible than her; and 5) she was told to wait before being permitted to ask questions.

First, appellant asserted her workload was different than another employee who was hired before her. N.T. p. 25. Appellant did not specify how their workloads differed. However, she subsequently noted she was given a microfiche project which was insurmountable because the equipment was not working and the necessary documents were unavailable. N.T. pp. 41-42. Appellant also claimed she

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<sup>12</sup> No testimony or other evidence was provided establishing Zurkan’s title or position. Appellant merely describes him as a “co-worker.” N.T. p. 26. Likewise, there is no evidence which would suggest Zurkan was involved in the decision to reject appellant on probation.

tried to meet her deadlines despite being given other projects. N.T. p. 42. With that said, appellant acknowledged she asked for more work because she likes to stay busy. N.T. p. 25.

Next, appellant asserted she was not permitted to take leave to see her 106-year-old great-grandmother who was dying. N.T. pp. 25-26. Appellant stated Dougherty told her, “Well, she’s not dead yet,” which appellant found to be “highly insensitive.” Dougherty denied making this comment. N.T. pp. 143, 180.

Dougherty explained appellant initially requested to use sick family leave to visit her great-grandmother who was ill and not expected to live. N.T. pp. 142, 179. Dougherty stated she sought clarification from Human Resources as to whether this type of leave could be used for a great-grandmother. N.T. pp. 142-143, 179. Human Resources determined appellant could not use sick family leave for this purpose. N.T. pp. 143, 179. Appellant then asked to use sick bereavement leave, which Dougherty denied. N.T. pp. 143, 179-180. Dougherty explained to appellant she could not use sick bereavement leave because her great-grandmother had not yet passed. N.T. pp. 179-180.

Regarding the alleged microaggressions, appellant claimed Zurkan called her “a transgender fold out” and threw a chair in the conference room. N.T. p. 28. Appellant indicated she discussed this incident with Human Resource Analyst Theresa Haag, along with other unspecified “microaggressions.” N.T. p. 70; Ap. Ex. 3. Appellant stated she also filed a discrimination complaint against Zurkan with the EEOC. N.T. pp. 70-71; Ap. Ex. 3. It is unclear if the alleged conference room incident was the basis for the EEOC complaint. Furthermore, appellant told Haag she was comfortable with the way the supervisor handled the conference room

situation and noted she and Zurkan had spoken and now have a better understanding of each other's personalities. N.T. pp. 28, 105-106. Appellant also noted Zurkan helped her address a backlog of cases, until he was moved to other delegations. N.T. p. 40.

In addition to the alleged incident with Zurkan, appellant asserted Zimmerman embarrassed her in front of her coworkers when she verbally reprimanded and detained her six minutes after the end of her shift. N.T. p. 35. Appellant stated Zimmerman did not have authority to reprimand her because she does not report to her. N.T. p. 35. Appellant further claimed Zimmerman's actions caused her to have a restless night. N.T. p. 35. Therefore, she talked to Bickhart about Zimmerman's behavior the next day. N.T. p. 35.

Appellant noted she was particularly concerned about Zimmerman's tone in an email in which Zimmerman explained to appellant how to respond to applicants via email. N.T. p. 36. Appellant stated this is when she started becoming concerned about her credibility in the division. N.T. pp. 36-37. Appellant stated after this incident she noticed a trend whereby her supervisor began sending her emails that were contrary to verbal conversations they had. N.T. p. 37. Appellant did not provide any testimony as to the specific contents of these emails, nor did she indicate whether the alleged emails were related to her EEOC complaint.

Dougherty explained Zimmerman is the Board Administrator for the State Board of Pharmacy, and, in that capacity, Zimmerman oversees and directs employees in that area, along with providing direction to clerical staff. N.T. p. 145. Dougherty recalled appellant had a conversation with Zimmerman, which made her upset because Zimmerman did not like the way appellant had done something. N.T.

p. 145. Dougherty noted appellant felt Zimmerman was reprimanding her. N.T. p. 145. Dougherty asserted Zimmerman was not reprimanding appellant, but rather, she was explaining to appellant what she had done wrong and asked her not to do it again. N.T. pp. 146, 192. Dougherty further stated although Zimmerman is a management employee, she does not have the authority to reprimand appellant because she is not a supervisor. N.T. p. 146.

Next, appellant claimed her credibility was continually questioned after she received the first counseling memorandum. N.T. p. 43. Appellant stated regardless of the records she kept and her email communications, she was not believed. N.T. p. 43. Appellant asserted other employees were always found to be more credible than her, which appellant characterized as “preferential treatment.” N.T. p. 26. Appellant did not indicate how this is related to her discrimination claim, which is presently before the Commission.

Lastly, appellant claimed she was often told to wait at her desk until her supervisor had time to come and see her. N.T. pp. 27, 37. Appellant stated any request she made was redirected or there was a delay in the response. N.T. pp. 37-38. Appellant also stated she was hurt when the Division Chief told her that she had a sense of entitlement and was not allowing her coworkers time to do their jobs. N.T. p. 38. Appellant argued without assistance, she “was left to guess at her job” because the training was inconsistent and ambiguous. N.T. p. 38.

In response to this allegation, Dougherty noted appellant often rudely interrupted when it was improper to do so. N.T. p. 213. Dougherty stated she spoke with Bickhart about appellant’s disruptions, and appellant was informed that when her supervisor and/or the Division Chief were unavailable or in a meeting, she

needed to wait to ask her questions, unless it was an emergency. N.T. p. 206. Dougherty noted, for example, appellant interrupted a meeting she was having with another employee regarding a disciplinary issue because appellant wanted an ink pad. N.T. p. 207. Dougherty stated she asked appellant to wait because appellant's request was not an emergency or critical at that point. N.T. pp. 207-209.

### *Retaliation*

Appellant asserts the appointing authority rejected her on probation because she filed a discrimination complaint with the EEOC. Comm. Ex. B. Appellant testified she filed the complaint with the EEOC on April 9, 2019, two days before she was removed. N.T. p. 301. However, she did not know whether the appointing authority was notified of the complaint prior to her removal. N.T. pp. 300-301. Appellant argued it was not her responsibility to notify the appointing authority of the complaint and claimed the appointing authority should have been aware of the complaint because she informed Haag that she had a phone interview with the EEOC about filing a complaint. N.T. pp. 71, 300-301.

Haag denied appellant's accusations. Haag testified she was not notified a complaint was filed until after appellant was terminated. N.T. pp. 110-111. Haag stated the only information she had prior to appellant's termination was that appellant was going to be speaking with the EEOC. N.T. p. 110; Ap. Ex. 3. Additionally, Haag provided a detailed timeline of all her interactions with appellant.

The first interaction Haag had with appellant was on January 11, 2019. On that date, Haag was informed appellant left a voicemail asking to speak with someone. N.T. p. 103. Haag stated she reached out to appellant and provided her

contact information to appellant because appellant had indicated through instant messaging that she was uncomfortable talking while at her desk. N.T. pp. 103, 120. Haag noted later that same day, she spoke with appellant over the phone regarding a reaction Zurkan had to a conversation appellant was having with a co-worker. N.T. p. 104. Haag explained she and appellant discussed various perspectives about the reaction. N.T. p. 104. Haag stated by the end of the conversation, appellant felt comfortable and no action was taken, other than making a notation in the file that they had spoken. N.T. p. 104.

Haag stated her next interaction with appellant occurred on January 17, 2019. N.T. p. 105. Haag explained she received a voicemail from appellant but was unable to speak with her until later that afternoon. N.T. p. 105. Haag stated when she was finally able to speak with appellant, appellant explained there was an interaction between her and Zurkan in a meeting room, which had since been resolved. N.T. p. 105. Appellant told Haag she was comfortable with the way the supervisor handled the situation and noted she and Zurkan had spoken and now have a better understanding of each other's personalities. N.T. pp. 105-106.

After conversing with appellant, Haag contacted the supervisor about the incident and asked the supervisor to obtain witness statements. N.T. p. 113. Haag also reached out to the training officer and requested a list of diversity trainings because appellant asked for diversity training. N.T. pp. 113-114. Haag stated she received a list of trainings and the training person indicated she would provide available training dates at her next bi-monthly meeting with the agency. N.T. p. 114.

Haag's next interaction with appellant occurred in February 2019. N.T. p. 106. Haag could not remember the exact date of this interaction, but noted appellant called to ask her if she could bring up the incident between her and Zurkan at a counseling session. N.T. p. 106. Haag told appellant she could bring up the incident, and informed appellant the Human Resources person handling the counseling session would know how to contact her if they needed additional information. N.T. p. 106.

Subsequently, on February 27, 2019, appellant called Haag and they had a long conversation about what appellant perceived to be microaggressions in the workplace. N.T. p. 107. Haag noted during this conversation, appellant expressed concerns with the behavior of at least five different people. N.T. p. 107. At the end of the conversation, Haag told appellant she could do an investigation and asked appellant to fill out a complaint form, which she emailed to appellant along with a synopsis of their conversation. N.T. p. 107; Ap. Ex. 3.

The next time Haag heard from appellant was in March 2019, when appellant emailed her apologizing for the delay and indicating that she had been very busy. N.T. pp. 107-108. During this conversation, appellant told Haag that she was waiting to see how things were going before completing the complaint form and stated she intended to submit the form shortly. N.T. p. 108. Haag stated she never received a complaint form from appellant, but noted on April 2 or 3, 2019, appellant emailed her about submitting leave for an appointment with the EEOC. N.T. p. 108; Ap. Ex. 3. Haag explained to appellant that she did not need to tell her supervisor why she needed to use the leave. N.T. p. 108.

Haag further testified she never notified anyone in appellant's chain of command or Human Resources about her interactions with appellant. N.T. pp. 108-109. Haag explained her conversations with appellant were confidential. N.T. p. 109. Haag denied reaching out to appellant's direct supervisor, Dougherty, or Drupp. N.T. pp. 109-110. Haag further explained when she conducts investigations, she does not mention a complainant's name unless it is necessary. N.T. p. 108.

Haag also noted she is responsible for accepting delivery of EEOC complaints that are filed by employees under the area she handles. N.T. p. 118. Haag testified she did not receive notification from the EEOC that a complaint had been filed by appellant until after appellant was terminated. N.T. pp. 110-111. Haag stated the only information she had prior to appellant's termination was that appellant was going to be speaking with the EEOC. N.T. p. 110. Haag denied discouraging appellant from filing an EEOC claim. N.T. p. 120.

Like Haag, neither Dougherty nor Drupp were aware that appellant filed an EEOC complaint, until after appellant was dismissed from her position. N.T. pp. 159-160, 231, 267. Indeed, Drupp testified none of the persons involved in the disciplinary process were aware appellant had filed an EEOC complaint. N.T. pp. 231, 268. Both Dougherty and Drupp also testified appellant's rejection on probation was solely based on the reasons set forth in the rejection on probation letter, which included failing to follow proper licensing procedures, failing to follow instructions, and engaging in disruptive behavior and inappropriate conduct. N.T. pp. 158-160, 168-169, 231; Comm. Ex. A. Dougherty and Drupp denied appellant's EEOC complaint was a factor in her rejection on probation. N.T. pp. 159-160, 231-232, 268.

Additionally, both Dougherty and Drupp testified appellant was not treated differently than other employees. N.T. p. 161. Dougherty explained she documented appellant's performance issues and submitted that documentation to Human Resources just as she does in every disciplinary matter. N.T. p. 161. Drupp also noted she used the same procedure to conduct appellant's fact-finding interviews as she did for other employees. N.T. p. 227.

### ***Motion to Dismiss***

Following the hearing, the appointing authority submitted a Brief in which it moved to dismiss the present appeal. AA Bf. Specifically, the appointing authority argued appellant failed to establish a *prima facie* case of discrimination during the hearing, thereby requiring the matter to be dismissed. AA Bf. Following our review, the Commission finds appellant has not met her burden of establishing traditional discrimination based on her retaliation claim. Accordingly, the appointing authority's Post-Hearing Motion is hereby granted for the reasons set forth in the following section of this adjudication.

### ***Credibility/Evidentiary Determinations***

To establish a claim of "traditional discrimination," the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). While the

Commission recognizes 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 her rejection on probation was retaliatory.

Appellant asserts her rejection on probation was retaliatory because she filed a complaint with the EEOC on April 9, 2019, two days before she was removed.<sup>13</sup> N.T. p. 301. However, there is no credible<sup>14</sup> evidence the appointing authority was aware of the filing at the time it rejected appellant on probation. Indeed, Haag, Dougherty, and Drupp credibly denied they had any knowledge of appellant's EEOC complaint prior to her removal. N.T. pp. 110-111, 159-160, 231, 267-268. Dougherty and Drupp also credibly testified appellant's EEOC complaint was not a factor in her rejection on probation. N.T. pp. 159-160, 231-232, 268.

Additionally, there is no evidence appellant was treated differently during the disciplinary process which resulted in her rejection on probation. Dougherty and Drupp credibly testified they followed the same procedures during appellant's disciplinary process as they had with other employees. N.T. pp. 161, 227. Therefore, based on the foregoing, we find appellant failed to present any credible evidence establishing a *prima facie* case of retaliation.

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<sup>13</sup> Despite being directed to limit the scope of her testimony to the retaliation claim, appellant insinuated she was discriminated against based on her race and disability. Since these allegations are not presently before us, we are constrained from opining on them. With that said, there is no credible evidence which would suggest appellant's rejection on probation was motivated by her race or disability. We find both Dougherty and Drupp credibly testified appellant's rejection on probation was based on her failure to follow procedures and instructions, as well as her inappropriate conduct. N.T. pp. 158-160, 168-169, 231; Comm. Ex. A. Additionally, Dougherty credibly denied appellant's race and disability were factors in her recommendation to reject appellant on probation. N.T. pp. 159-160. Accordingly, we find there is no evidence to support appellant's claim of race and/or disability discrimination.

<sup>14</sup> 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).

Furthermore, we find, even if appellant's evidence had been sufficient to shift the burden of proof to the appointing authority, the appointing authority presented sufficient evidence of a legitimate, non-discriminatory reason for removing appellant from her position. *Nwogwugwu*, 594 A.2d at 850. Specifically, we find credible the testimony and evidence presented by the appointing authority's witnesses that appellant was unable or unwilling to satisfactorily perform her duties.

Section 2404(a)(3) of Act 71 of 2018 provides in pertinent part:

The appointing authority may remove an employee during the probationary period if, in the opinion of the appointing authority, the probation indicates that the employee is unable or unwilling to perform the duties satisfactorily or that the employee's dependability does not merit continuance in the service.

71 Pa.C.S.A. § 2704(a)(3). Thus, a probationary status civil service employee does not enjoy the job security afforded persons on regular status, who may be removed only for just cause. 71 Pa.C.S.A. § 2607.

The Commission concludes based on the credible testimony of the appointing authority's witnesses, which is detailed above, appellant was unable to satisfactorily perform the duties of a Clerk Typist 3. Specifically, appellant's rejection on probation was based on her continued failure to follow procedures and instructions, as well as her inappropriate conduct. Therefore, we find the evidence establishes appellant was removed from her position for legitimate non-discriminatory reasons. Additionally, we find appellant provided no credible evidence the appointing authority's merit-related reasons were pretextual. Thus, we find appellant has failed to establish traditional discrimination. Accordingly, we enter the following:

CONCLUSION OF LAW

Appellant has failed to present evidence establishing discrimination violative of Section 2704 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Charmaine L. Bailey challenging her removal from probationary Clerk Typist 3 employment with the Department of State, and sustains the action of the Department of State in the removal of Charmaine L. Bailey from Clerk Typist 3 employment, effective April 12, 2019.

State Civil Service Commission

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Gregory M. Lane  
Commissioner

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Bryan R. Lentz  
Commissioner

Mailed: 1/28/21