

COMMONWEALTH OF PENNSYLVANIA

Ralph E. Lynn : State Civil Service Commission
 :
 v. :
 :
 State Correctional Institution :
 at Frackville, :
 Department of Corrections : Appeal No. 30245

Ralph E. Lynn : Jocelyn G. Schultz
Pro Se : Attorney for Appointing Authority

Aaron M. Novotnak
Indispensable Party¹

ADJUDICATION

This is an appeal by Ralph E. Lynn challenging his non-selection for promotion to Corrections Welding Trade Instructor employment with the State Correctional Institution at Frackville, Department of Corrections. A hearing was held on November 13, 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. The issue before the Commission is whether appellant has established that his non-selection for Corrections Welding Trade Instructor was the result of discrimination.

¹ In recognition of the due process requirements noted in *Jefferson County Assistance Office, Department of Public Welfare v. Wolfe*, 136 Pa. Commw. 115, 582 A.2d 425 (1990), the individual currently occupying the challenged position was given the opportunity to participate in the proceedings. Comm. Ex. B; N.T. p. 7. By e-mail dated September 13, 2019, the indispensable party indicated he would be participating. Comm. Ex. B-1; N.T. p. 8. As discussed further below, the indispensable party did not appear the day of the hearing to participate in the proceedings.

FINDINGS OF FACT

1. On April 25, 2019, appellant accepted a conditional offer of employment for the position of Corrections Welding Trade Instructor from the appointing authority and was subsequently provided a starting date of May 5, 2019 for the new position. N.T. pp. 28-29, 37.
2. On April 29, 2019, the appointing authority rescinded the conditional offer of employment for Corrections Welding Trade Instructor appellant had previously accepted. Comm. Ex. A; N.T. pp. 29-30.
3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018.
4. On February 28, 2019, a vacancy posting was issued inviting applications for a Corrections Welding Trade Instructor position at the appointing authority. The closing date for the posting was March 14, 2019. AA Ex. 1.

5. The vacancy posting indicated individuals who wanted to be considered for the position must apply to the vacancy posting, meet the eligibility requirements, complete the supplemental questions, and receive a score. Candidates were further advised the score was only valid for this specific vacancy, and once the position was filled, the score would no longer be valid. AA Ex. 1.

6. As noted in the vacancy posting, Corrections Welding Trade Instructor is in pay scale group CO37 and “is journeyman level welding trades work” which “provides on-the-job training and shop instruction for the vocational training of inmates in the welding trade [and] . . . is responsible for the custody and discipline of inmates during training and work assignments.” AA Ex. 1.

7. The Minimum Experience and Training Requirements (hereinafter “METs”) for Corrections Welding Trade Instructor are:
 - Four years of experience in arc and gas welding of various components or structural frameworks;
 - or
 - Completion of an approved apprenticeship in the welding trade;
 - or

An equivalent combination of experience and training which includes one year of journey level work in the welding trade.

Job specification effective 11/2/2018.²

8. Both appellant and the indispensable party, Aaron Novotnak, applied and took the exam for Corrections Welding Trade Instructor. N.T. pp. 62, 64-65, 67; AA Exs. 2, 3.
9. At the time appellant applied for and took the exam, he was already employed by the appointing authority as a Corrections Officer 1, a civil service position in the CO35 pay scale group. N.T. pp. 28-29, 32, 39.
10. At the time Novotnak applied for and took the exam, he was already employed by the appointing authority as a Labor Foreman, a non-civil service position in the same CO35 pay scale group (pay range) as Corrections Officer 1. N.T. pp. 39, 72.

² Official job specifications may be found at the Job Specification Search site maintained by the Office of Administration, <http://www.jobclass.state.pa.us/>.

11. Novotnak was initially deemed ineligible for Corrections Welding Trade Instructor because it was determined he did not satisfy the METs for the position. N.T. pp. 64-65, 95-96.
12. Novotnak subsequently filed a challenge to the determination he was ineligible for Corrections Welding Trade Instructor and provided additional information regarding his qualifications.³ This challenge was not resolved until April 2019, when the Office of Administration (hereinafter “OA”) determined he satisfied the METs and was eligible for the position. N.T. pp. 64-65, 95-96; AA Ex. 4.
13. The appointing authority requested two types of lists to fill the Corrections Welding Trade Instructor position: an employment certification list, also known as a “Code 11” list; and a veterans’ preference list, also known as a “Code 22” list. N.T. pp. 62-63.
14. On March 20, 2019, two lists were referred to the appointing authority: employment certification 2019-35355 and veterans’ preference certification 2019-35362. N.T. p. 64; AA Ex. 2.

³ The record does not indicate the exact date when Novotnak was deemed ineligible, nor when he filed his challenge to that determination.

15. The March 20, 2019 veterans' preference certification list (2019-35355) consisted of a total of three individuals being referred on that certification. AA Ex. 2.
16. The March 20, 2019 employment certification list referred a total of fourteen individuals on that certification. The employment certification list included the names of all three veterans that appeared on the veteran's preference certification list. AA Ex. 2.
17. Appellant's name appears on the March 20, 2019 employment certification list with a "vet indicator" included for his name, and an "Exam Score" of 95 as well as a "Total Score"⁴ of 95. Appellant's score of 95 places him in the rule of three on the employment list, which indicates he has a referred rank of "2." AA Ex. 2.
18. OA's Bureau of Talent Acquisition determines if an individual is eligible for veterans' preference. N.T. p. 68.

⁴ Total Score includes ten (10) points added to the Exam Score for individuals who qualify for veterans' preference under the veterans' preference provisions of the Pennsylvania Military and Veterans Code (51 Pa.C.S. §§ 7101-7109).

19. While appellant has a veteran indicator on the March 20, 2019 employment certification list, OA did not grant him veterans' preference and ten points were not added to his exam score because he currently held civil service status as a Corrections Officer 1. N.T. p. 67.
20. Novotnak's name did not appear on either the employment certification (2019-35355) or the veterans' preference certification (2019-35362) issued on March 20, 2019 because he had been deemed ineligible due to not satisfying the METs for Corrections Welding Trade Instructor. N.T. pp. 95-96; AA Ex. 2.
21. At the time relevant to the present appeal, Anne Sommers was a Field Human Resource Officer 3 responsible for all aspects of human resources, including recruitment and hiring, at the appointing authority and the State Correctional Institution at Mahanoy. N.T. pp. 41-42, 44.
22. Kimberly Taylor is a Human Resource Analyst 3 employed by OA. Taylor works in the Human Resource Delivery Center which serves several

agencies, including the Department of Corrections and Pennsylvania Board of Probation and Parole. N.T. p. 60.

23. Taylor is a placement supervisor who oversees all of the placements (i.e., appointments and promotions) for agencies served by the delivery center. Every civil service and non-civil service hire for those agencies comes to Taylor for approval. N.T. pp. 60-61.
24. Since May 2018, Dawn Jacobs has served as Human Resource Analyst 1 and is responsible for recruitment for both the State Correctional Institution at Frackville and the State Correctional Institution at Mahanoy. N.T. pp. 78-79.
25. Jacobs' involvement in filling the Corrections Welding Trade Instructor position included handling one of the requests to fill the position, as well as notifying appellant by e-mail of the date and time of his interview. N.T. p. 79.
26. On or about April 2, 2019, Sommers approached Jacobs and asked if Novotnak was part of the list that had been referred to the appointing authority. N.T. p. 82.

27. As a result of Sommers' inquiry, on April 2, 2019, Jacobs sent an e-mail to Lydia White, the Section Manager of the Veterans Preference and Referral Section for OA's Bureau of Talent Acquisition, regarding both the Employment Certification (2019-35355) and the Veterans' Preference Certification (2019-35362) that had been issued on March 20. AA Ex. 4. The e-mail stated:

Good Morning Lydia

Can you check to see if there was [sic] any additional referrals for this position. I was made aware that an individual by the name of Anthony [sic] M. Novotnak applied to this position, was denied and he since appealed and received a score of 90.

Thanks,

Dawn

N.T. pp. 80-81; AA Ex. 4.

28. On April 3, 2019, White sent Jacobs a reply e-mail advising Jacobs "As a result of a challenge, Aaron Novotnak has been deemed eligible and is being added to these referral list[s]." Below that text is a screen shot which lists the Requisition number, Requisition Title, Job title, Exam Plan, and the Date Referred for the Veterans' Preference

Certification (2019-35362) and the Employment Certification (2019-35355). The date referred for both lists is April 3. AA Ex. 4.

29. Appellant's name appears on the April 3, 2019 amended employment certification list with a "vet indicator" included for his name, and an "Exam Score" of 95 as well as a "Total Score" of 95. Appellant's score of 95 places him in the rule of three on the employment list, which indicates he has a referred rank of "3." AA Ex. 3.
30. As with the original March 20, 2019 employment certification list, on the April 3 amended list, OA did not grant appellant veterans' preference and ten points were not added to his exam score because he currently held civil service status as a Corrections Officer 1. N.T. p. 67.
31. On April 25, 2019, after receiving approval, Jacobs called appellant, advised him he had been selected, and asked if he would accept the position: appellant accepted the offer. N.T. pp. 29, 80.

32. On or shortly after April 25, 2019, Major of the Guard Nathan Winder notified appellant that his start date for the new position was May 5, 2019. N.T. p. 29.
33. On April 29, 2019, appellant was relieved of his post to attend a meeting that included Winder and Jacobs. N.T. pp. 29-30.
34. At the April 29, 2019 meeting, appellant was advised that while he had been approved by OA, and selected by the appointing authority, he had been denied the position because there were two individuals that had veterans' preference and, because of this, appellant was eliminated from the eligibility list. N.T. p. 31.
35. Novotnak was appointed to the Corrections Welding Trade Instructor position. He began working in the position on June 16, 2019. N.T. pp. 95-96.
36. At the time of the Commission's November 13, 2019 hearing on the present appeal, OA's Bureau of Talent Acquisition had not completed the final audit of Novotnak's placement into the Corrections Welding Trade Instructor position. N.T. pp. 95-96.

DISCUSSION

The issue in the present appeal is whether appellant established that his non-selection for promotion to Corrections Welding Trade Instructor was the result of discrimination. Appellant has alleged discrimination⁵ based upon a violation of Act 71 of 2018 and/or the Rules applicable to merit system employment.⁶ Comm. Ex. A. Specifically, appellant is challenging the rescission of a conditional job offer for the position, which he accepted and for which he was provided a starting date. Comm. Ex. A. Appellant alleges that despite the fact he was a qualified veteran and had one of the top three scores, he “was ruled ineligible” after he had accepted the conditional offer and been provided a date on which he would be starting employment in his new position. Appellant, a current appointing authority employee, further alleged that he was provided with no documentation or explanation regarding the change in his status regarding his eligibility to be appointed to Corrections Welding Trade Instructor and removal from the position. Comm Ex. A.

⁵ Appellant’s original Appeal Request Form also alleged discrimination based upon political opinions/affiliations. Comm. Ex. A. However, appellant did not present evidence in support of this claim at the hearing; his presentation at the hearing focused solely on his claims of technical discrimination. Consequently, we dismiss appellant’s claim as it relates to discrimination based upon political opinions/affiliations.

⁶ These rules include the temporary regulations adopted for Act 71 of 2018. Section 2203 of Act 71 provides OA with the authority to promulgate regulations necessary to carry out their functions under Act 71. Under Section 2203(b), OA is authorized to promulgate temporary regulations for a limited period (three years) to implement Act 71. Under the authority of Section 2203(b), OA promulgated temporary regulations, effective March 28, 2019. These temporary regulations (“Merit System Employment Regulations”) were published in the Pennsylvania Bulletin on March 16, 2019 (Vol. 49, No. 11). 49 Pa. Bull. 1307-1323. The temporary regulations can be found at 4 Pa. Code §§ 601.1-607.13.

Subsequent to having been granted a hearing, appellant submitted a request to amend his appeal. In his amendment request, appellant indicated that since the time he filed his original appeal on May 14, 2019, the Corrections Welding Trade Instructor position had been awarded to the indispensable party, Aaron Novotnak, who had been provided a start date of June 16, 2019. Appellant further indicated he wanted to amend the appeal due to the fact the position had been awarded to Novotnak, and to challenge Novotnak's qualifications for the position. Comm. Ex. A. By letter dated August 23, 2019, the Commission advised appellant that his request to amend his appeal had been considered by the Commissioners at the August 21, 2019 Commission meeting and his request had been granted. Comm. Ex. A.

On August 30, 2019, the Commission issued a "Memorandum of Notice to Indispensable Party" joining Novotnak to the proceedings as a party and notifying him of his right to participate in the appeal. Comm. Ex. B. The memorandum expressly advised him that if he elected not to participate as an indispensable party, the hearing would proceed without him. Further, he was advised that a decision in favor of the appellant could result in Novotnak's removal from his position as Corrections Welding Trade Instructor and if he elected not to participate, he would waive his right to appeal the result of the hearing, even if he was displaced from his Corrections Welding Trade Instructor position.⁷ Comm. Ex. B.

⁷ The Commission memorandum cited to *Fatool v. State Civil Service Commission (Danville State Hospital)*, 14 A.3d 919 (Pa. Commw. Ct. 2011), *petition for allowance of appeal denied* 2011 Pa. LEXIS 2559 (2011). In *Fatool*, the Commission sent a similar notice to the indispensable party, which indicated the propriety of his appointment was at issue, that he could participate fully in the proceedings, but if he elected not to, the hearing would proceed without him and could result in his removal from the position to which he had been appointed. Commonwealth Court determined that the notice fully satisfied due process requirements.

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). Section 2704 of Act 71 of 2018 provides:

§ 2704. Prohibition of discrimination.

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. § 2704. As expressly provided for in this section, the Commission has jurisdiction over claims of discrimination involving numerous actions that occur in the merit system, including “recruitment,” as well as “appointment” and “promotion.” 71 Pa.C.S. § 2704. Under Section 3003(7)(ii), the Commission has authority to convene hearings when an individual aggrieved by an alleged violation of Section 2704 files a timely appeal. 71 Pa.C.S. § 3003(7)(ii).

The provisions of Section 2704 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.⁸ In applying this language, the

⁸ Section 905.1 provides:

905.1 Prohibition of Discrimination—No officer or employe[e] 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.

courts have held these provisions address both “traditional” and “procedural” discrimination. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 462 (Pa. Commw. Ct. 1988). “Traditional discrimination” encompasses claims of discrimination based on race, sex, national origin or other non-merit factors. “Procedural discrimination” refers to a technical violation of the statute. In a case where an employee alleges a technical violation, no showing of intent is required. There must be evidence, however, to show that the employee was harmed by the technical noncompliance or that because of the peculiar nature of the 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).

In support of his appeal, appellant testified on his own behalf. In response, the appointing authority presented the testimony of Anne Sommers, Kimberly Taylor, and Dawn Jacobs. Indispensable party Novotnak did not appear at the hearing on this appeal. N.T. p. 12.

At the start of the hearing, the appointing authority stipulated that appellant was interviewed, given a conditional offer of employment for the Corrections Welding Trade Instructor position, and the appointing authority subsequently rescinded the offer.⁹ N.T. p. 19. In his testimony, appellant provided further details concerning his acceptance of the position. Appellant testified that on April 25, 2019, Jacobs called, advised him he had been selected for the position, and asked if he would accept. N.T. p. 29. Jacobs has worked as a Human Resource

⁹ This stipulation was made in response to appellant’s request for a continuance to serve a subpoena he obtained from the Commission to secure the attendance of a witness to testify concerning Novotnak’s qualifications, a witness whom the appointing authority previously indicated would need to be available for the hearing. N.T. pp. 12-23. See further discussion below.

Analyst 1 since May 2018. N.T. p. 78. Appellant testified he accepted, and subsequently, Major of the Guard Nathan Winder notified appellant his start date for the new position was May 5, 2019. N.T. p. 29.

Appellant further testified that on April 29, he was relieved of his post to attend a meeting in the conference room. Winder, Jacobs, and Patty Zurick¹⁰ were present for this meeting. N.T. pp. 29-30. Appellant testified he was advised that while he had been approved by the Office of Administration (hereinafter “OA”), and selected by the appointing authority, the “State Civil Service” denied him the position because there were two individuals that had veterans’ preference and, because of this, appellant was eliminated from the eligibility list. N.T. p. 31.

Appellant testified he then questioned how he could be removed from the position due to a clerical error after he had already been selected for the position and officially been given a start date. N.T. pp. 31-32. He was advised these individuals had a right to the position over appellant. N.T. p. 32. According to appellant, he was told they could not provide him with the names of these two individuals. N.T. p. 32. Appellant further testified that when he asked how he was ruled ineligible because someone else had veterans’ preference, when appellant has prior military service, he was told he could not use preference points for a promotion. N.T. p. 32. Appellant had a score of 95 on the exam. N.T. p. 32. Appellant testified he knew one of the individuals on the list, and that he was in the same pay classification (CO35)¹¹ as appellant. N.T. p. 32. At the meeting, appellant asked

¹⁰ Zurick’s job title is not indicated in the record.

¹¹ CO is the type of pay scale applicable to these positions, and 35 is the pay scale group.

how the other individual was able to use veterans' preference points for promotional purposes if appellant was not able to use veterans' preference for a promotion. N.T. pp. 32-33. Appellant testified he received no response to this question. N.T. p. 33.

Appellant testified he decided he was better off ending the meeting and filing an appeal or grievance. He told the appointing authority he was going to file an appeal or grievance, and the appointing authority knew he filed his appeal before they filled the position with Novotnak on June 16, 2019. N.T. pp. 33-35. Appellant does not believe the appointing authority could proceed with placing Novotnak into the position when they already had awarded the position to appellant, provided him with a start date, and knew he filed an appeal which was active. N.T. pp. 35-36. Appellant asserts that a candidate is not permitted to be removed from a position based upon a clerical error.¹² N.T. p. 36.

On cross-examination, appellant acknowledged that he currently works for the appointing authority as a Corrections Officer 1, and the Corrections Welding Trade Instructor position is considered a promotion.¹³ N.T. p. 37. Appellant also testified that Novotnak, who **was** permitted to use veterans' preference for a promotion, was a Labor Foreman employed by the appointing authority, in a non-civil service position in the same CO35 pay range as appellant. N.T. pp. 38-39.

¹² In his Appeal Request Form, appellant specifically cited to Chapters 22 and 23 of Act 71. Comm. Ex. A.

¹³ Counsel for the appointing authority asked appellant whether he had utilized veterans' preference when he was appointed to his position as Corrections Officer 1 and appellant confirmed that he had. N.T. p. 37. We note that the position that veterans' preference can only be used one time during the course of an individual's classified service employment was expressly rejected by Commonwealth Court because it conflicted with the preference provisions of the Pennsylvania Military and Veterans and Code (51 Pa.C.S. §§ 7101-7109). See *Cutler v. State Civil Service Commission (Office of Administration)*, 924 A.2d 706 (Pa. Commw. Ct. 2007) *petition for allowance of appeal denied* 596 Pa. 710, 940 A.2d 366 (2007).

In response to the appellant’s presentation, Sommers testified that she is a Field Human Resource Officer 3 responsible for all aspects of human resources, including recruitment and hiring, at the appointing authority and the State Correctional Institution at Mahanoy. N.T. pp. 41-42, 44. Sommers testified about the posting of the Corrections Welding Trade Instructor position. N.T. pp. 45-47. *See* Findings of Fact 3 through 5. The posting was open from February 28, 2019 through March 14, 2019. AA Ex. 1. Sommers also indicated that the posting included the Minimum Experience and Training Requirements (METs),¹⁴ which all candidates are required to meet in order to be eligible for the position. N.T. p. 48.

Sommers testified the State Civil Service Commission, not the Department of Corrections, establishes the eligibility requirements for positions.¹⁵ N.T. p. 49. Regarding how she became aware of “what happened” in appellant’s case, Sommers testified:

I was actually not even in the office. I was on vacation. My staff realized that there was an error made. They contacted me, explained to me what occurred. I informed

¹⁴ The METs listed on the vacancy posting do not include the first item listed on the job specification (“Four years of experience in arc and gas welding of various components or structural frameworks”). The posting provides: “**Minimum Experience and Training Requirements** - Completion of an approved apprenticeship in the welding trade; OR an equivalent combination of experience and/or training which includes one year of journeyman level work.” AA Ex. 1.

¹⁵ Authority for establishing the required qualifications for positions in the classified service (civil service) has long been vested with the Executive Board. The Executive Board establishes Job Specifications for classified service positions, which includes the METs required for a classification. This authority was transferred from the Commission to the Executive Board in the 1963 amendments to the Civil Service Act (Act 286 of 1941), 71 P.S. §§ 741.1-741.1005. Those amendments were Act 520 of 1963 (P.L. 1257). Classification of positions in the classified service (civil service) remains vested with the Executive Board under Act 71 of 2018. *See* 71 Pa.C.S. § 2504. Under Act 286, the State Civil Service Commission was responsible for determining if candidates satisfied those METs established by the Executive Board—i.e., determining if candidates were eligible for a position. This function of determining eligibility was transferred to OA under Act 71.

them that they need to make the superintendent aware of the situation and they would need to get Mr. Lynn in---in contact with him and explain to him what occurred.

N.T. p. 49. Sommers testified that they are required to ensure the rules for hiring for civil service positions are followed. N.T. pp. 51-52. Sommers was asked if a clerical error occurred, how this was handled in the present case. N.T. p. 51. Sommers explained, “In this situation we realized that there was an error made. . . . [C]lerical error or not, as a hiring agent, you want to say . . . respect the Civil Service rules. We’re obligated to maintain those rules. If there was an error made, we need to correct it.” N.T. p. 51. Sommers testified Novotnak was deemed qualified¹⁶ and he was currently in probationary status, which is at least six months. N.T. p. 50.

Kimberly Taylor testified she is a Human Resource Analyst 3 employed by OA.¹⁷ N.T. pp. 57-58. Taylor works in the Human Resource Delivery Center which serves several agencies, including the Department of Corrections and Pennsylvania Board of Probation and Parole. N.T. p. 60. Taylor serves as a placement supervisor. She testified that she oversees all of the placements for the delivery center, and serves as a “subject knowledge expert.” N.T. p. 60. She testified that every civil service and non-civil service hire comes to her for approval. N.T. pp. 60-61. She further testified she “get[s] involved in the external legality of hires to ensure that people are qualified for the position.” N.T. p. 60. According to Taylor, once the selection is made, she provides guidance, training, and education to the agencies covered by the delivery center. N.T. p. 61.

¹⁶ While Sommers testified that the State Civil Service Commission found Novotnak qualified, at the time in question (April 2019), all of those eligibility functions had already shifted to OA upon full implementation of Act 71 of 2018, which occurred on March 28, 2019.

¹⁷ Taylor began her Commonwealth employment in 2016 working with the Pennsylvania Department of Transportation. N.T. p. 59.

Taylor also testified about how agencies obtain lists of candidates to fill positions. According to Taylor, the appointing authority would submit a request through NeoGov. N.T. p. 62. OA’s Bureau of Talent Acquisition then evaluates all of the candidates and “applies them to the specific list types that were requested.” N.T. p. 62. Taylor testified the appointing authority requested two types of lists: an employment certification, also known as a “Code 11” list; and a veterans’ preference list, also known as a “Code 22” list. N.T. pp. 62-63. Taylor testified that OA’s Bureau of Talent Acquisition referred these lists to the appointing authority on March 20, 2019. N.T. p. 64. The appointing authority submitted those lists into the record as AA Ex. 2.

Novotnak’s name did not appear on either the Code 11 employment certification (2019-35355) or the Code 22 veterans’ preference certification (2019-35362).¹⁸ AA Ex. 2. However, appellant’s name was certified on the employment list. The veterans’ preference certification list (2019-35355) consisted of a total of three individuals being referred on that certification. AA Ex. 2. The list had the names of the three individuals referred, their score, and several other categories of information, including the categories below:

Name	Action Date	Vet Indicator	Date Vet Ind Assigned	Exam Score	Total Score	Referred Rank
Buckley, Christopher F	03/20/2019	V	4/27/2018	95	105	1
Shivelhood, Robert Andrew	03/20/2019	V	3/5/2019	75	85	2
Spotts, Joseph Donald	03/20/2019	V	3/14/2018	75	85	2

AA Ex. 2.

¹⁸ The lists entered into the record at the hearing generated by NeoGOV do not identify the type of list by either name (employment certification list/veterans’ preference certification list) or by Code number (Code 11/Code 22 respectively) used by the witness in her testimony. AA Ex. 2.

Similarly, the employment certification list referred a total of fourteen individuals on that certification. AA Ex. 2. The employment certification list included the names of all three veterans that appeared on the veteran's preference certification list. AA Ex. 2. Appellant's name also appears on the employment certification list with a "vet indicator" included for his name, and a "Referred Rank" of 2 based on a total score of 95. This list provided:

Name	Action Date	Vet Indicator	Date Vet Ind Assigned	Exam Score	Total Score	Referred Rank
Buckley, Christopher F	03/20/2019	V	4/27/2018	95	105	1
Kline, Michael	03/20/2019			95	95	2
Kozel, Dominic	03/20/2019			95	95	2
Lynn, Ralph Earl	03/20/2019	V	3/13/2019	95	95	2
Davis, Craig A	03/20/2019			90	90	3
Melnick, Anthony J	03/20/2019			90	90	3
Picth, William	03/20/2019			90	90	3
Cuff, Chris	03/20/2019			85	85	4
Kah, Christopher M	03/20/2019			85	85	4
May, Kenneth Lloyd	03/20/2019			85	85	4
Shivelhood, Robert Andrew	03/20/2019	V	3/5/2019	75	85	4
Spotts, Joseph Donald	03/20/2019	V	3/14/2018	75	85	4
Thrash, Gary S	03/20/2019			85	85	4
Sock, Angel	03/20/2019			80	80	5

AA Ex. 2.

Taylor testified that veterans appearing on the Code 22 veteran's preference certification list, regardless of their score, are offered the opportunity to interview for a position. N.T. p. 68. But she further testified even if the veterans are

interviewed, they do not need to be selected. N.T. p. 68. The appointing authority can use other options, such as an “internal candidate from an internal posting,” or a different type (code) of list the appointing authority requested. N.T. p. 68. She testified, “So, it’s not an absolute. You know, you must be hired, but it does offer you the option to be interviewed.” N.T. p. 68. Taylor explained that OA’s Bureau of Talent Acquisition determines if an individual is eligible for veterans’ preference. N.T. p. 68.

Taylor testified that even though appellant has a veteran indicator on the employment certification list, he does not qualify for veterans’ preference because he currently held civil service status as a Corrections Officer 1. N.T. p. 67. She testified appellant is considered a “working veteran”¹⁹ and points were not added to his test score because the Corrections Welding Trade Instructor position would be a promotion. N.T. p. 67. Taylor did indicate appellant would qualify for veterans’ preference points if he applied “externally” for positions that constituted a lateral transfer or a demotion.²⁰ N.T. p. 67.

¹⁹ The term “working veteran” does not appear in Act 71 or OA’s temporary regulations. The term was, however, used previously for candidates who had been granted veterans’ preference upon entrance into the classified service and were subsequently barred from utilizing veterans’ preference for any other classified service positions. As noted above, in 2007 Commonwealth Court struck down this policy, contained in a Management Directive, in the *Cutler* decision because the policy was in conflict with the veterans’ preference provisions of the Military and Veterans Code. 924 A.2d 706, 707.

²⁰ In her testimony, Taylor uses the term “external” to refer to positions where a candidate applied for and took an examination and received a test score, even if the candidate was currently employed by the Commonwealth in the same agency where the vacancy in question is being filled. N.T. pp. 68-69. The term “external” does not appear in Act 71 of 2018 or the temporary regulations in the context of appointments, recruiting, or considering candidates. The only reference to “external” in Act 71 appears in Section 2603(a)(3) in the context of suspensions pending investigation to refer to external investigations conducted by external agencies. 71 Pa.C.S. § 2603(a)(2). Similarly, the temporary regulations only use the term “external” in the context of suspension pending investigation when referring to investigations. 4 Pa. Code § 605.2(b) and (d). We note that a transfer, by definition, is the movement of a classified service employee from one appointing authority to another—i.e, the individual is *not* a candidate already working for the appointing authority (a current employee), but they may be considered an “internal” candidate in the sense that the individual is already employed by the Commonwealth.

Taylor was questioned about “an update” to the original lists referred on March 20, 2019. N.T. p. 68. Taylor explained that on April 3, 2019, the lists were updated to add Novotnak’s name to the employment certification list and the veterans’ preference list as a result of a challenge Novotnak filed to initially being found ineligible for Corrections Welding Trade Instructor. N.T. pp. 64-65; AA Ex. 3. Taylor testified candidates have twenty days²¹ to challenge a determination of ineligibility by the Bureau of Talent Acquisition and to submit supporting documentation. N.T. pp. 69-70. Taylor also testified that if an individual files a challenge and is then deemed eligible, their name is added to the referral list or exam list that “falls in that specific posting.” N.T. p. 70.

The update to the list was the subject of an exchange of e-mails between Jacobs and Lydia White, who at the time served as the Section Manager of the Veterans Preference and Referral Section for the OA’s Bureau of Talent Acquisition. N.T. pp. 80-81; AA Ex. 4. On April 2, 2019, Jacobs sent an e-mail to White regarding both the employment certification (2019-35355) and the veterans’ preference certification (2019-35362) that had been issued on March 20. AA Ex. 4. The e-mail stated:

Good Morning Lydia

Can you check to see if there was [sic] any additional referrals for this position. I was made aware that an individual by the name of Anthony [sic] M. Novotnak applied to this position, was denied and he since appealed and received a score of 90.

Thanks,

Dawn

AA Ex. 4.

²¹ While Taylor indicated this was twenty “business days, the temporary regulation provides individuals have twenty *calendar* days to file a challenge. N.T. pp. 69-70. See 4 Pa. Code § 602.19.

On April 3, 2019, White sent Jacobs a reply e-mail advising Jacobs “As a result of a challenge, Aaron Novotnak has been deemed eligible and is being added to these referral list[s].” AA Ex. 4. Below that text is a screen shot which lists the Requisition number, Requisition Title, Job title, Exam Plan, and the Date Referred for the veterans’ preference certification (2019-35362) and the employment certification (2019-35355). The date referred for both lists is 4/03.²² AA Ex. 4.

The appointing authority also submitted updated lists for the record, both of which included Novotnak’s name and listed an “Action Date” for his name of “04/03/2019.” AA Ex. 3. Each of the lists has handwritten on the top left side of the document:

“4/3/19

Revised”

AA Ex. 3. The veterans’ preference certification list now had a total of four names being referred and contained the same categories of information as the March 20, 2019 certifications. The list consisted of:

Name	Action Date	Vet Indicator	Date Vet Ind Assigned	Exam Score	Total Score	Referred Rank
Buckley, Christopher F	03/20/2019	V	4/27/2018	95	105	1
<i>Novotnak, Aaron</i>	<i>04/03/2019</i>	<i>V</i>	<i>4/13/2018</i>	<i>90</i>	<i>100</i>	<i>2</i>
Shivelhood, Robert Andrew	03/20/2019	V	3/5/2019	75	85	3
Spotts, Joseph Donald	03/20/2019	V	3/14/2018	75	85	3

AA Ex. 3 (italics added).

²² The year is obscured on the exhibit submitted by the appointing authority. AA Ex. 4.

Similarly, the updated employment certification indicated that fifteen names were being referred. AA Ex. 3. The first page²³ of this list provided:

Name	Action Date	Vet Indicator	Date Vet Ind Assigned	Exam Score	Total Score	Referred Rank
Buckley, Christopher F	03/20/2019	V	4/27/2018	95	105	1
<i>Novotnak, Aaron</i>	<i>04/03/2019</i>	<i>V</i>	<i>4/13/2018</i>	90	100	2
Kline, Michael	03/20/2019			95	95	3
Kozel, Dominic	03/20/2019			95	95	3
Lynn, Ralph Earl	03/20/2019	V	3/13/2019	95	95	3
Davis, Craig A	03/20/2019			90	90	4
Melnick, Anthony J	03/20/2019			90	90	4
Picth, William	03/20/2019			90	90	4
Cuff, Chris	03/20/2019			85	85	5
Kah, Christopher M	03/20/2019			85	85	5

AA Ex. 3 (italics added).

Taylor testified appellant was the only Corrections Officer 1 that appeared on the April 3, 2019 employment certification. N.T. p. 72. Taylor also testified that since Novotnak held the non-civil service position of a Corrections Maintenance Foreman, he is not considered to be in the classified service. N.T. p. 72. She further testified, “Because he is not in the classified service the veteran’s [sic] preference would apply to him even if it is a promotion because he does not

²³ No explanation was provided by the appointing authority for only providing the first page of the two-page certification. Presumably, the other names included with the March 20, 2019 certification would have been included on the updated certification. The data listed under the categories of information would also presumably be the same, with the exception of the “Referred Rank” of candidates appearing on the second page.

hold Civil Service status.” N.T. p. 72. Taylor testified that appellant could not be appointed because on the April 3 employment certification, Buckley and Novotnak were veterans in the rule of three.²⁴ N.T. p. 70.

Taylor was also questioned about what would happen if the conditional offer to appellant had not been “rescinded”:

Q. . . . What would have been the outcome if the offer did not get rescinded?

A. If the offer had not been rescinded and Mr. Lynn had been placed into this position, upon review by the Bureau of Talent Acquisition, he would have been subsequently removed from the position as an illegal hire.

Q. And what is a conditional offer?

A. Conditional offer is the initial first step once a candidate has been selected. We initially offer the position dependent upon successful completion of a background check, verification of experience, education training requirement, internal approval such as criminal clearance or certification by the Commission.

N.T. p. 73. Taylor testified that even though appellant had been given a start date for the Corrections Welding Trade Instructor position, he had not officially started the position. She testified he could be removed at any time from the date of the

²⁴ Section 2402 of Act 71 provides for the “rule of three.” The relevant provisions of this section state:

- (b) Selection of certified eligibles.--The following apply:
- (1) The certification of eligibles created and issued under this section shall be valid for 90 business days.
 - (2) If the vacant position is to be filled from an eligible list, the appointing authority shall select an individual who is among the three highest-ranking available individuals on the certification of eligibles, unless the Office of Administration has specified prior to testing the eligibles on the eligible list that either all available individuals regardless of ranking or a specified alternative number other than three of the highest-ranking available individuals shall be used in making selections for the classification.
 - (3) In making the second or subsequent selection from the eligibles on an employment or promotional certification, each selection shall be from among the similarly ranked available individuals remaining on the certification of eligibles.

conditional offer to the start date. She further testified he could be removed after the start date and when he was formally in the position as an illegal hire when the audit of the Bureau of Talent Acquisition was completed. N.T. p. 74.

Jacobs testified she served as a Human Resource Assistant 2 since July 2015. N.T. p. 78. Since May 2018, Jacobs has served as Human Resource Analyst 1 and is responsible for recruitment for both the State Correctional Institution at Frackville and the State Correctional Institution at Mahanoy. N.T. p. 79. She testified she became involved with appellant's case when she handled one of the requests to fill the position at issue. Jacobs received the lists referred for filling the Corrections Welding Trade Instructor position and sent the e-mail to appellant to notify him of when his interview would be held. N.T. p. 79. Jacobs testified that on April 25, 2019, after she "received NeoGov approval for him as well as EEO I called --- contacted him via phone to inform hi[m] that he was selected for the position and --- and would he accept." N.T. p. 80. Jacobs was asked what happened after appellant accepted the position:

Q. And what did you learn after that?

A. After that I reviewed my Civil Service list again that I received for that position and I realized that an error was made and Mr. Lynn was not in fact eligible for the position due to the fact that there was a veteran who interviewed that was eligible.

N.T. p. 80. Jacobs identified that veteran as Buckley, and testified Novotnak's name was underneath Buckley. N.T. p. 80.

Jacobs also testified about her exchange of e-mails with White on April 2 and 3, 2019 about Novotnak. N.T. p. 82. Jacobs testified that Sommers had approached her and asked if Novotnak was part of the list that had been referred to the appointing authority. N.T. p. 82. Jacobs testified that is why she sent the e-mail to White, who had responded that the list was revised and Novotnak's name should be added. N.T. p. 82. She confirmed that April 3, 2019 was the date she received the revised civil service "exam list" which included Novotnak's name. N.T. pp. 82-83.

Jacobs testified that after contacting the superintendent, she met with appellant on April 29 and informed him she had made an error and appellant was not eligible for the position. Jacobs testified she informed appellant that even though he was considered a veteran, he did not receive veteran preference points for this particular position because it was a promotion for him. N.T. p. 83.

In response to the appointing authority's case, appellant testified he did not believe Novotnak had the qualifications for the position in order to be certified. He also noted Novotnak did not attend the hearing, despite having indicated he would attend and participate in the proceedings. N.T. p. 94. Appellant was unable to question him about his qualifications, which was part of his amended appeal. He again noted that he had subpoenaed individuals who could substantiate his claims. Appellant renewed his request, made at the start of the hearing, for a continuance of the proceedings to be able to serve the subpoenas to secure the attendance of these witnesses.²⁵ N.T. pp. 90, 91.

²⁵ The two witnesses were individuals the appointing authority initially indicated would need to be present for the hearing. Scheduling of the hearing was based upon the appointing authority agreeing to a hearing date because of the availability of those individuals. Appellant obtained subpoenas for their attendance at the November 13, 2019 hearing.

Prior to Commissioner Lane ruling on the continuance request, Taylor was recalled and asked about the status of the audit of Novotnak's appointment to the Corrections Welding Trade Instructor position. Taylor testified that while Novotnak started working in the position on June 16, 2019, as of the date of the hearing, the Bureau of Talent Acquisition had not completed the final audit of Novotnak's placement into the position (which includes verification of employment or educational experience utilized during the eligibility process to find the candidate satisfied the METs and was, consequently, eligible for the position). N.T. pp. 95-96. Commissioner Lane subsequently denied appellant's request for a continuance and an additional day of hearing for purposes of securing the attendance of witnesses for which subpoenas had been issued to appellant. N.T. pp. 99-100. Commissioner Lane noted the Commission would be looking at the issues raised by appellant regarding whether the placement of Novotnak into the candidate pool and removal of appellant violated the regulations. N.T. p. 100. At the conclusion of the November 13, 2019 hearing, the parties elected not to file briefs or make closing statements, and rested on the record. N.T. pp. 107-109.

Analysis of Appellant's Technical Discrimination Claims

Amendments to a Civil Service List

We first address appellant's claim that the appointing authority could not rescind the job offer that had already been accepted by appellant after he had been notified he had been selected for the Corrections Welding Trade Instructor

position from the March 20, 2019 employment certification. Appellant's asserts that the accepted offer could not have been withdrawn by the appointing authority under the rationale that a clerical error had occurred.

There is no dispute that appellant appeared on the employment list certified to the appointing authority on March 20, 2019 and was within the rule of three. There is also no dispute that Novotnak had initially been deemed ineligible and his name did not appear on either the employment list or the veterans preference list that were referred on March 20, 2019. Under Act 286, which was in effect at the time the March 20, 2019 lists were issued, certifications of eligibles were valid for sixty (60) work days. 71 P.S. § 741.602. Under Act 71, certifications of eligibles issued to an agency are valid for ninety (90) business days. 71 Pa.C.S. § 2402. Consequently, under either provision, the certification was valid well beyond the date (April 25, 2019)²⁶ appellant had been provided the conditional offer and start date. The April 3, 2019 addition of Novotnak to the March 20, 2019 employment certification list and veterans preference certification list was described by Taylor as an "update" to those lists. N.T. p. 68. The record is clear that OA had elected to add Novotnak's name to the already issued March 20 certifications as a result of Novotnak prevailing in a challenge he filed to the determination he was not eligible for Corrections Welding Trade Instructor. In other words, those March 20 lists were amended by OA.

²⁶April 25, 2019 was twenty-six business days from March 20 utilizing a standard, Monday-through-Friday schedule, and thirty-six calendar days.

Section 2307 of Act 71 addresses errors and revisions to eligible lists. Section 2307(c) provides: “(c) Correction and revision.--The Office of Administration may correct clerical errors occurring in connection with the preparation of an eligible list and revise the eligible list accordingly. No individual who has been appointed as the result of certification from the eligible list shall be displaced by the action.” 71 Pa.C.S. § 2307(c). OA’s temporary regulations further provide for amendments to eligible lists and the effect of such amendments:

§ 602.22. Amendment of an eligible list.

(a) Basis for amendment. **The Office of Administration may amend an eligible list to: correct a clerical error; indicate a change in veteran status; add or remove a name; or suspend or change eligibility for certification or appointment.**

(b) Effect of amendment. An amendment to an eligible list may not disadvantage a fully qualified eligible already appointed **or notified of appointment in good faith, based on a valid certification previously issued.**

4 Pa. Code § 602.22 (emphasis added). While Sommers testimony regarding whether amending the March 20 lists really was the correction of a “clerical error” is somewhat ambiguous, this is irrelevant under 602.22(b). N.T. p. 51. Whether the amendment to the list was to “correct a clerical error,” or was to add a name or change the eligibility of a candidate for certification or appointment, that cannot disadvantage a qualified eligible, such as appellant, notified of appointment in good faith based on a valid certification previously issued.

In the present case, the appointing authority has not asserted bad faith on the part of Sommers, Jacobs, Taylor, or any employee of either the appointing authority or OA. An error was made and apparently discovered—after appellant had been notified of the appointment, accepted the position, and been provided a start date. We find the amendment to the eligible list could not disadvantage appellant per the express provisions of the temporary regulations.²⁷

We note that while appellant presented evidence clearly establishing a violation of the provisions under Act 71 and the temporary regulations which resulted in his not being placed in the Corrections Welding Trade Instructor position, the appointing authority has not presented a clear explanation of how or why the error was made in not correctly utilizing the amendments to the employment list and veterans' preference list. While Jacobs acknowledges “there was an error” and “an error was made,” the appointing authority presented no explanation of how Jacobs used the March 20 lists in the interview, selection, and offer process to appellant without utilizing the April 3 amendment which added Novotnak's name to the issued certifications. Further, neither Jacobs nor the appointing authority offered an explanation for why Novotnak was selected over Buckley, whom Jacobs testified **had** been interviewed for the position under the March 20, 2019 employment certification list and was in the rule of three.

²⁷ We note no explanation was provided on the record for why appellant was ever interviewed, if in fact, candidates not entitled to veterans' preference are prohibited from being interviewed or appointed if there is a veteran in the rule of three on an employment certification. The March 20, 2019 employment list included Buckley in the rule of three with veteran status **and** veterans' preference points added to his score. There does not appear to be any explanation from the appointing authority of the position being offered to Buckley and him declining in order for the appointing authority to be able to interview candidates in the rule of three who did not have veterans' preference points added to their score on the employment list, such as appellant.

Even if an error was made solely by Jacobs in not using the April 3, 2019 amendment to the lists, it does not change the outcome because it is an error attributable not to appellant but to OA. While Jacobs and Sommers identified themselves as employees of the appointing authority, they are part of OA as “OneHR.” They may be assigned to a correctional institution as a work location, but they are supervised by and report to OA, not the assigned institution. This is reflected in the official organizational chart for OA approved by the Executive Board,²⁸ effective February 11, 2019, published in the Pennsylvania Bulletin. 49 Pa. Bull. 927-928 (March 2, 2019). The Public Safety Human Resource Delivery Center provides services for several entities, including Department of Corrections and Pennsylvania Board of Probation and Parole. Under the Executive Board Resolution reorganizing OA and human resources reporting structures, authority for Human Resources functions and services were transferred from multiple agencies, including Department of Corrections and Pennsylvania Board of Probation and Parole, to OA. Under the Delivery Center structure, the Public Safety Human Resource Delivery Center includes several divisions, including a Division “Field Operations Office.” The Public Safety Human Resource Delivery Center—as well as the five other Human Resource Delivery Centers—report directly to the Human Resource Delivery Centers Office, which in turn reports to OA’s Deputy Secretary for Human Resources and Management. Similarly, the Bureau of Talent Acquisition, reports directly to the Talent Management Office, which also reports directly to OA’s Deputy Secretary for Human Resources and Management.

²⁸ Executive Board Resolution OR-19-003.

Consequently, actions taken by Human Resource Delivery Center employees assigned to Department of Corrections institutions—which include providing offers of employment to candidates—are also actions of OA. Appellant credibly testified that during the April 29, 2019 meeting, he was advised that despite having been approved by OA, and selected by the appointing authority, he was subsequently eliminated from the eligibility list because there were two individuals with veterans’ preference. His testimony is consistent with Jacobs’ testimony that she had received approval “through NeoGov” prior to extending the offer of the position to appellant. Further, their testimony is also consistent with Taylors’ testimony that every hire for the Department of Corrections and the Pennsylvania Board of Probation and Parole comes to her for approval through the delivery center serving these agencies.

While Taylor testified appointing appellant could result in an “illegal appointment” necessitating the removal of appellant as an “illegal hire” after beginning to work in the position, she provided no explanation for why she approved appointment of appellant to the position prior to the April 25, 2019 offer of employment being made. Further, the appointing authority did not present testimony from any other witness in the Bureau of Talent Acquisition to explain why an appointment that had ostensibly been approved by Taylor was now being disapproved. Similarly, the appointing authority presented no policy document, regulation, or other authority for why the amendment to the list was made as a result of Novotnak having filed a challenge when OA has refused to amend issued certifications for other candidates who have filed challenges. *See, e.g., Charlene J. Branham v. Executive Offices, Office of Administration*, Appeal No. 30394, issued August 31, 2020.

Under Section 3003(8) of Act 71, where an appellant prevails in an appeal, the Commission has the express authority to fashion a remedy and issue an appropriate order to assure rights accorded to an individual under Act 71 are protected. 71 Pa.C.S. § 3003(8)(ii). As a result of our determination that the rescission of the previously accepted offer of employment is not in compliance with Act 71 and temporary regulation 602.22, we are directing that Novotnak be removed from the Corrections Welding Trade Instructor position and appellant placed into the position. Further, appellant's records will be amended to indicate an appointment date of May 5, 2019, and he will be compensated for the differential in pay between Corrections Officer 1 and Corrections Welding Trade Instructor from May 5, 2019 until the date he begins working as a Corrections Welding Trade Instructor in compliance with our Order.

Veterans' Preference

Appellant has also raised a challenge to the different treatment he received regarding veterans' preference compared with Novotnak. Specifically, the fact that both he and Novotnak were current employees of the appointing authority, were in positions in pay scale group CO35, and were competing for the same position in pay scale group CO37. Both appellant and Novotnak are veterans. When he was ultimately found eligible after filing his challenge, Novotnak had ten points added to his exam score and qualified for the mandatory preference on lists where his name was certified and he was in the rule of three. The sole difference between appellant and Novotnak is that appellant was a civil service employee (Corrections Officer 1) and Novotnak was a non-civil service employee (Labor Foreman). Even on the

revised April 3, 2019 employment list, appellant is within the rule of three with an exam score of 95 and total score of 95. After already having accepted the offer of employment and having been given a start date, appellant was then advised he was being eliminated from appointment under the employment list because he was not a “veteran” in the rule of three.

The appointing authority has cited to no statutory authority, regulatory authority, or policy basis for this disparate treatment of individuals employed in the classified service from those who are not in the classified service seeking promotion. The present case is particularly concerning since both employees are employed at the same institution and are in the same CO35 pay scale group. The movement to Corrections Welding Trade Instructor position for both candidates involves the movement to the CO37 pay scale group with a higher maximum salary. For appellant, the movement into the Corrections Welding Trade Instructor position is a departure from his career path as a Corrections Officer 1.

In upholding the validity of veterans’ preference for civil service appointments, the Pennsylvania Supreme Court explained the rationale for distinguishing between appointments to civil service positions and promotions within the same promoting agency or organization. *Housing Authority of the County of Chester v. Pennsylvania State Civil Service Commission (“Chester County”)*, 556 Pa. 621, 730 A.2d 935 (Pa. 1999). The Pennsylvania Supreme Court explained:

In the promotions context, the competing candidates are seeking to move up from within the same organization. They will have had ample opportunity during their tenure in that agency or organization to hone the skills relative to the promotion which they seek. If, during the period in which they have had the opportunity to develop their skills in the exact same environment as the rival candidates, they

have failed to progress to the same skill level as those rivals, then the fact that they had experience in the armed services is not probative and does not justify the candidate's shortcomings. On the other hand, when candidates seek appointment to a position in an organization or agency in which none of them have any experience, the fact that one of the candidates has military experience may rationally be viewed as that which distinguishes him as the superior candidate for the position. . . .

556 Pa. 621, 647, 730 A.2d 935, 949. In the present case, there is no merit-related reason for denying appellant preference while awarding it to Novotnak.²⁹ Both candidates were currently employed at the same agency, in the same institution—the same organization and environment in which to hone their skills—prior to seeking the Corrections Welding Trade Instructor position. Awarding preference to Novotnak because he is non-civil service and ejecting appellant after he had accepted the position and been given his start date penalizes appellant for already being in the classified service.

According to Taylor's testimony, the reason appellant was rejected from the Corrections Welding Trade Instructor position was the determination by OA that he **was not** a veteran for purposes of appointment and that Novotnak—after he prevailed in his eligibility challenge—**was** a veteran for purposes of appointment to that position. Appellant and Novotnak both had previously been determined by OA to be veterans, both currently worked for the appointing authority in CO35

²⁹ We note that even without ten points added to his score, appellant's initial score of 95 placed him in the rule of three on the March 20, 2019 employment list certified to the appointing authority. AA Ex. 2.

positions, and their appointment to Corrections Welding Trades Instructor would move them to the CO37 pay scale group. The sole distinction between appellant and Novotnak was appellant was a classified service employee and Novotnak was in a non-civil service position: Novotnak qualified for veterans' preference only because he was in a non-civil service position. Denying appellant veterans' preference as a "working veteran"³⁰ was disparate treatment based upon appellant's civil service status.

Civil service status is *merit system* status. To treat an individual *less* favorably solely because they are a member of the classified service is the essence of a non-merit factor, and antithetical to the purpose of the merit system and veterans' preference. This is simply not permitted under Act 71, which requires that decisions be made based upon merit-related factors and in compliance with Act 71, the temporary regulations, and the veterans' preference provisions in the Military and Veterans Code.

Consequently, we further determine appellant should have been considered a veteran within the rule of three, even on the amended April 3, 2019 employment list utilizing a score of 95. Appellant's acceptance of the conditional offer on April 25, 2019 was a valid acceptance of an offer to a candidate who qualified for veterans' preference for appointment to Corrections Welding Trade Instructor and was in the rule of three on the March 20 employment list and the

³⁰ Stated another way, OA's determination that appellant's appointment from the March 20, 2019 certification would be an "illegal appointment" because OA deemed him a "working veteran" and, therefore, not a veteran for purposes of appointment to Corrections Welding Trades Instructor was erroneous and resulted in disparate treatment of appellant compared with Novotnak.

April 3 amended employment list certified for the position. We hold this is a separate and independent basis for our order directing that Novotnak be removed from the Corrections Welding Trade Instructor position and appellant placed into the position.

Finally, we note that the current appeal does **not** involve a situation where OA amended an issued certification or eligible list because an individual meeting the definition of soldier under the veterans' preference provisions of the Military and Veterans Code submitted suitable discharge or release documentation after a list was certified or an eligible list was established. Nor does it involve a situation where an individual completed qualifying service or active duty (other than for training) and qualified for preference by meeting the definition of soldier after a list was certified or an eligible list was established.³¹ Those situations are simply not before the Commission in the present appeal.

Qualifications of the Indispensable Party

Due to the disposition of the appeal in favor of appellant on the two above-stated bases, it is not necessary to address the additional issue in appellant's appeal regarding the underlying qualifications of Novotnak. Consequently, it is also

³¹ While the appointing authority made it a point to question appellant about whether he had received veterans' preference in connection with his initial appointment as a Corrections Officer, appellant was not able to ask Novotnak whether he received preference for his appointment to the non-civil service position of Labor Foreman. Appellant was unable to do so because, despite indicating he would attend and participate in the proceedings, Novotnak did not attend the November 13 hearing. N.T. p. 12. We do note, however, that the April 3, 2019 lists indicate Novotnak had been assigned the veteran indicator April 13, 2018, almost a full year before the notification was issued inviting applications for the Corrections Welding Trade Instructor position at issue in the present appeal.

not necessary for the Commission to further address issues raised by either appellant or the appointing authority regarding continuing the hearing, subpoenas, service of the subpoenas, or the failure of Novotnak to appear at the hearing. Accordingly, we enter the following:

CONCLUSION OF LAW

Appellant has presented 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, sustains the appeal of Ralph E. Lynn challenging his non-selection for promotion to Corrections Welding Trade Instructor employment with the State Correctional Institution at Frackville, Department of Corrections and overrules the action of the State Correctional Institution at Frackville, Department of Corrections in the promotion of Aaron M. Novotnak to Corrections Welding Trade Instructor employment. Aaron M. Novotnak is to be returned to the position he held immediately prior to his promotion. Appellant is directed to be appointed to the Corrections Welding Trade Instructor position and his records amended to indicate an appointment date of May 5, 2019. The appointing authority is directed to compensate appellant for the difference in pay between Corrections Officer 1 and Corrections Welding Trade Instructor from May 5, 2019 until the date he begins

working as a Corrections Welding Trade Instructor. We further order that within thirty (30) calendar days of the mailed date of this opinion, the appointing authority shall submit written notice of compliance with this Order to the Executive Director of the State Civil Service Commission.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: October 26, 2020