

COMMONWEALTH OF PENNSYLVANIA

Patricia M. Blair : State Civil Service Commission  
 :  
 v. :  
 :  
 Department of Labor and Industry : Appeal No. 30332

Patricia M. Blair Frederick J. Gentile  
*Pro Se* Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Patricia M. Blair challenging her Interim Employee Performance Review for the rating period May 30, 2019 to July 12, 2019 (hereinafter “final Interim EPR”), and her removal from probationary Vocational Rehabilitation Counselor employment with the Department of Labor and Industry (hereinafter “appointing authority”). A hearing was held on February 27, 2020 at the State Civil Service Commission’s Eastern Regional Office in Philadelphia, Pennsylvania, before Commissioner Bryan R. Lentz.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Briefs submitted by the parties. The issue before the Commission is whether appellant established the final Interim EPR and removal were motivated by discrimination.

## FINDINGS OF FACT

1. By letter dated August 12, 2019, appellant was notified of her removal from her position as a probationary Vocational Rehabilitation Counselor with the Bureau of Vocational Rehabilitation Services, Philadelphia District Office, Department of Labor and Industry (hereinafter “appointing authority”), effective August 12, 2019. Comm. Ex. B.
  
2. The appointing authority charged appellant with unsatisfactory work performance, in relevant part, as follows:

On June 17, 2019, you were issued an Interim Employee Performance Review and had an overall rating of Unsatisfactory. Specifically, you were rated Unsatisfactory or Needs Improvement in the following Job Factors: Job Knowledge/Skills, Work Results, Communications, Initiative/Problem Solving, Interpersonal Relations/Equal Employment Opportunity, and Work Habits. You were advised that you must improve your performance to a satisfactory level by July 12, 2019, and were instructed that failure to improve your performance in any of the deficient areas could lead to your rejection while on probation.

Despite additional training and mentoring, you failed to achieve a satisfactory level of performance, as evidenced in your Final Employee Performance Review....

Comm. Ex. B.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018.
4. All new employees who are hired by the appointing authority are required to serve a probation period upon beginning their employment. N.T. p. 83.
5. On March 18, 2019, appellant began her employment as a Vocational Rehabilitation Counselor with the appointing authority. N.T. p. 83.
6. In early April 2019, appellant was counseled for failing to show up for work on March 19, 2019, and for arriving late on March 20, 21, and 22, 2019. N.T. pp. 84, 107-108.

7. On April 17, 2019, during a meeting with a disabled customer, appellant asked the customer: 1) what color his military uniform was; and 2) if his goal to be a personal trainer was a joke. N.T. p. 117.
8. On April 19, 2019, appellant was counseled about her unprofessional behavior during the April 17, 2019 meeting with the disabled customer. N.T. p. 117.
9. On June 17, 2019, appellant was counseled a second time for time and attendance violations. N.T. p. 85.
10. On June 17, 2019, a Memorandum of Instruction was issued to appellant because she demonstrated inappropriate and unprofessional workplace behavior. Specifically, appellant referred to a customer as “not right in the head” and speculated about the customer’s medical conditions in an open area of the office. N.T. pp. 85, 115, 119; Ap. Ex. 2.
11. On June 18, 2019, appellant was issued an Interim EPR, for which she received an overall rating of “Unsatisfactory.” N.T. p. 85.

12. After the June 18, 2019 Interim EPR was issued, the appointing authority met with appellant to provide her remedial training to help her achieve a “Satisfactory” rating. N.T. p. 86.
13. A “Satisfactory” EPR rating is required for new hires to pass probation. N.T. p. 86.
14. On August 6, 2019, a meeting was scheduled to issue appellant a “rejection on probation letter.” N.T. p. 88.
15. Approximately ten to fifteen minutes prior to the August 6, 2019 meeting, appellant requested union representation. This was the only time appellant exercised her right to union representation during her employment with the appointing authority. N.T. pp. 88, 91.
16. Neither the union representative nor the local union steward was available to attend the August 6, 2019 meeting. N.T. p. 88.
17. Since the union representative was not available on August 6, 2019, the meeting was rescheduled for August 12, 2019. N.T. pp. 88-89.

18. Appellant's union representative attended the August 12, 2019 meeting. N.T. p. 88-89.
19. At the August 12, 2019 meeting, a final Interim EPR for rating period May 30, 2019 to July 12, 2019 (hereinafter "final Interim EPR"), was issued to appellant, along with the "rejection of probation letter," which removed appellant from her position effective August 12, 2019. N.T. pp. 86-87; Comm. Exs. A, B.
20. Appellant received an overall rating of "Unsatisfactory" on the final Interim EPR. Comm. Ex. A.
21. On the final Interim EPR, appellant was rated "Unsatisfactory" in the following Job Factors: Job Knowledge/Skills, Work Results, Communications, Initiative/Problem Solving, Interpersonal Relations/Equal Employment Opportunity, and Work Habits. Comm. Ex. A.
22. Appellant suffers from "complicated migraines," which occur without warning and cause visual disturbances. N.T. p. 39.

23. On one occasion, appellant was unable to finish her workday because her migraine symptoms did not subside after she rested for about thirty to forty minutes in a private room. Appellant's supervisor asked appellant if she wanted to go home because she only had about two hours left in her workday. Appellant indicated she did and stated she was able to drive. Appellant then went home. N.T. pp. 109-112.

### DISCUSSION

The present appeal challenges the Interim Employee Performance Review issued to appellant for rating period May 30, 2019 to July 12, 2019 (hereinafter "final Interim EPR"), and the appointing authority's decision to remove appellant from probationary status employment as a Vocational Rehabilitation Counselor. Before this Commission, appellant could only bring this challenge through Section 3003(7)(ii) of Act 71 of 2018<sup>1</sup> based upon an allegation the ratings on the final Interim EPR and the decision to remove her was due to discrimination in violation of Section 2704 of Act 71 of 2018.<sup>2</sup> 71 Pa.C.S.A. §§ 2704, 3003(7)(ii). Specifically, appellant alleges she was discriminated against based on age, regional culture, disability, and retaliation. Comm. Ex. C.

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

<sup>2</sup> Full implementation of Act 71 of 2018 occurred on March 28, 2019, the date on which all sections of Act 71 of 2018 went into effect. *See* Act 71 of 2018, Section 3. The removal which is the subject of the instant appeal occurred after the full implementation of Act 71 of 2018, which is codified as 71 Pa.C.S.A. §§ 2101-3304.

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

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

71 Pa.C.S.A. § 2704.<sup>3</sup> 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.<sup>4</sup> *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. Ct. 1996), citing *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988). Here, appellant has alleged a traditional discrimination claim based on age, regional culture, disability, and retaliation. Comm. Ex. C.

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<sup>3</sup> The provisions of Section 2704 of Act 71 of 2018 are substantially the same as the provisions in Section 905.1 of Act 286 (71 P.S. § 741.905a), and both sections of the respective acts use virtually the same language.

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

In support of her claim, appellant testified on her own behalf. The appointing authority presented the testimony of Human Resource Assistant Caitlin Chiarchiaro;<sup>5</sup> District Manager Shari Brightful;<sup>6</sup> and Vocational Rehabilitation Supervisor Leslie Vazquez.<sup>7</sup> The evidence presented by the parties has been reviewed by the Commission and is summarized below.

### *Summary of the Evidence*

On March 18, 2019, appellant began her employment as a Vocational Rehabilitation Counselor with the appointing authority. N.T. p. 83. Appellant, like all new employees, was required to serve a probation period upon beginning her employment. N.T. p. 83. Vocational Rehabilitation Supervisor Leslie Vazquez was responsible for training and supervising all new hires, including appellant, and she was involved in determining whether the new hires pass their probationary period. N.T. pp. 105-106.

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<sup>5</sup> Chiarchiaro is employed as a Human Resource Assistant with the Office of Administration in the Employment, Banking, and Revenue Human Resources Delivery Center. N.T. pp. 81-82. Chiarchiaro has held this position for approximately two years and is responsible for addressing issues with probationary employees, as well as employee arrests. N.T. p. 82.

<sup>6</sup> Brightful is the District Manager for the appointing authority's Bureau of Vocational and Rehabilitation Services in Philadelphia. N.T. p. 94. Brightful is Vazquez's second level supervisor. N.T. pp. 94-95.

<sup>7</sup> Vazquez is employed by the appointing authority as a Vocational Rehabilitation Supervisor and has held this position for over four years. N.T. p. 105. In that capacity, Vazquez is responsible for training and supervising new hires, and she is involved in determining whether the new hires pass their probationary period. N.T. pp. 105-106. Vazquez has trained approximately thirty-three employees, two of whom failed to pass their probationary period. N.T. p. 106. Appellant was one of these two employees. N.T. p. 106. The other employee failed to pass probation in August 2016. N.T. p. 106.

During the first week of appellant's employment, Vazquez was out on medical leave. N.T. pp. 106-107. Assistant District Administrator Lakeysa McLaurin, who is Vazquez's direct supervisor, covered Vazquez's duties while Vazquez was on medical leave. N.T. p. 107. Vazquez met with McLaurin upon her return on March 25, 2019, at which time, McLaurin informed Vazquez about appellant's attendance issues during her first week of employment. N.T. p. 107. Specifically, on March 19, 2019, which was appellant's second day of employment, appellant did not show up for work. N.T. p. 107. On March 20, 21, and 22, 2019, appellant arrived late for work by several hours, which appellant attributed to navigation difficulties. N.T. pp. 107-108. These attendance issues were addressed by the appointing authority via counseling in early April 2019. N.T. p. 84.

Although the appointing authority counseled appellant, her time and attendance issues persisted. N.T. p. 84. Also, appellant began engaging in unprofessional conduct and had work performance issues. N.T. p. 84. On June 17, 2019, appellant was again counseled for her time and attendance issues, and that same day, a Memorandum of Instruction was issued to appellant addressing her unprofessional conduct. N.T. p. 85; Ap. Ex. 2.

On June 18, 2019, appellant was issued an Interim EPR, for which she received an overall rating of "Unsatisfactory." N.T. p. 85. After the June 18, 2019 Interim EPR was issued, the appointing authority continued to meet with appellant and provide her remedial training to help her achieve a "Satisfactory" rating, which is required for new hires to pass probation. N.T. p. 86.

Around the end of July 2019, it became apparent appellant was not going to be able to perform at a “Satisfactory” level. N.T. p. 86. Therefore, the appointing authority requested “a rejection on probation.” N.T. p. 86. After reviewing the voluminous documentation provided by the appointing authority, Human Resource Assistant Caitlin Chiarchiaro approved the request. N.T. p. 86.

On August 12, 2019, a final Interim EPR was issued to appellant, along with a “rejection on probation letter confirming her removal from her position.” N.T. pp. 86-87. Appellant argues: 1) the Interim EPRs issued to her are unsupported by any evidence; 2) she did not receive adequate instruction or training; 3) she did not act in an unprofessional manner; 4) she was discriminated against based on her age, regional culture, and disability; 5) she suffered workplace bullying; and 6) the appointing authority retaliated against her based on her union membership and because she reported discriminatory behavior. Each of appellant’s claims and the appointing authority’s responses are detailed below.

### *Employee Performance Review*

Appellant testified there is no methodology for measuring her performance and asserted the remarks on the Interim EPR are general and unsupported. N.T. p. 49. Appellant noted there is a comment on her final Interim EPR which reads: “You continue to avoid communication with customers with whom you are perceived to be difficult and/or have a cultural barrier.” N.T. pp. 49-50. Appellant asserted this comment is slanderous and devalues her experience. N.T. pp. 50-51. Vazquez was the rater on appellant’s final Interim EPR, and as such, she was responsible for drafting this Interim EPR. N.T. p. 119; Comm. Ex. A.

*Instruction and Training*

Appellant asserted the training she received was “poor, undocumented, and chaotic.” N.T. p. 34. Additionally, appellant testified the instructions given to her were confusing and “ever changing.” N.T. p. 35. Appellant also noted she was unable to receive “the plethora of emails” sent to her because she did not have a computer, which resulted in her “always playing catch-up.” N.T. pp. 35-36. Appellant explained her computer was constantly being repaired by the IT department, which resulted in her not having the main tool she needed to perform her job duties. N.T. p. 34. Appellant testified her computer was never repaired, nor was she provided an alternate computer to use, even though she repeatedly asked Vazquez, McLaurin, and District Manager Brightful what she should do because she did not have a computer. N.T. p. 35.

Contrary to appellant’s claim, the comment for the Initiative/Problem Solving Job Factor reads in relevant part:

Since June 2019, you have submitted eight (8) or more tickets to the LINKS Help Desk for issues with your laptop which you have indicated as a deterrent to your ability to complete work related tasks in a timely manner. As a result, this supervisor has directed you to work from alternative work stations within the District Office and/or complete the appropriate steps on paper and give the information to your clerical assistant to input into CWDS.

Comm Ex. A.

*Appellant's Unprofessional Behavior*

Appellant testified Vazquez made “inflammatory comments” suggesting appellant did not have good relationships with her coworkers and clients. N.T. pp. 47-48; Ap. Ex. 2. Specifically, appellant took issue with the Memorandum of Instruction, which was issued to her in June 2019. Ap. Ex. 2. In the Memorandum of Instruction, Vazquez noted when she spoke to appellant about a customer complaint, appellant accused the customer of lying because he was not “right in the head.” N.T. p. 52; Ap. Ex. 2. Appellant denied saying the customer was not “right in the head.” N.T. pp. 48, 52, 122, 125. Appellant asserted she has an “extremely good rapport with every client,” as well as her coworkers. N.T. pp. 48-49, 52. Appellant further testified she acted appropriately during her interactions with the customer, but Vazquez failed to support her. N.T. pp. 52-56.

Vazquez, who prepared the Memorandum of Instruction, contradicted appellant’s claims. N.T. p. 112. Vazquez explained appellant had met with the customer on June 11, 2019, after which the receptionist informed her the customer was requesting to meet with appellant’s supervisor. N.T. pp. 112-113. Vazquez brought the customer to a private room to discuss his issues because the customer did not want to see appellant and she did not want to discuss the issue in the lobby area. N.T. p. 113. The customer informed Vazquez that, when he met with appellant, she talked down to him and told him to request another counselor. N.T. p. 114.

After Vazquez met with the customer, she spoke with appellant. N.T. p. 115. Vazquez testified appellant became upset during their conversation and accused Vazquez of making a scene because she believed Vazquez was taking the

customer's side. N.T. pp. 115-116. Appellant also questioned why Vazquez believed the customer, asserted the customer was not "right in the head," and referenced the customer's mental health diagnosis. N.T. pp. 115, 119. Vazquez asked appellant not to discuss the customer's diagnosis because they were in an area where others could hear their conversation. N.T. p. 115.

Vazquez further testified this was not the first time appellant acted unprofessionally. On April 19, 2019, Vazquez and McLaurin met with appellant to address her unprofessional behavior which occurred during a meeting with a disabled customer on April 17, 2019. N.T. p. 117. On that day, appellant was assigned to shadow Donna Washington, who is one of the appointing authority's staff members. N.T. p. 116. Washington was scheduled to meet with a customer, who was suffering from a disability, and appellant was to attend the meeting as an observer. N.T. p. 116. During the meeting, appellant made two unprofessional comments to the customer. N.T. pp. 116-117. Specifically, during the review of the military service section of the customer's application, appellant asked the customer what color his uniform was. N.T. p. 117. Appellant also laughed at the customer's statement that he wanted to be a personal trainer and asked the customer if that was a joke. N.T. p. 117. When Vazquez and McLaurin addressed these unprofessional comments with appellant, appellant was combative, denied making the comments, and asserted she was professional and could write a book about professionalism. N.T. p. 118.

*Discrimination Claims*

Appellant testified she was harassed about her age by Sharon Silverman, who was employed by the appointing authority as a supervisor. N.T. pp. 34, 37, 42-43. Appellant stated this occurred on more than one occasion, beginning around June 20, 2019, and continuing thereafter. N.T. pp. 34, 43. Appellant testified on one occasion, Silverman directed her supervisee to apologize to appellant, but the supervisee refused. N.T. p. 43. Silverman then told appellant the supervisee's age. N.T. p. 44. Appellant stated she told Silverman this was inappropriate, and Silverman responded she was just trying to figure out what appellant had in common with the supervisee. N.T. p. 44. Appellant stated later, when she was going to lunch, Silverman suggested she talk about age. N.T. p. 45. Appellant testified she asked Silverman to stop referring to her age or she would report her. N.T. p. 45. Appellant stated Silverman replied, "Go for it," and continued engaging in the offending behavior until appellant was removed. N.T. p. 45.

Additionally, appellant accused Silverman of making disparaging remarks about her regional culture on several occasions. N.T. pp. 34-35. Appellant did not specify what the offending comments were or when Silverman made the comments. However, appellant noted after she told Silverman to stop or she would report the behavior, Silverman responded, "I've been here eleven years. Go for it." N.T. p. 35. Appellant argued this was a complete disregard for her distress. N.T. p. 35. With that said, appellant noted she never reported Silverman. N.T. p. 76. Appellant also acknowledged Silverman was not her supervisor. N.T. p. 76.

In addition to her claims of age and cultural discrimination, appellant asserted she was discriminated against based on her disability. Appellant testified she is disabled in that she suffered from “complicated migraines,” which occur without warning and cause visual disturbances. N.T. p. 39. Appellant indicated she filed an accommodation request with Human Resources for her migraines. N.T. p. 77.

Appellant stated on one occasion she was sent home when she reported she had a migraine. N.T. p. 40. Appellant argued she should not have been sent home because the duration of the migraine was likely to last less than an hour. N.T. p. 40. Appellant noted she provided information to Vazquez concerning the nature of the type of headaches she suffered, but nonetheless, she was told she needed to come to work ready to work, and if she was unable to work, she needed to go home. N.T. pp. 40-41. Appellant stated when she asked Vazquez if the same policy would apply to employees with epilepsy who experienced a seizure at the office, Vazquez responded, “Yes,” although appellant acknowledged this was the only time she had a headache and was sent home. N.T. pp. 41-42. Appellant stated this occurred one month prior to her removal. N.T. p. 42.

In response to appellant’s disability discrimination claims, Vazquez testified, as a practice, she explains to all new hires how to request an accommodation. N.T. p. 108. Vazquez recalled she first met with appellant on March 25, 2020, at which time she provided appellant with an accommodation request form and explained the process for requesting an accommodation to her. N.T. pp. 108-109. Vazquez noted this occurred prior to the fact-finding meeting for appellant’s attendance issues. N.T. p. 109. Vazquez further noted during appellant’s

employment, she continued to remind appellant of the availability of the accommodation process. N.T. p. 109. Vazquez stated she provided additional copies of the accommodation request form to appellant on May 13, June 6, and July 19 and 26, 2019. N.T. p. 109.

Regarding the day appellant went home because of a migraine, Vazquez testified appellant was pacing outside of her cubicle, holding her hands over her head, and mumbling unintelligibly. N.T. pp. 109-110. At the time, Vazquez was in a meeting with one of her supervisees. N.T. p. 109. Vazquez dismissed the supervisee and asked appellant to come into her cubicle and have a seat. N.T. p. 110. Vazquez asked appellant if she was okay. N.T. p. 110. Appellant explained she was having some visual disturbances and felt numbness in her face and arm. N.T. p. 110. Vazquez was concerned the symptoms were serious and asked appellant if she need medical attention or wanted her to call 911. N.T. p. 110. Appellant declined Vazquez's offer.

As Vazquez was talking to appellant, she sent a message to McLaurin and asked her to come to her cubicle because she was concerned about appellant. N.T. p. 110. McLaurin came to her cubicle and they assessed the situation. N.T. p. 110. They provided appellant with a private room and allowed her about thirty to forty minutes to recuperate. N.T. p. 110. After appellant was provided time to recuperate in the private room, Vazquez asked her if she was capable of finishing the workday. N.T. p. 111. Appellant responded she was unsure whether she could finish the workday because it was going to take a while for her to recover. N.T. p. 111. Appellant explained it usually takes her about an hour to an hour and a half

to recover. N.T. p. 111. Appellant's shift ended in about two hours. N.T. p. 111. So, they asked appellant if she wanted to go home, to which she responded, "Yes." N.T. p. 111. Vazquez also asked appellant if she had someone to drive her home or if she could call someone to pick her up. N.T. p. 111. Appellant responded, "No." N.T. p. 111. Vazquez then asked appellant if she was able to drive, and appellant indicated she was because the visual disturbance had passed, and her vision was now clear. N.T. p. 111. Appellant went back to her desk, grabbed her things, and then went home. N.T. pp. 111-112.

### *Workplace Bullying*

Appellant stated in April 2019, she contacted the State Employee Assistance Program (hereinafter "SEAP") for counseling regarding workplace bullying. N.T. p. 69. Appellant further stated, on July 10, 2019, she emailed Brightful and asked to speak with her about the bullying and harassment she was experiencing. N.T. p. 67; Ap. Ex. 6. This email reads:

Dear Shari,

My request to meet with you can no longer wait...there is a serious breach in my employment that needs to be addressed asap.

I am at lunch at 12:00 PM UNTIL 12:30 P [sic]

Ap. Ex. 6.

Per appellant's request, Brightful met with appellant on July 10 and 22, 2019. Ap. Ex. 6. However, Brightful denied appellant ever complained to her about being bullied. N.T. pp. 95, 103. Brightful explained appellant met with her

regarding her Interim EPR. N.T. p. 100. Appellant told Brightful she did not agree with the rating on the Interim EPR, and following this discussion, Brightful emailed appellant the contact information for the Office of Equal Opportunity. N.T. pp. 100-101; Ap. Ex. 6. Brightful denied bullying appellant. N.T. p. 95

### *Retaliation*

Appellant asserted her removal one week prior to the end of her probationary period was retaliatory. N.T. p. 36. Specifically, appellant asserted she was being retaliated against for joining the union. N.T. p. 46. Appellant explained, she requested union representation at “impromptu” meetings, and these requests were ignored. N.T. pp. 36-37, 46, 73. Appellant stated a week after she refused to attend a meeting without union representation, she was removed. N.T. pp. 37, 74.

Chiarchiaro refuted appellant’s allegations. N.T. p. 87. Chiarchiaro testified the “rejection on probation letter” was initially going to be issued to appellant on August 6, 2019. N.T. p. 88. However, per the collective bargaining agreement, any SEIU employee is entitled to have union representation present during disciplinary issuance. N.T. p. 88. Approximately ten to fifteen minutes prior to the August 6, 2019 meeting, appellant requested union representation. N.T. p. 88. The union representative was contacted, but she was not available, nor was local union steward available. N.T. p. 88. The meeting was rescheduled until the union representative was available, and subsequently occurred on August 12, 2019. N.T. pp. 88-89. Chiarchiaro noted this was the first time appellant exercised her right to union representation. N.T. p. 91. At a fact-finding meeting in April 2019, appellant declined union representation. N.T. pp. 90-91.

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

The appointing authority asserted the allegations contained in appellant's appeal form did not rise to the level necessary to establish a claim of traditional discrimination. N.T. pp. 12-13. Therefore, the appointing authority moved to dismiss the present appeal at the beginning of the hearing. N.T. pp. 12-13. Ruling on this Pre-Hearing Motion was deferred pending review by the full Commission. N.T. pp. 184-185. Following our review, the Pre-Hearing Motion is hereby denied. The Commission properly granted appellant a hearing under Section 3003(7)(ii) of Act 71 of 2018.

Following the hearing, the appointing authority submitted a Brief in which it again moved to dismiss the present appeal. AA Bf., p. 14. Specifically, the appointing authority argued appellant failed to establish a *prima facie* case of discrimination during the hearing, thereby requiring the matter to be dismissed. AA Bf. Following our review, the Commission finds appellant has not met her burden of establishing traditional discrimination. Accordingly, the appointing authority's Post-Hearing Motion is hereby granted for the reasons set forth in the following section of this adjudication.

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

To establish a claim of "traditional discrimination," the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. *Henderson*

*v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). While the Commission recognizes the burden of establishing a *prima facie* case cannot be an onerous one, *Nwogwugwu, supra.*, in this matter, appellant's evidence is not enough to show her removal and final Interim EPR were motivated by discrimination.

We find appellant did not present any credible<sup>8</sup> evidence establishing her removal and final Interim EPR were based on her age, regional culture, or disability; nor did appellant present any credible evidence that these actions were retaliatory. Each of appellant's claims are discussed more fully below.

#### *Age Discrimination*

Appellant alleged Sharon Silverman harassed her about her age on June 20, 2019 and on multiple occasions thereafter. N.T. pp. 34, 43. However, appellant only provided testimony regarding one such incident—the alleged June 20, 2019 incident. N.T. pp. 43-45. Appellant did not provide any evidence connecting this alleged incident to her final Interim EPR or her removal. Furthermore, there is no credible evidence Silverman supervised appellant, nor is there any evidence Silverman was involved in drafting appellant's final Interim EPR or the decision to remove her.

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<sup>8</sup> It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 505 A.2d 339, 341 (Pa. Commw. Ct. 1986).

During the time appellant worked for the appointing authority, Vazquez was appellant's supervisor. N.T. p. 76. As appellant's supervisor, Vazquez was responsible for training appellant and completing appellant's final Interim EPR. N.T. pp. 119, 105-106. Appellant has provided no evidence that Vazquez knew of the alleged harassment by Silverman or that the alleged harassment influenced Vazquez's assessment of appellant's work performance as detailed in the final Interim EPR. Indeed, appellant acknowledged she never reported Silverman. N.T. p. 76. Thus, appellant has failed to establish a *prima facie* case of discrimination based on her age.

#### *Regional Culture Discrimination*

Appellant asserts she was discriminated against based on her regional culture in that Silverman made disparaging remarks about her regional culture and there was a comment on the last page of her final Interim EPR noting a cultural barrier. N.T. pp. 34-35, 49-50. Regarding Silverman's alleged remarks, appellant did not present any evidence as to the nature of the alleged remarks or when the remarks were made. Also, there is no evidence connecting the unspecified remarks to appellant's final Interim EPR or the decision to remove her. Thus, appellant's vague accusation regarding Silverman's alleged remarks is insufficient to meet appellant's burden.

Likewise, the comment on appellant's final Interim EPR is insufficient to meet appellant's burden. On appellant's final Interim EPR, the comments section for the Interpersonal Relations/Equal Employment Opportunity Job Factor reads, in pertinent part:

You continue to avoid communication with customers with whom you perceive to be difficult and/or have a cultural barrier.

Comm. Ex. A. We do not find this comment to be discriminatory. Rather, it is an observation regarding appellant's failure to be sensitive to customers of various cultural backgrounds and treat them in a fair and equitable manner, which is an element of her job duties.

The Interpersonal Relations/Equal Employment Job Factor, under which this comment was made, "[m]easures the employee's development and maintenance of positive and constructive internal/external relationships," which includes the employee's ability to "recognize [the] needs and sensitivities of others, and treat others in a fair and equitable manner." Comm. Ex. A. As evidenced by Vazquez's testimony, appellant's poor communication and unprofessional conduct with customers was an issue throughout her employment with the appointing authority. Specifically, Vazquez recalled inappropriate comments appellant made to a disabled customer who wanted to be a personal trainer. N.T. pp. 116-117. Also, a Memorandum of Instruction was issued to appellant for referring to a customer as "not right in the head" and not maintaining the customer's privacy by discussing the customer's mental health diagnosis out in the open. N.T. pp. 115, 119; Ap. Ex. 2. Thus, we find appellant has failed to establish a *prima facie* case of discrimination based on her regional culture.

### *Disability Discrimination*

Appellant asserted she was discriminated against based on her disability—“complicated migraines.” Specifically, appellant argued Vazquez discriminated against her because she was sent home on one occasion when she was suffering from a migraine. N.T. p. 40. This singular incident is insufficient to establish appellant’s final Interim EPR and removal were motivated by discrimination. There is no evidence this incident, in any way, affected or influenced the ratings on appellant’s final Interim EPR. Nor is there any evidence this singular incident was one of the bases for removing appellant. Furthermore, Vazquez provided credible testimony refuting appellant’s recollection of this incident. N.T. pp. 109-112. As Vazquez credibly testified, appellant was provided a private room and allowed about thirty to forty minutes to recuperate, after which she was asked if she wanted to go home since her shift ended in two hours. N.T. p. 111. Appellant indicated she was able to drive and wanted to go home, which she did. N.T. pp. 111-112. Appellant was not disciplined for this incident nor was it reflected negatively in the final Interim EPR. Comm. Exs. A, B. Thus, we find appellant has failed to establish a *prima facie* case of discrimination based on her disability.

### *Retaliation*

Appellant asserted her final Interim EPR and removal were retaliatory because she asked to speak with Brightful about the bullying and harassment she was experiencing, and because she joined the union. N.T. pp. 46, 67. First, there is no credible evidence appellant asked to speak with Brightful about the alleged

bullying and harassment. Brightful credibly testified appellant only asked to meet with her regarding the Interim EPR and did not complain to her about being bullied. N.T. pp. 95, 100, 103. Furthermore, there is no credible evidence appellant ever reported the discriminatory behavior during her employment with the appointing authority.

Likewise, there is no credible evidence of retaliation based on appellant joining the union. Contrary to appellant's claims, the appointing authority presented credible evidence that the only time appellant exercised her right to union representation was on August 6, 2019, which was the initial meeting date to discuss her failure to successfully complete her probation. N.T. p. 88. This meeting was rescheduled to accommodate appellant's union representative. N.T. p. 88. Thus, there is no credible evidence that appellant was removed because she was a member of the union. Nor is there any credible evidence appellant's union membership factored into the ratings on her final Interim EPR. Thus, we find appellant has failed to establish a *prima facie* case of discrimination based on retaliation.

### *Conclusion*

Based on the foregoing, we find appellant failed to establish a *prima facie* case of traditional discrimination based on her age, regional culture, or disability. Likewise, we find appellant failed to present any credible evidence establishing a *prima facie* case of retaliation. Furthermore, we find, even if appellant's evidence had been sufficient to shift the burden of proof to the appointing authority, the appointing authority presented sufficient evidence of a legitimate, non-

discriminatory reason for removing appellant from her position. *Nwogwugwu*, 594 A.2d at 850. Specifically, we find credible the testimony and evidence presented by the appointing authority's witnesses that appellant was unable or unwilling to satisfactorily perform her duties.

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

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

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

The Commission concludes based on the credible testimony of the appointing authority's witnesses, which is detailed above, appellant was unable to satisfactorily perform the duties of a Vocational Rehabilitation Counselor. Comm. Ex. A. Therefore, we find the evidence establishes appellant was removed from her position for a legitimate non-discriminatory reason—unsatisfactory work performance. Additionally, we find appellant provided no credible evidence the appointing authority's merit-related reason was pretextual. Thus, we find appellant has failed to establish traditional discrimination. Accordingly, we enter the following:

CONCLUSION OF LAW

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

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Patricia M. Blair challenging her Interim Employee Performance Review for the rating period May 30, 2019 to July 12, 2019, and her removal from probationary Vocational Rehabilitation Counselor employment with the Department of Labor and Industry, and sustains the action of the Department of Labor and Industry in the issuance of the Interim Employee Performance Review for the rating period May 30, 2019 to July 12, 2019, and the removal of Patricia M. Blair from Vocational Rehabilitation Counselor employment, effective August 12, 2019.

State Civil Service Commission

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Gregory M. Lane  
Commissioner

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Bryan R. Lentz  
Commissioner

Mailed: November 20, 2020