

COMMONWEALTH OF PENNSYLVANIA

Anthony L. Ersher : State Civil Service Commission
:
v. :
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:
Pennsylvania Department of :
Transportation : Appeal No. 30276

Anthony L. Ersher Eric J. Jackson
Pro Se Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Anthony L. Ersher challenging his non-selection for promotion to the position of Civil Engineer Trainee with the Pennsylvania Department of Transportation. A hearing was held on January 23, 2020, at the State Civil Service Commission’s Western Regional Office in Pittsburgh, Pennsylvania, before Hearing Officer Odelfa Smith Preston.

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

FINDINGS OF FACT

1. By email dated June 5, 2019, appellant was informed he was not selected for the position of Civil Engineer Trainee with the Pennsylvania Department of Transportation (hereinafter “appointing authority”). Comm. Ex. A.
2. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018.
3. There is a two-step application process for Civil Engineer Trainee vacancies. First, the applicant must take an online civil service exam and receive a score. Then, when a vacancy becomes available, the applicant must apply for that vacancy. N.T. p. 178.
4. The civil service exam score is used to determine who is eligible for an interview. N.T. pp. 184-185.
5. All eligible candidates are interviewed for the position, and when there are a large number of candidates, two rounds of interviews are conducted. N.T. pp. 185-186.

6. Appellant received a score of 105 on the civil service exam for the Civil Engineer Trainee job title. N.T. pp. 28, 159; Ap. Ex. 3A.
7. On April 3, 2019, appellant interviewed for a Civil Engineer Trainee position with the appointing authority's Engineering District 11 (hereinafter "District 11"). N.T. p. 29.
8. Two rounds of interviews were conducted for the District 11 vacancies because there were a large number of candidates. N.T. p. 188.
9. Appellant did not advance to the second round of interviews. N.T. pp. 228, 262.
10. Principal Assistant Construction Engineer Douglas Thompson and Contract Consultant Agreement Engineer Dina Salemi were the panelists who conducted the first round of interviews. N.T. pp. 204, 208, 254.
11. The candidates who were interviewed during the first round were asked the same interview questions. N.T. pp. 203, 207, 210; Ap. Exs. 2A-2F.

12. Appellant admits he did not perform well during the first round of interviews. N.T. p. 30.
13. Appellant began the interview by saying he was surprised he qualified to be interviewed. N.T. p. 211.
14. In response to the interview questions, appellant gave very brief answers and did not provide a lot of detail or additional information when given an opportunity to do so. N.T. pp. 212-214, 255.
15. Appellant had difficulty answering a question about leadership even though he holds a leadership position as the union president. N.T. pp. 226-227; AA Ex. 2 (p. 3).
16. Thompson reminded appellant of his leadership role as union president because appellant was struggling to answer the question about leadership. N.T. pp. 226-227.
17. Thompson considered appellant's role as union president positively because it demonstrates his leadership ability. N.T. pp. 226-227.

18. Appellant's union membership was not a factor in Thompson or Salemi's decision not to recommend appellant for a second interview. N.T. pp. 228, 262.
19. Appellant was not selected for the Civil Engineer Trainee position because he did not interview well and because he failed to satisfy the minimum education, experience, and training requirements (hereinafter "METs") for the position. N.T. pp. 211-214, 226-227, 255, 257, 259.
20. To be eligible for civil service positions, candidates must satisfy the METs for the position. N.T. p. 24.
21. There are three ways candidates can satisfy the METs for the Civil Engineer Trainee job title:
 - A bachelor's degree in civil engineering, or in a closely related field, which includes or was supplemented by major coursework in civil engineering; or
 - Four years of civil engineering experience and training which includes possession of an Engineer-In-Training Certificate issued by or acceptable to the Pennsylvania State Registration Board for Professional Engineers, Land Surveyors and Geologists; or

An equivalent combination of experience and training which includes possession of an Engineer-In-Training Certificate issued by or acceptable to the Pennsylvania State Registration Board for Professional Engineers, Land Surveyors and Geologists.

AA Ex. 1 (p. 2).

22. Appellant does not have a bachelor's degree or an Engineer-In-Training Certificate. N.T. pp. 222-223, 259.
23. Appellant is employed by the appointing authority as a Transportation Construction Inspector and has served in this position for approximately twelve years. N.T. pp. 21-22, 153.
24. Appellant's current duties as a Transportation Construction Inspector are not equivalent to four years of engineering experience and training. N.T. pp. 219, 225, 249, 260.
25. The duties of a Transportation Construction Inspector include confirming the work and operations performed by the contractor are in conformance with the specifications, plans, and standards. Transportation Construction Inspectors

are also responsible for collecting certifications for the materials incorporated and verifying those certifications to ensure the correct materials required by the plan are being used. N.T. pp. 214-215, 235.

26. Transportation Construction Inspectors do not make engineering decisions. N.T. pp. 219-220.
27. Civil Engineer Trainees are responsible for assisting engineers in all units in designing plans and bridges, performing inspection-related activities, and putting together plans, specifications, and estimate packages. N.T. p. 218; AA Ex. 1 (pp. 1-2).
28. To effectively perform their duties, Civil Engineer Trainees must have a fundamental understanding of basic engineering theories, which is gained through education. N.T. pp. 239-240.
29. Civil Engineer Trainees are automatically promoted to an engineering classification upon completing a twelve-month rotation. N.T. pp. 216, 238, 242.

30. There are often several Civil Engineer Trainee vacancies at the same time in different areas, such as bridge inspection, maintenance, and construction management. N.T. pp. 223-224.
31. The appointing authority's Equal Opportunity Policy Statement affirms, in pertinent part, the appointing authority is committed to the following:
1. To ensure that equal employment opportunity affects all employment practices for employees and applicants for employment including recruiting, interviewing, hiring, promoting, training, transfers, compensation, benefits, recognition, layoffs or other terminations regardless of a person's age, ancestry, color, disability, national origin, race, religious creed, union membership, sex, sexual orientation, gender identity or expression or AIDs or HIV status.

Ap. Ex. 10A (p. 1).

32. Section 1(a) of Executive Order 2016-04 provides:
- No agency under the Governor's jurisdiction shall discriminate against any employee or applicant for employment on the basis of race, color, religious creed, ancestry, union

membership, age, gender, sexual orientation, gender identity or expression, national origin, AIDS or HIV status, or disability.

Ap. Ex. 10B (p. 1).

DISCUSSION

The issue before the Commission is whether appellant presented sufficient evidence to prove his non-selection for the position of Civil Engineer Trainee in June 2019 was for reasons motivated by discrimination. Appellant could only bring this challenge through section 3003(7)(ii) of Act 71 of 2018¹ (hereinafter “Act 71”) based upon an allegation that the appointing authority’s decision not to select him was motivated by discrimination in violation of section 2704 of Act 71.² 71 Pa.C.S.A. §§ 2704, 3003(7)(ii). Specifically, appellant alleges he was discriminated against based on non-merit factors, including his union membership and affiliation, and his education. Comm Ex. B. Additionally, appellant asserts the appointing authority violated the Merit System Employment Regulations.³ Comm. Ex. B.

¹ Act of June 28, 2018, P.L. 460, No. 71, § 1.

² 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 non-selection decision 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.

³ Upon taking effect on March 28, 2019, Act 71 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, OA promulgated temporary regulations, which are referred to as the Merit System Employment Regulations, 4 Pa. Code §§ 601-607.

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 his claim of discrimination. Section 2704 of Act 71 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. The prohibition set forth in this section encompasses two general types of discrimination—“traditional discrimination,” which encompasses 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. *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 both traditional and technical discrimination claims. Appellant has alleged traditional discrimination claim based on non-merit factors, including his union membership and affiliation and his education. N.T. p. 22. Additionally, appellant asserts the appointing authority

engaged in technical discrimination because the interview questions were not based on position-related criteria, the same criteria was not applied to all candidates, and the appointing authority did not follow its anti-discrimination policies.⁴ N.T. pp. 39-40.

At the hearing, appellant testified on his own behalf. The appointing authority presented the testimony of Human Resource Officer Marsha Harrer,⁵ Principal Assistant Construction Engineer Douglas Thompson,⁶ and Contract Consultant Agreement Engineer Dina Salemi.⁷ The evidence presented by the parties is summarized below.

⁴ Appellant also asserts the appointing authority failed to follow Management Directive 580.10 Amended. N.T. pp. 39-40, 50; Ap. Ex. 9. This Management Directive was rescinded on March 28, 2019, prior to appellant's interview for the position. 49 Pa.B. 3749. As such, Management Directive 580.10 Amended is not applicable to the present matter and cannot be considered by the Commission. With that said, the Commission may and will review the substance of appellant's testimony related to this claim because appellant is asserting non-merit factors were considered during the selection process. Specifically, appellant asserts the interview questions were not job-related and the same selection criteria was not applied to all candidates.

⁵ Harrer is employed by the appointing authority as a Human Resource Officer. N.T. p. 175. Harrer has held this position since 2006 and has worked in the appointing authority's Human Resources Department for approximately twenty-eight years. N.T. pp. 175-176. Harrer's responsibilities include "the placement process, posting of positions, the classification process, identifying job duties within classifications, helping create position descriptions, evaluating candidates, [and] the interview process." N.T. p. 177.

⁶ Thompson is the Principal Assistant Construction Engineer for the appointing authority's Engineering District 11 (hereinafter "District 11"). N.T. p. 199. Thompson has held this position since 2013. N.T. p. 199. In that capacity, Thompson is second-in-command of District 11's Construction Unit and oversees District 11's Materials Unit, Finals Unit, and Constructability Unit. N.T. p. 200. Thompson also oversees some of District 11's more complex construction projects. N.T. p. 200. Thompson was one of the panelists who interviewed appellant for the position which is the subject of the present appeal. N.T. pp. 204, 208.

⁷ Salemi is employed by the appointing authority as a Contract Consultant Agreement Engineer and has held this position for the past seven years. N.T. p. 251. Salemi was also one of the panelists who interviewed appellant for the position which is the subject of the present appeal. N.T. pp. 204, 208.

I. Evidence Presented by the Parties

A. Appellant's Evidence

Appellant is employed by the appointing authority as a Transportation Construction Inspector. N.T. p. 21. Appellant has served in this position for approximately twelve years. N.T. pp. 21-22, 153. At some point during his employment, appellant took the civil service exam for the Civil Engineer Trainee job title. Upon receiving his score for this exam, appellant applied for all Civil Engineer Trainee positions within a ninety-minute radius. N.T. p. 28. On April 3, 2019, appellant interviewed for a Civil Engineer Trainee position with the appointing authority's District 11. N.T. p. 29.

Appellant testified to be eligible for civil service positions, such as the Civil Engineer Trainee position, candidates must satisfy the minimum education, experience, and training requirements (hereinafter "METs") for the job title. N.T. p. 24. Appellant noted there is more than one way to satisfy the METs for the Civil Engineer Trainee job title. N.T. p. 26. Appellant stated between 2012 and 2018, the Office of Administration (hereinafter "OA") added an option under the METs whereby an applicant who has four years of any type of civil engineering experience may qualify for the position in lieu of having a bachelor's degree. N.T. p. 26. Appellant explained, previously, OA required a bachelor's degree in Engineering to be eligible for the Civil Service Trainee job title. N.T. p. 25.

Appellant claims his work experience makes him more qualified for the position of Civil Engineer Trainee than candidates who only have a college degree. N.T. pp. 22-23, 63-64, 77-78, 160; Ap. Exs. 12A, 12B. Appellant also noted he

received a qualifying score of 105 on the civil service exam for the Civil Engineer Trainee job title. N.T. pp. 28, 159; Ap. Ex. 3A. Appellant argues he was not selected for the position based on non-merit factors, including his union membership and affiliation, and his education. N.T. p. 22. Additionally, appellant asserts the appointing authority violated its anti-discrimination policies, asked non-merit related questions in the interview, and failed to apply the same criteria to all candidates. N.T. pp. 39-40; Ap. Exs. 10A, 10B. The evidence presented by appellant pertaining to each of these allegations is summarized below.

Labor Union Membership and Affiliation

Appellant argues he was not selected for the position because he is a member of the union. Appellant testified only non-union members were selected for the position which is the subject of the present appeal. N.T. pp. 44, 52. Appellant stated three of the candidates who were not selected were union members, held the same position as him, and scored 105 on the exam. N.T. pp. 38, 44. Appellant also noted two of these three union members had over ten years of civil engineering experience and were over the age of thirty. N.T. p. 38.

Additionally, appellant, who is the union steward, testified “over the years” he has been “ridiculed” by management personnel for providing defenses to union members and “mocked” for some of his initiatives, to include a safety-related grievance. N.T. pp. 64-65. Appellant also noted he observed hostility toward a union member for making a report. N.T. p. 65. Appellant did not indicate what the union member reported, only that the report led to further harassment. N.T. p. 65.

Appellant also presented several examples of decisions by management, which he characterized as demonstrating a pattern of arbitrary and capricious behavior, as well as a disregard for the union. N.T. pp. 66, 78; Ap. Exs. 15A, 15B. These examples included a dispute regarding payment of a shift differential, an overtime equalization grievance, changes to bidding options for Transportation Construction Inspector positions, and other reassignment changes. N.T. pp. 66-68, 71-74, 76-78, 116; Ap. Exs. 15A, 15B, 15C1, 15C2, 15C3. Appellant speculated disagreements between the union and management resulted in his non-selection for civil service positions on which he bid over the last two years. N.T. p. 65.

Education

Appellant asserts only younger candidates who had minimum relevant work experience and held bachelor's degrees were selected for the position. N.T. pp. 52, 164. Appellant testified the six candidates who were selected for the position were all under forty years of age and had bachelor's degrees. N.T. p. 52. Appellant noted most of these candidates were around twenty-five years of age. N.T. pp. 52, 164.

Appellant testified only one of the six selected candidates was a registered professional engineer⁸ and well experienced. N.T. p. 36. Appellant determined the remaining five selected candidates were under the age of thirty, based on the dates they graduated high school and/or started college. N.T. p. 36. Appellant stated the only relevant work experience for four of these candidates were

⁸ In his testimony, appellant indicates this candidate was a registered "BE" since 2013. N.T. p. 36. The Commission believes appellant meant "PE" which is a common abbreviation for professional engineer.

internships with the appointing authority. N.T. p. 37. However, appellant acknowledged one of the candidates had three years of work experience in the private sector but had not taken the Fundamentals of Engineering Exam⁹ (hereinafter “FE Exam”). N.T. p. 37. Appellant further noted three of the selected candidates had not taken the FE Exam at the time of the first round of interviews, and two of the selected candidates had not completed the FE Exam at the time of hire. N.T. p. 37. Appellant stated he took and passed the FE Exam in 2006, after he completed his third year of college, but acknowledged his grade point average was lacking.¹⁰ N.T. pp. 142-143.

Additionally, appellant asserts the appointing authority’s past practices establish a pattern of selecting younger college graduates for Civil Engineer Trainee positions. Appellant testified during the past twelve years, only a handful of new hires for Civil Engineer Trainee positions were “over the age of thirty with very little work experience.” N.T. pp. 25-26.

Interview Questions and Selection Criteria

Appellant asserted the following questions, which were asked during his April 3, 2020 interview, establish a bias toward candidates who have bachelor’s degrees: 1) Why did you pursue an education and career in civil engineering; 2) Where did you obtain your degree; 3) What area was the focus of your civil

⁹ Appellant explained the FE Exam is a nationally accredited test which demonstrates the test taker’s understanding of the fundamentals of engineering. N.T. p. 142. Appellant stated to be eligible to take the FE Exam, a person either needs eight years of progressive experience in engineering or three years of college education. N.T. p. 142.

¹⁰ Appellant’s application for the “Civil Engineer Trainee (Online Exam)” reflects he obtained an associate degree. Ap. Ex. 13A (p. 2). There is no evidence appellant obtained a bachelor’s degree in civil engineering or a closely related field.

engineering education; 4) What areas interest you at PennDOT; 5) What was your undergraduate GPA; and 6) Is your GPA a reflection of you. N.T. p. 29; Ap. Exs. 2A-2F. Appellant testified candidates could only earn points on these questions based on academics. N.T. pp. 50, 57. Appellant argues this was discriminatory because a bachelor's degree is not required under the METs, thereby making it a non-merit factor. N.T. pp. 57-58, 148. However, appellant acknowledged there is an alternative option under the METs whereby an applicant who holds a bachelor's degree in civil engineering would be eligible for the position of Civil Engineer Trainee. N.T. p. 150; AA Ex. 1 (p. 2).

Additionally, appellant noted when he interviewed with another agency and other Districts, he was not asked questions regarding academics. N.T. pp. 28-29, 140-141. With that said, appellant does not dispute he did not interview well. N.T. p. 30. Appellant explained he was not feeling well on the day of the interview. N.T. p. 30. Appellant also acknowledged he does not have an Engineer-in-Training Certificate, which is a requirement for the position, but generally argued there is an equivalent under which he qualifies. N.T. p. 152.

Violation of Anti-discrimination Policies

Appellant asserts the appointing authority violated the following anti-discrimination policies: 1) Equal Employment Opportunity Policy Statement, dated February 18, 2019; and 2) Executive Order 2016-04.¹¹ N.T. pp. 39-40; Ap. Exs 10A,

¹¹ Appellant also asserted the appointing authority violated its Disability Related Employment Policy. N.T. p. 40. Specifically, appellant claimed the interview questions regarding college education are discriminatory because persons with learning disabilities may not be able to acquire the skills in a classroom setting and may benefit by learning from work experience. N.T. p. 54. However, appellant did not allege he was discriminated based on a disability in his appeal request, nor did he present any evidence that he is disabled and/or was discriminated against based on a disability. Comm. Ex. B. Therefore, we are constrained from opining on this issue.

10B. Additionally, appellant testified, in May of 2019, the appointing authority mandated all employees receive diversity training.¹² N.T. p. 42. Appellant stated this training defined diversity to include “age, education, and experience.” N.T. p. 42. Appellant argues the appointing authority failed to follow this training because “the majority of the candidates selected were around twenty-five years of age, had minimal relevant work experience, [were] non-union member, and were recent college graduates.” N.T. p. 42.

B. Appointing Authority’s Evidence

Through the testimony of its witnesses, the appointing authority presented evidence regarding the selection process and the reasons for appellant’s non-selection. The appointing authority’s evidence is summarized below.

The Selection Process

Human Resource Officer Marsha Harrer explained there is a two-step application process for Civil Engineer Trainee vacancies. N.T. p. 178. Harrer stated first, the applicant must take an online exam¹³ and receive a score. N.T. p. 178. Then, when a vacancy becomes available, the applicant must apply for that vacancy. N.T. p. 178.

¹² Appellant presented excerpts from a diversity inclusion training. N.T. pp. 40, 42. The decision whether to admit the excerpts was deferred. N.T. p. 104. Upon review, we find appellant failed to present credible evidence as to when the training, from which these excerpts were taken, occurred. Accordingly, the excerpts will not be admitted into evidence.

¹³ Appointing Authority Exhibit 1 is the posting for the online exam for the Civil Engineer Trainee job title. N.T. pp. 178-179, 196; AA Ex. 1. This exam applies to future vacancies at multiple agencies, including the appointing authority. N.T. pp. 179-180; AA Ex. 1 (p. 1).

Harrer testified most candidates receive a similar score on the online exam, which is based on the candidate's experience and education. N.T. p. 184. Harrer stated this score is used to determine who is eligible for an interview. N.T. pp. 184-185. Harrer explained the placement analyst for the agency generates a list of eligible candidates, on which candidates' scores are noted. N.T. p. 185.

Harrer testified all eligible candidates are interviewed for the position. N.T. p. 185. Harrer explained when there are a large number of candidates, two rounds of interviews are conducted. N.T. p. 186. The first round of interviews is normally conducted by higher level management staff, and the second round of interviews are conducted by either the Assistant District Executives and/or the District Executive. N.T. pp. 186, 204.

Harrer testified, during the first round of interviews, all candidates are asked the same interview questions. N.T. p. 187. Typically, a different set of interview questions are asked during the second interview. N.T. p. 187. Harrer noted the interview questions are usually developed by the hiring manager or whoever is leading the interview panel and sent to the placement analyst or HR Manager for review and approval prior to being asked during the interviews. N.T. p. 187.

The vacancy, which is the subject of the present appeal, was for a Civil Engineer Trainee position in District 11. N.T. p. 183. Two rounds of interviews were conducted for this vacancy because there were a large number of candidates. N.T. p. 188. Principal Assistant Construction Engineer Douglas Thompson and Contract Consultant Agreement Engineer Dina Salemi were the panelists who conducted the first round of interviews. N.T. pp. 204, 208, 254. Thompson testified

the same process and questions were used for these interviews as were used in all of the interviews in which he has participated. N.T. pp. 203, 207, 210. Thompson explained after the first round of interviews were completed, he and Salemi discussed the candidates and made their recommendations as to who should receive a second interview. N.T. pp. 204-205. Five candidates were selected to fill the position from the second round of interviews.¹⁴ N.T. pp. 189, 206.

Reasons for Appellant's Non-selection

Thompson and Salemi testified appellant was not selected for the position because he did not satisfy the education requirements under the METs, and he did not interview well. N.T. pp. 211-214, 226-227, 255, 257, 259. To be eligible for the Civil Engineer Trainee position, appellant was required to satisfy the METs. There are three ways candidates can satisfy the METs for this job title:

A bachelor's degree in civil engineering, or in a closely related field, which includes or was supplemented by major coursework in civil engineering; *or*

Four years of civil engineering experience and training which includes possession of an Engineer-In-Training Certificate issued by or acceptable to the Pennsylvania State Registration Board for Professional Engineers, Land Surveyors and Geologists; *or*

An equivalent combination of experience and training which includes possession of an Engineer-In-Training Certificate issued by or acceptable to the Pennsylvania State Registration Board for Professional Engineers, Land Surveyors and Geologists.

AA Ex. 1 (p. 2) (emphasis added).

¹⁴ Appellant testified six candidates were selected for the position. N.T. p. 52. Regardless of the specific number, there is no dispute multiple vacancies were filled.

Appellant does not have a bachelor's degree or an Engineer-In-Training Certificate, as required under the METs. N.T. pp. 222-223, 259. Also, appellant's current duties are not equivalent to four years of engineering experience and training. N.T. pp. 219, 225, 249, 260. Appellant's current duties as a Transportation Construction Inspector include confirming the work and operations performed by the contractor are in conformance with the specifications, plans, and standards. N.T. pp. 214-215, 235. For example, appellant is responsible for confirming whether the building conforms with the dimensions on the plan or whether a contractor used the correct amount of rebar in accordance with the plan. N.T. p. 215. Appellant is also responsible for collecting certifications for the materials incorporated and verifying those certifications to ensure the correct materials required by the plan are being used. N.T. p. 215. Thompson explained these duties do not require a lot of decision making. N.T. p. 216. Rather, "[i]t's yes or no, you're complying with the specifications." N.T. p. 216. Transportation Construction Inspectors do not make engineering decisions. N.T. pp. 219-220.

In contrast, the duties of a Civil Engineer Trainee include assisting engineers in all units in designing plans and bridges, putting together plans, specifications, and estimate packages, and performing inspection-related activities. N.T. p. 218. Civil Engineer Trainees are also exposed to reading and interpreting the appointing authority's contracts. N.T. p. 218. After a twelve-month rotation, Civil Engineer Trainees are automatically promoted to an engineering classification. N.T. pp. 216, 238.

Considering the preceding, Thompson and Salemi asserted appellant did not satisfy the METs as required to qualify for the position. N.T. pp. 225, 259. In addition to this requirement, Thompson testified the following factors were

considered when selecting candidates for the position: 1) the quality of the interview; and 2) the areas of interest and focus during the candidate's education. N.T. p. 223. Both Thompson and Salami testified appellant did not interview well. Thompson recalled appellant began the interview by saying he was surprised he qualified to be interviewed. N.T. p. 211. Thompson and Salemi also noted appellant gave very brief answers and did not provide a lot of detail when answering the interview questions. N.T. pp. 212-214, 255, 257. Salemi added she did not think appellant was very prepared and noted appellant did not provide any additional information or ask questions at the end of the interview when he was provided an opportunity to do so. N.T. pp. 255, 257.

Additionally, Thompson recalled appellant had difficulty answering a question about leadership even though he holds a leadership position as the union president. N.T. pp. 226-227; AA Ex. 2 (p. 3). Thompson explained he mentioned appellant's union membership to him because he was struggling to answer this question. N.T. pp. 226-227. Thompson noted he considered appellant's union membership positively because appellant is the union president which demonstrates his leadership ability. N.T. pp. 226-227. Indeed, both Thompson and Salemi denied appellant's union membership was a factor in the decision not to recommend him for a second interview. N.T. pp. 228, 262.

Regarding the education of the candidates, Thompson explained there are often several vacancies at the same time in different areas (*i.e.* bridge inspection, maintenance, and construction management), which is why it is important to know if the candidate has education or experience in the area with an opening. N.T. pp. 223-224. Thompson further explained there is some knowledge that can only be gained from education. N.T. pp. 239-240. Thompson stated, for example, to design

drainage, an engineer needs to understand hydrology, water flow, and the types of soil to determine run-offs. N.T. p. 239. Likewise, to design a beam, an engineer would need to understand basic theories of civil engineering. N.T. pp. 239-240. Thompson stated these basic foundations cannot be learned through on-the-job training. N.T. p. 240. Thompson further explained the candidates' education is important because Civil Engineer Trainees are automatically promoted to an engineering classification upon completing their rotation. N.T. pp. 238, 242. Therefore, Thompson stated a candidate's education is considered when evaluating the candidate. N.T. p. 242. Salemi also agreed it was important to consider the candidate's education. N.T. p. 260. With that said, Thompson noted there was a candidate with an engineering degree who was not recommended for the second round of interviews. N.T. p. 243.

Additionally, Thompson noted whether the candidates have passed the FE Exam or have an Engineer-In-Training Certificate is also considered. N.T. pp. 243-244. However, Thompson stated there is no point total assigned to each factor. N.T. p. 244. Rather, all factors are assessed in relation to the candidates who are interviewed. N.T. pp. 243-244.

II. Credibility/Evidentiary Determinations and Analysis

Following the presentation of appellant's case-in-chief, the appointing authority made a Motion to Dismiss this appeal. N.T. pp. 170-172. At the hearing, ruling on the Motion was deferred pending review by the full Commission. N.T. pp. 172-173. Following our review, the Motion is hereby denied. Each of appellant's discrimination claims are discussed more fully below.

A. Traditional Discrimination Claims

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). The Commission recognizes the burden of establishing a *prima facie* case cannot be an onerous one. *Nwogwugwu, supra*. Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate non-discriminatory explanation for the employment action. However, the appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason is merely pretext for discrimination. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864.

While appellant’s evidence is not overwhelming, it is sufficient, if believed and otherwise unexplained by the appointing authority, to make out a *prima facie* case based on labor union membership and age as it relates to his education. Appellant presented credible¹⁵ evidence the candidates selected for the position were all non-union members and under the age of forty with bachelor’s degrees. N.T. pp. 36, 42, 44, 50-52. Additionally, appellant established the appointing authority’s past hiring practices show a pattern of selecting younger college graduates for Civil Engineer Trainee positions. N.T. pp. 25-26, 28. Therefore, we find appellant established a *prima facie* case of discrimination.

¹⁵ It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 505 A.2d 339, 341 (Pa. Commw. 1986).

Although appellant met his initial burden of proof, for the reasons stated below, we find the appointing authority presented credible evidence which establishes legitimate non-discriminatory reasons for appellant's non-selection. Specifically, the appointing authority established appellant was not selected for the position because he did not satisfy the education requirements under the METs, and he did not interview well. N.T. pp. 211-214, 226-227, 255, 257, 259. Appellant does not have a bachelor's degree or an Engineer-In-Training Certificate, as required under the METs. N.T. pp. 222-223, 259; AA Ex. 1 (p. 2). Nor does appellant have an equivalent combination of engineering experience and training, which could be substituted for this requirement. N.T. pp. 219, 225, 249, 260; AA Ex. 1 (p. 2). Thus, appellant failed to satisfy the educational requirements under the METs.

Additionally, appellant did not perform well during the interview, which he admits. N.T. p. 30. Appellant gave very brief answers and did not provide a lot of detail when answering the interview questions. N.T. pp. 212-214, 255, 257. Furthermore, appellant's union membership was only mentioned during the interview because appellant was having difficulty answering a question about leadership. N.T. pp. 226-227; AA Ex. 2 (p. 3). Thompson explained appellant is the union president, which demonstrates his leadership ability. N.T. pp. 226-227. Therefore, Thompson considered this to be a positive attribute. N.T. p. 226. Indeed, both Thompson and Salemi credibly denied appellant's union membership was a factor in his non-selection. N.T. pp. 228, 262. Thus, we are not persuaded by appellant's claim he was discriminated against based on his union membership.

Upon consideration of the above, we find the appointing authority successfully rebutted the presumption of discrimination raised by appellant's *prima facie* case. Specifically, we find the appointing authority provided legitimate, non-

discriminatory explanations for not selecting appellant for the Civil Engineer Trainee position—appellant’s failure to satisfy the METs and poor performance during the interview. Appellant has failed to provide any credible evidence that these reasons were pretextual. The same questions were asked of each candidate and there is no evidence of unequal treatment in the interview process. *See Cola v. State Civil Service Commission (Department of Conservation and Natural Resources)*, 861 A.2d 434 (Pa. Commw. 2004)(holding a *prima facie* case of discrimination was not established where the same questions were asked of each interviewee, there was no evidence of unequal treatment in the interview process, and the interviewers testified the selected candidate did the best job of answering the interview questions). Appellant simply did not perform well during the interview, which he admits. N.T. p. 30. Furthermore, we find Thompson and Salemi credibly testified appellant’s union affiliation was not a factor in their decisions. Accordingly, we find appellant has failed to establish traditional discrimination.

B. Technical Discrimination Claims

Appellant alleges technical noncompliance with the Merit System Employment Regulations based on the interview questions and selection criteria, as well as the appointing authority’s anti-discrimination policies. To establish a claim of technical discrimination, appellant must show he was harmed because of the procedural noncompliance with these requirements or that, because of the peculiar nature of the procedural impropriety, he could have been harmed, but there is no way to prove that for certain. *See Pronko, supra*. No showing of intent is required. *See Pronko, supra*. We find appellant has failed to meet this burden.

Section 603.7 of the Merit System Employment Regulations provides an appointing authority may conduct interviews or otherwise assess the relative suitability of eligible candidates provided the assessment is based on position-related criteria. 4 Pa. Code § 603.7. There is no dispute candidates for the Civil Engineer Trainee position were required to have a bachelor's degree in civil engineering or a closely related field, or an equivalent combination of civil engineering and training to satisfy the METs for the position. AA Ex. 1 (p. 2). The interview questions regarding the candidates' education, areas of academic interest, and GPA are directly related to these requirements.

Furthermore, we find credible the testimony and evidence presented by the appointing authority explaining the relationship between the selection criteria, interview questions, and the position. N.T. pp. 223-224, 239-240, 260. The duties of a Civil Engineer Trainee include assisting engineers in all units in designing plans and bridges, performing inspection-related activities, and putting together plans, specifications, and estimate packages. N.T. p. 218; AA Ex. 1 (pp. 1-2). To effectively perform these duties, Civil Engineer Trainees must have a fundamental understanding of basic engineering theories, which is gained through education. N.T. pp. 239-240. This is particularly important because Civil Engineer Trainees are automatically promoted to an engineering classification upon completing a twelve-month rotation. N.T. pp. 216, 238, 242. Also, the candidates' areas of academic interest and experience are crucial to determining whether the candidate has experience in one or more of the areas where there is a vacancy. N.T. pp. 223-224. Accordingly, we find the selection criteria set forth in the METs and the interview questions were based on position-related criteria as required under Section

603.7 of the Merit System Employment Regulations. *See Price*, 672 A.2d at 414 (holding an agency's failure to promote an employee, based in part upon an interview where the candidates were questioned about job-related criteria did not result in technical discrimination).¹⁶

We are not persuaded by appellant's argument that the interview questions are discriminatory because he was not asked questions about academics when he was interviewed by other agencies and other Engineering Districts. N.T. pp. 28-29, 140-141. First, those hiring actions are not presently before the Commission for review. Furthermore, no evidence was presented regarding the duties or the METs for those positions. Thus, there is insufficient information for the Commission to compare the hiring actions.

Moreover, as explained above, the interview questions asked in the hiring action, which is the subject of the present appeal, are clearly related to the duties of the position, as well as the selection criteria. These questions were asked of each candidate invariably. N.T. p. 207; Ap. Exs. 2A-2F. Appellant simply did not answer the questions as well as the other candidates, which he admits. N.T. p. 30. Therefore, we find the evidence presented by appellant was insufficient to establish his technical discrimination claim based on the interview questions and selection criteria.

¹⁶ While the *Price* decision only addressed Section 97.16 of the Rules of the Civil Service Commission, the provisions of Section 97.16 are substantially the same as the provisions of Section 603.7 of the Merit System Employment Regulations. Thus, the Commonwealth Court's decision in *Price* is instructive.

Additionally, we are not persuaded by appellant's claim of technical discrimination based on his allegation that the appointing violated its anti-discrimination policies. N.T. pp. 39-40. Specifically, appellant asserts the appointing authority violated its Equal Employment Opportunity Policy Statement, dated February 18, 2019, and Executive Order 2016-04. N.T. pp. 39-40. Both of these policies provide similar protections as those set forth in Section 2704 of Act 71. Ap. Exs. 10A, 10B.

The appointing authority's Equal Opportunity Policy Statement affirms the appointing authority's commitment to ensuring non-discriminatory employment practices in interviewing and hiring regardless of the candidate's union membership, age, and other listed non-merit factors. Ap. Ex. 10A (p. 1). Likewise, Section 1(a) of Executive Order 2016-04 prohibits discrimination against applicants for employment based on union membership, age, and other listed non-merit factors. Ap. Ex. 10B. There is no credible evidence the appointing authority violated either of these policies. As explained in detail in the preceding section, the appointing authority presented credible evidence its decision was based on legitimate non-discriminatory reasons—appellant's failure to satisfy the education requirements under the METs and his poor interview. N.T. pp. 211-214, 226-227, 255, 257, 259. Therefore, we find appellant failed to establish a claim of technical discrimination based on a violation of the appointing authority's anti-discrimination policies. Accordingly, based on the foregoing, we enter the following:

CONCLUSION OF LAW

The appellant has not 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, dismisses the appeal of Anthony L. Ersher challenging his non-selection to the position of Civil Engineer Trainee with the Pennsylvania Department of Transportation and sustains the action of the Pennsylvania Department of Transportation in not selecting Anthony L. Ersher for the position of Civil Engineer Trainee.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: October 26, 2020