

COMMONWEALTH OF PENNSYLVANIA

Ayman Ghobrial : State Civil Service Commission
: :
v. : :
: :
Department of Environmental : :
Protection : Appeal No. 30355

Ayman Ghobrial John J. Cantwell
Pro Se Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Ayman Ghobrial challenging his Employee Performance Review for the rating period from August 1, 2018, to August 1, 2019, in his position as a Licensed Professional Geologist, regular status, with the Department of Environmental Protection. A hearing was held on January 28, 2020, at the 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. The issue before the Commission is whether the appointing authority discriminated against appellant in relation to his Employee Performance Review for the rating period of August 1, 2018, to August 1, 2019.

FINDINGS OF FACT

1. On August 12, 2019 appellant received his Employee Performance Review for the rating period of August 1, 2018, to August 1, 2019 (hereinafter “EPR”). Professional Geologist Manager, C. David Brown, was the Rater; he issued appellant overall rating of Satisfactory. Program Manager Ragesh Patel was the Reviewing Officer; he concurred with Brown’s ratings. Comm. Ex. A; Ap. Exs. 014-021; AA Ex. 4.
2. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. D.
3. On August 1, 2018, Brown met with appellant to review the performance objectives for the EPR’s rating period. After reviewing the performance objectives, Brown and appellant acknowledged and signed them. N.T. pp. 98-99, 103; AA Exs. 1, 2.
4. On March 18, 2019, Brown provided appellant a Performance Management Progress Review form for the period of August 1, 2018, to February 28, 2019. N.T. pp. 105-106; AA Ex. 3.

5. Brown and appellant signed appellant's Performance Management Progress Review form on March 18, 2019. N.T. p. 110; AA Ex. 3.
6. Brown rated appellant's job performance, signed appellant's EPR, and finalized the EPR on August 7, 2019. Comm. Ex. A; N.T. pp. 126-127, 175; Ap. Exs. 014-021; AA Ex. 4.
7. Appellant's EPR provided an overall rating of Satisfactory. In addition, Brown provided a rating of Commendable for the job factor of job knowledge and skills. Appellant received ratings of Satisfactory for the job factors of: work results, communication, initiative/problem solving, interpersonal relations/EEO, and work habits. Comm. Ex. A; N.T. pp. 114, 115, 117-118, 120, 121, 123; Ap. Exs. 014-021; AA Ex. 4.
8. Although Brown was aware of appellant's appeal challenging his non-selection for promotion to Professional Geologist Manager employment with the appointing authority, Brown did not factor appellant's pending appeal into how he rated appellant's job performance. N.T. p. 128.

9. Brown submitted appellant's EPR to Patel through the appointing authority's online system. N.T. pp. 130-131.
10. Patel received and reviewed appellant's EPR. Patel agreed with Brown's ratings and returned appellant's EPR to Brown. N.T. pp.130-131, 207.
11. Patel did not take into consideration appellant's pending appeal of his non-selection for promotion to Professional Geologist Manager employment when he reviewed appellant's EPR. N.T. p. 238.
12. Brown met with appellant to discuss the ratings and comments within appellant's EPR on August 12, 2019. N.T. pp.131-132.
13. After meeting with Brown, appellant took his EPR to review. On August 14, 2019, appellant returned his EPR to Brown but did not sign it. Instead, appellant submitted a rebuttal as an attachment to his EPR. N.T. pp. 132-133; Ap Exs. 024-027; AA Ex. 4.

14. Brown scanned appellant's EPR with the attached rebuttal, provided a copy to appellant, and to the appointing authority's HR Liaison Officer May Lapina to add to appellant's personnel file on August 14, 2019. N.T. pp. 133, 136; AA Ex. 5.
15. Section Supervisor Renata Moseley received and reviewed appellant's EPR and rebuttal through the appointing authority's online system. Comm. Ex. A; N.T. p. 263; Ap. Exs. 014-021, 024-027; AA Ex. 4.
16. Moseley determined appellant's EPR was a fair and objective EPR without any negative ratings. N.T. pp. 269, 271.
17. After her review, Moseley advised her staff to place appellant's EPR in his personnel folder. N.T. p. 266.

DISCUSSION

The issue before the Commission is whether the appointing authority discriminated against appellant in relation to his Employee Performance Review for the rating period of August 1, 2018, to August 1, 2019 (hereinafter "EPR"). Comm. Ex. A; Ap. Exs. 014-021; AA Ex. 4. Appellant could only bring his challenge of his

EPR under section 3003(7)(ii) of Act 71 of 2018 based upon the claim that the appointing authority discriminated against him in violation of Section 2704 of Act 71. Pa. C.S.A. §§ 2704, 3003(7)(ii). Specifically, appellant alleges he was discriminated against on the basis of retaliation when he received an overall rating of Satisfactory performance on his EPR. Comm. Ex. B.

In an appeal alleging discrimination, the burden of presenting evidence in support of an allegation 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 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. 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.¹ The prohibition set forth in this section encompasses two general types of discrimination. First, “traditional discrimination” encompasses claims of discrimination based on labor union

¹ 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.

affiliation, race, sex, national origin or other non-merit factors; and second, “technical discrimination” 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). In the instant matter, appellant did not appeal his EPR under a claim of technical discrimination.

In analyzing claims of discrimination under Section 2704 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 Pa.C.S.A. § 2704; *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *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).

A retaliation claim is a specific subcategory of the broader category of non-merit factor discrimination. In a retaliation case, appellant may establish a *prima facie* case by proving 1) she engaged in a protected activity; 2) the appointing authority was aware of the protected activity; 3) that subsequent to participation in the protected activity, appellant was subjected to an adverse employment action by the appointing authority; and 4) that there is a causal connection between participation in the protected activity and the adverse employment action. *Robert Wholey Co., Inc. v. Pennsylvania Human Rel. Commn.*, 606 A2d 982, 983 (Pa. Commw. 1992) citing *Brown Transport Corp. v. Pennsylvania Human Rel. Commn.*,

578 A.2d 555 (Pa. Commw. 1990). When participation in a protected activity and the occurrence of an adverse employment action occurs within close proximity in time, causation is inferred. *Id.* at 984.

Once a *prima facie* case of discrimination has been established, the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for the personnel action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretextual. *Henderson*, 126 Pa. Commw. at 614-615.

In support of his appeal, appellant testified on his own behalf. In response, the appointing authority presented the testimony of Professional Geologist Manager C. David Brown,² Program Manager Ragesh Patel,³ and Section Supervisor Renata Mosely.⁴

² C. David Brown is employed as a Professional Geologist Manager for the appointing authority located in the Southeast Regional Office. N.T. p. 95. As a Professional Geologist Manager, Brown supervises five employees within the Special Project Section in the Environmental Cleanup and Brownfields Program. N.T. p. 96. Per his supervisory duties, Brown is responsible for preparing EPRs for his five employees, including appellant. N.T. p. 96. Brown received supervisory training regarding hiring, managing, fostering employee development, and preparing EPRs. N.T. p. 97.

³ Ragesh Patel is employed as a Program Manager for the Environmental Cleanup and Brownfields program. N.T. p. 197. As a Program Manager, Patel supervises the Storage Tank Program, Corrective Action Program, Land Recycling Program and the HSCA Program through the Section Chief and additional staff. Patel also supervises four employees and acts as a reviewing officer for twenty-two employees. Pursuant to his duties as a reviewing officer, Patel reviews EPRs from his subordinate employees. N.T. p. 199. Patel meets with his subordinate employees, such as Brown, on a biweekly basis to address any of their concerns while they supervise different programs. N.T. p. 202. Patel annually receives supervisory training for HSCA management, sexual harassment, and performance reviews. N.T. p. 200.

⁴ Renata Moseley is employed as a Section Supervisor for Employee Relations and Workforce Support Services. N.T. p. 244. As a Section Supervisor, Moseley manages the performance management system and employee relations, which supervises the staff investigating employee misconduct. N.T. p. 244.

Appellant asserted he received an overall rating of Satisfactory in his EPR because his review was based on retaliation⁵ for appealing his non-selection for promotion to Professional Geologist Manager employment with the appointing authority. Comm. Ex. A; N.T. pp. 42, 44-45, 77, 79; Ap. Exs. 014-021; AA Ex. 4. Appellant further argued his EPR was influenced by Brown possessing the supervisory file from appellant's previous supervisor, Walter Payne. Appellant recalled how Brown told appellant that Payne left the supervisory file regarding appellant's performance and the file would not be used against him. N.T. p. 53. On November 8, 2018, appellant emailed Brown requesting a copy of Payne's supervisory file. In response, although Brown informed him that he was in possession of Payne's supervisory files, Brown did not provide appellant a copy of the file. N.T. pp. 49-50; Ap. Exs. 004, 005, 006.

After his meeting with Brown regarding Payne's supervisory file and the subsequent email correspondences, appellant noticed Brown giving appellant a larger workload than other Licensed Professional Geologists. N.T. p. 56. Appellant argued after he requested a copy of Payne's supervisory file, Brown began overworking him in retaliation for the request. N.T. p. 63. Appellant stated he complained about the increased workload to Patel, who is Brown's supervisor, on January 11, 2019. N.T. p. 56; Ap. Exs. 039A, 39B.

⁵ Both parties stipulated the following:

[O]n November 9, 2018, appellant filed an appeal with the Commission regarding that another interview be conducted for the Professional Geologist Manager position. And that a --- a panel be selected that was impartial and to --- secure for a selection. And that he alleged in that complaint that he was discriminated against by Ragesh Patel and David Brown.

N.T. pp. 79-80.

Appellant received his EPR on August 12, 2019 and met with Brown to discuss the overall rating of Satisfactory. N.T. pp. 38, 74. Appellant expressed to Brown that he felt he did a much better job than a rating of Satisfactory. Brown told appellant he would get back to him in a couple of days so he could think about the rating. After a couple of days, Brown communicated to appellant that he could not change the rating. After receiving Brown's correspondence, appellant approached Patel regarding the overall rating of Satisfactory. Appellant recalled Patel told him that no one receives a rating of Outstanding because there would not be any room for improvement. N.T. p. 74. Appellant testified he responded to his EPR. N.T. pp. 67, 85; Ap Exs. 024, 025, 026, 027. Appellant asserted in his rebuttal to his EPR that the overall rating of Satisfactory is based on retaliation by Brown for appealing his non-selection for promotion to the Professional Geologist Manager employment with the appointing authority to the Commission. N.T. p. 91; Ap Exs. 024-027.

We find appellant's testimony is sufficient to state a *prima facie* case of retaliation. Once appellant establishes a *prima facie* case of discrimination, the burden of proof shifts to the appointing authority to present legitimate non-discriminatory reasons for the personnel action. *Henderson, supra*.

Brown confirmed he is responsible for drafting appellant's EPRs. Comm. Ex. A; N.T. p. 112; Ap. Exs. 014-021AA Ex. 4. On August 1, 2018, Brown met with appellant to go over the previous EPR from the previous rating period and performance objectives. N.T. pp. 98-99, 103; AA Exs. 1, 2. After reviewing the

performance objectives, Brown and appellant acknowledged and signed them. N.T. pp. 99, 103. On August 13, 2018, Brown emailed appellant a copy of appellant's 2017-2018 EPR.⁶ Appellant also received performance objectives for his 2018-2019 EPR. N.T. p. 100; AA Ex. 1. During the course of the EPR's rating period, Brown kept notes of appellant's performance, significant deviations, concerns, difficulties, and positive contributions. N.T. pp. 99, 105.

Brown recalled appellant emailing him on November 8, 2018 requesting Payne's supervisory file. N.T. p. 167; Ap. Exs. 04, 05, 06. Brown responded to appellant on November 13, 2018. In his response, Brown referred to possessing Payne's supervisory file on appellant. Brown asserted "I did not refer to anything specifically in the files. I haven't read the files, so I don't know what was in the files at the time." N.T. p. 171; Ap. Ex. 5. Brown acknowledged he reviewed the contents of Payne's supervisory files in November 2018. N.T. p. 177. Brown explained he may have told appellant that he possessed a supervisory file from Payne regarding appellant's performance but told appellant it was not being used to evaluate appellant's job performance. N.T. p. 163.

Brown recalled assigning appellant six projects in January 2019. N.T. p. 182. Brown explained that in the Brownfield program, projects are created once they are filed by the property owner. As a result, the timing of appellant's project assignments is driven by external entities and not by Brown's decision. N.T.

⁶ Brown described how he prepared appellant's EPR for the rating period of August 1, 2017 through August 1, 2018. Brown used the same process as he prepared appellant's challenged EPR by reviewing his notes, emails, and proceeding through each job factor. For this EPR, Brown rated appellant's overall performance as Satisfactory. Brown met with appellant regarding this EPR. Appellant submitted a rebuttal to the 2017-2018 EPR. Brown signed and dated appellant's EPR for the rating period of August 1, 2017 through August 1, 2018 on July 30, 2018. N.T. pp. 141-142, 143, 161; Ap. Exs. 028-037; AA Ex. 11. Appellant signed this EPR on August 8, 2018. N.T. p. 162.

pp. 184-185. Once the project is assigned, a Licensed Professional Geologist would have a sixty or ninety-day period to complete a responsive report pursuant to regulatory deadlines. N.T. p. 186. Brown recalled appellant complaining to him about how the deadlines for the assigned six projects were near one another. N.T. p. 188. In response, Brown reviewed appellant's project deadlines and determined it was a reasonable amount of work for that period of time. Brown also considered reassigning appellant's projects to other staff members by reviewing the Corrective Action Program but discovered it would be difficult based on their workloads. N.T. pp. 190, 193-194. Brown testified he previously completed six projects within a three-month period as a Licensed Professional Geologist. N.T. p. 193.

On March 18, 2019, Brown provided appellant a Performance Management Progress Review form for the period of August 1, 2018, to February 28, 2019. N.T. pp. 105-106; AA Ex. 3. When he provides a Performance Management Progress Review form to an employee, Brown discusses each job factor that are concerning in relation to the employee's job performance. N.T. p. 107. Within appellant's Performance Management Progress Review form, there are the following performance factors: job knowledge and skills, work results, communication, initiative problem solving, interpersonal relationships/ EEO, work habits, supervisory management,⁷ and EPD update. AA Ex. 3.

Brown provided a checkmark for appellant's job knowledge and skills, work results, communication, initiative problem solving, interpersonal relations/EEO, and EDP update. AA Ex. 3. Brown explained a checkmark signifies

⁷ Since appellant's position as a Licensed Professional Geologist does not have any supervisory responsibilities, the performance factor of supervisory management is not applicable to appellant's performance. AA Ex. 3.

that there are no significant deviations from the expected job performance. N.T. p. 107. Brown commented on appellant's work habits by noting appellant to be attentive to his work schedule. Brown explained he noticed a few incidents where appellant deviated from his work schedule. N.T. p. 108; AA Ex. 3. Brown emphasized his comment regarding appellant's need to be more attentive to his work schedule was a constructive comment. Brown and appellant signed appellant's Performance Management Progress Review form on March 18, 2019. N.T. p. 110; AA Ex. 3.

Brown described his process for preparing an EPR for an employee he supervises. The appointing authority has an online system for supervisors, such as Brown, to prepare EPRs. Once inside the system, Brown fills out the employee's ratings per job factor. The ratings include Outstanding, Commendable, Satisfactory, Needs Improvement, and Unsatisfactory. After completing the EPR, Brown electronically submits the EPR to the reviewing officer, which is Brown's immediate supervisor, Patel. The reviewing officer reviews the EPR and if he or she agrees with the EPR's ratings, the reviewing officer signs it and returns it to Brown. Shortly thereafter, Brown schedules a meeting with the employee to review the EPR. N.T. pp. 111, 129.

When drafting appellant's EPR, Brown referred to his notes regarding appellant's performance and emails. Brown did not review or utilize other documents when he was preparing appellant's EPR. Specifically, Brown did not refer to appellant's previous EPRs when creating appellant's 2018-2019 EPR. N.T. pp. 114, 128-129, 159. Brown rated appellant's job knowledge and skills as Commendable. Comm. Ex; A; N.T. p. 114; Ap. Exs. 014-021; AA Ex. 4. Job

knowledge and skills refer to an employee's understanding of a Licensed Professional Geologist's responsibilities. N.T. pp. 114-115. Brown commented on how appellant has a strong knowledge of the Licensed Professional Geologist's program. Comm. Ex. A; N.T. pp. 115-116; Ap. Exs. 014-021; AA Ex. 4.

Brown rated appellant's work results as Satisfactory. Work results refer to the quantity and quality of an employee's work, which includes timeliness of submitting assignments and customer service. Brown explained he rated appellant's work results as Satisfactory because he felt appellant met the standards of a Licensed Professional Geologist instead of frequently exceeding the expected quantity and quality of his work. Comm. Ex. A; N.T. p. 116; Ap. Exs. 014-021; AA Ex. 4. Brown commented on appellant's work results by noting he appreciated appellant's efforts to complete his work in a timely manner, giving him time to review appellant's work before the deadline. Comm. Ex. A; N.T. p. 117; Ap. Exs. 014-021; AA Ex. 4.

Brown rated appellant's communication skills as Satisfactory. Communications refer to an employee's verbal communications and exchanging information with co-workers, supervisors, consultants, and the public. Comm. Ex. A; N.T. p. 117; Ap. Exs. 014-021; AA Ex. 4. Brown explained he rated appellant's communications as Satisfactory because he believed appellant communicated effectively and exchanged relevant information in a timely manner. Brown did not rate appellant's communications as Commendable because Brown did not feel appellant communicated at a high level of quality. Comm. Ex. A; N.T. pp. 117-118; Ap. Exs. 014-021; AA Ex. 4. Brown commented on appellant's communications noting how appellant's memos were concise. Brown also noted he had to ask appellant to elaborate and provide important information for decisions. Comm. Ex. A; N.T. p. 118; Ap. Exs. 014-021; AA Ex. 4.

Brown rated appellant's initiative/problem solving skills as Satisfactory. Comm. Ex. A; N.T. p. 120; Ap. Exs. 014-021; AA Ex. 4. Initiative/problem solving reflects the employee's independence and how they can do the job without corrections. N.T. p. 120. Brown explained a Satisfactory rating for appellant's initiative/problem solving reflects how appellant addresses existing and potential problems, assists in developing solutions, and cooperates with the team. Brown did not feel appellant's performance exceeded the standard expectations for a Licensed Professional Geologist's initiative/problem solving skills. N.T. p. 121. Brown commented on how appellant completed most of his work assignments independently. Comm. Ex. A; N.T. p. 121; Ap. Exs. 014-021; AA Ex. 4.

Brown rated appellant's interpersonal relations/EEO skills as Satisfactory. Comm. Ex. A; N.T. p. 121; Ap. Exs. 014-021; AA Ex. 4. Interpersonal relations/EEO skills refers to an employee's interactions with coworkers, managers, and the public. Brown explained a rating of Satisfactory for this skill reflects how appellant interacted with others in a cooperative manner, appropriately dealt with conflict, and treated others equitably. N.T. p. 122. Brown commented on how appellant interacted well with coworkers on discussions of technical issues. Comm. Ex. A; N.T. p. 122; Ap. Exs. 014-021; AA Ex. 4.

Brown rated appellant's work habits as Satisfactory. Comm. Ex. A; N.T. p. 123; AA Ex. 4; Ap. Exs. 014-021. Work habits refers to an employee's ability to adhere to office procedures, ethical standards, attendance, and assignment requirements. N.T. p. 123. Brown explained appellant's Satisfactory rating represents how appellant routinely handled the volume of work, met deadlines, and adhered to the appointing authority's policies and procedures. N.T. p. 123. Brown

commented on appellant's work habits by reminding appellant the importance of being attentive to his work hours and other work rules when appellant arrived late to work on April 16, 2019, May 13, 2019, and when appellant took an excessively long lunch break. Comm. Ex. A; N.T. p. 124; Ap. Exs. 014-021; AA Ex. 4.

Brown rated appellant's overall performance as Satisfactory. Brown testified a Satisfactory rating presents how an "employee meets the expectations and standards of the employee's job in a fully adequate way." Comm. Ex. A; N.T. p. 126; Ap. Exs. 014-021; AA Ex. 4. Brown commented on appellant's overall job performance by noting, "[y]our experience is of value to our program. You've expressed concerns several times about your workload. As an LPG I believe your assignments are consistent with expectations for the position and there are opportunities for you to take on additional responsibilities." Brown signed appellant's EPR on August 7, 2019, and finalized the EPR. Comm. Ex. A; N.T. pp. 126-127, 175; Ap. Exs. 014-021; AA Ex. 4.

Brown emphasized the purpose of his comments to appellant was to provide constructive criticism intended to encourage appellant's continued performance. N.T. p. 119. The comments throughout appellant's EPR were never used as a form of punishment. N.T. p. 125. Brown explained a rating of Satisfactory on an EPR is not a negative rating. Specifically, a "[S]atisfactory rating is a good rating. That means the employee is doing the job as expected. If there is deviations from that, they are minor." N.T. pp. 119-120. Brown acknowledged he was aware of appellant's filed appeal with the Commission challenging his non-selection for promotion to Professional Geologist Manager employment with the appointing

authority and that he was a named party in the appeal. N.T. p. 127. Brown testified appellant's appeal did not factor into how he rated appellant's performance in appellant's EPR. N.T. p. 128.

Brown submitted appellant's EPR to Patel. N.T. pp. 130-131. Patel testified he is responsible as a reviewing officer for reviewing appellant's EPRs. N.T. p. 201. Patel explained at the beginning of every rating period, he ensures every employee knows his or her performance objectives for them to obtain a Satisfactory rating. N.T. p. 202. Throughout an employee's rating period, Patel maintains notes on the employee's performance and receives a draft of the employee's EPR from his or her supervisor. N.T. p. 203. Patel admitted to reviewing an employee's previous EPRs in order to gain more knowledge about the employee when preparing an EPR. N.T. pp. 216, 217. Patel asserted it is not his general practice to review prior EPRs in preparing a current EPR. N.T. p. 217. Patel reviews the drafted EPR, including the attached comments. If there are any issues with the drafted EPR, Patel returns the EPR to the employee's supervisor with comments to make changes to the draft. N.T. p. 203. However, if there are no changes, Patel sends the EPR back to the employee's supervisor and instructs him or her to finalize the EPR. The employee's supervisor and Patel sign the EPR for it to be presented to the employee. N.T. p. 204.

Patel received and reviewed appellant's EPR from Brown. Patel reviewed appellant's job factors and comments. Comm. Ex. A; N.T. pp. 206-207; Ap. Exs. 014-021; AA Ex. 4. Patel commented on appellant's overall rating of Satisfactory by noting "thank you so much for your timely reviews and working well with the regulated community. As a senior staff member, I would expect more input and guidance to newer staff as time permits." Comm. Ex. A; N.T. p. 207; Ap. Exs. 014-021; AA Ex. 4. Patel intended for his comment to appellant to be

constructive toward appellant's work habits as a Licensed Professional Geologist. N.T. p. 210. Patel explained appellant's overall rating of Satisfactory is considered as a good EPR because appellant met all the performance objectives for the Licensed Professional Geologist position. Additionally, appellant did not receive any constructive or negative ratings, such as Needs Improvement or Unsatisfactory. Comm. Ex. A; N.T. pp. 208, 210; Ap. Exs. 014-021; AA Ex. 4. Patel testified he did not refer to other information beside his personal notes when reviewing appellant's EPR. N.T. p. 237.

Patel emphasized appellant's appeal of his non-selection for promotion to the Professional Geologist Manager position did not factor into his review of appellant's EPR. N.T. p. 238. Additionally, Patel did not discuss appellant's appeal of his non-selection for promotion with Brown when appellant's EPR was being drafted. N.T. p. 238. Patel recalled meeting with appellant regarding his non-selection for promotion. Patel mentioned to appellant that "this is my decision and you should keep an open mind. And the decision is going to be made by me as opposed to Dave Brown." N.T. p. 228. Patel also told appellant his selection of Sue Kennedy as an interview panelist was his decision. N.T. p. 241. Patel remembered appellant complaining that Brown possessed Payne's supervisory files regarding appellant's performance. N.T. p. 231. Patel did not begin an investigation regarding Brown's possession of Payne's supervisory files. N.T. p. 236. Patel signed appellant's EPR on August 7, 2019. N.T. pp. 207, 211; AA Ex. 4.

After receiving the electronic version of appellant's EPR back from Patel, Brown printed it out, signed it, dated it, and gave it to Patel for his physical signature. N.T. pp. 130-131. Once Brown received Patel's signature, he met with appellant on August 12, 2019 to review the EPR. N.T. p. 131. During the meeting,

Brown explained each individual rating, comment, and overall rating. Brown also provided appellant an opportunity to ask questions about the EPR. During the meeting, Brown noticed appellant was dissatisfied with his rating. N.T. p. 132. After the meeting, Brown recalled appellant took the EPR to his desk to review. On August 14, 2019, appellant returned his EPR to Brown but did not sign it. Instead, appellant provided a rebuttal as an attachment to the EPR. N.T. pp. 132-133; Ap. Exs. 024-027; AA Ex. 4. After receiving appellant's EPR with the attached rebuttal, Brown scanned it, provided a copy to appellant, and provided a copy to the appointing authority's HR Liaison Officer May Lapina for appellant's personnel file on August 14, 2019. N.T. pp. 133, 136; AA Ex. 5. Brown did not have any further involvement in appellant's EPR once he submitted it to Lapina. N.T. p. 137.

Section Supervisor Renata Moseley recalled receiving and reviewing appellant's challenged EPR through the online system. Comm. Ex. A; N.T. p. 263; Ap. Exs. 014-021; AA Ex. 4. Moseley is not only responsible for reviewing submitted EPRs but also assists supervisors in how to correct performance and document an employee's performance. N.T. p. 245. When contacted by supervisors and reviewing officers to provide assistance, Moseley and her staff utilize the Personnel Rules,⁸ Management Directives,⁹ and the appointing authority's

⁸ Moseley provided an overview of the Personnel Rules, Management Directive 505.7, Chapter 9 regarding employee performance management. Employee performance management provides guidance for a supervisor to instruct an employee on what to do, how to perform the job function, and correct any errors made. It also provides supervisors, reviewing officers, and Human Resources employees guidance to rate an employee's performance and describes sections of the EPR form. N.T. pp. 246-247; AA Ex. 6. Pursuant to the chapter, ratings and progress reviews are to be completed on a timely basis by supervisors familiar with the work performance of their employees. In most cases, the immediate supervisor rates the employee. Subsequently, the reviewing officer is to be the rater's immediate supervisor. N.T. p. 247; AA Ex. 6.

⁹ Moseley described the contents of Management Directive 540.7, amended May 2, 2011, regarding the performance management program, as well. Moseley explained this Management Directive provides specific directions on how EPRs are to be handled in the entire system and information about the actual EPR. The Management Directive gives more explicit information on the EPR form and how a supervisor can use the form. N.T. p. 250; AA Ex. 7. Moseley stated supervisors can find these Management Directives and Personnel Rules on the Office of Administration's website or through the Performance Management Factor Links. N.T. pp. 251=252; AA Ex. 8. Once a supervisor or

Performance Management Policy,¹⁰ effective March 5, 2012, to review an EPR. N.T. pp. 253-254. Moseley evaluated Brown's and Patel's comments within appellant's EPR and reviewed appellant's rebuttal. N.T. pp. 265-266. Moseley explained she did not see any comments that required her to conduct an investigation or to reach out to either Brown or Patel. N.T. p. 266. Specifically, Moseley determined appellant's statements did not require further actions because they were referring to prior EPRs with prior rating periods outside the current EPR's existing rating period. N.T. pp. 267-268. Moseley noticed appellant mentioning he had an appeal pending at the time of his EPR. N.T. p. 281. Moseley believed Brown's comments substantiated the overall rating of Satisfactory for appellant's performance. N.T. p. 268. Based on her review, Moseley determined appellant's EPR was a fair and objective EPR without any negative ratings. N.T. pp. 269, 271. After her review, Moseley advised her staff to place appellant's EPR inside his personnel folder. N.T. p. 266.

Moseley provided an explanation of how a supervisor or reviewing officer prepares an EPR during a rating period. Moseley testified a supervisor should only be considering the work assignments and performance of an employee for the finite time period from the beginning and the end of the rating period. N.T. p. 258. A supervisor should also be comparing the employee's work performance with the performance standards. Moseley explained an EPR's rating factors from Outstanding to Unsatisfactory, "it's not like the grading system at school, where it

reviewing officer completes an EPR form, the Performance Management Factor Links provides links to the Management Directives pertaining to the performance management program. N.T. p. 252.

¹⁰ Moseley explained that pursuant to the appointing authority's Performance Management Policy, EPRs are prepared within the appointing authority's online system. The appointing authority's Performance Management Policy is consistent with both Management Directives. It gives an opportunity for an employee to meet with the rater and reviewing officer. It also includes an option to have a union representative present at the review meeting. N.T. p. 256; AA Ex. 9. After the meeting, the EPR is placed in the employee's personnel folder. N.T. p. 257; AA Ex. 9.

goes from A to F. In fact, if you're [S]atisfactory, that's an A. That means that you're doing the job, you're doing it well, you're meeting the standards." N.T. p. 259. A rating of Needs Improvement is considered a corrective action while a rating of Unsatisfactory is considered a negative rating for an employee's EPR. N.T. p. 271.

Moreover, a supervisor's justification for an EPR is contained within each evaluation for the specific rating period. N.T. p. 277. Supervisors are not supposed to consider an employee's EPR from a prior rating period when preparing an EPR. N.T. pp. 259-260. Moseley further explained a supervisor does not have to justify a change of ratings between consecutive EPRs. Moseley emphasized supervisors are not expected to go back to previous EPRs and if they use them as a baseline, "[i]t damages the foundation of performance standards and then the work that comes in and the results of the employee during that rating period." N.T. p. 274.

Having carefully reviewed the record, the Commission finds the appointing authority has presented legitimate, non-discriminatory reasons to support the ratings on appellant's EPR. In support of our conclusion, we find the testimony given by C. David Brown, Ragesh Patel, and Renata Moseley to be credible.¹¹

In response to appellant's retaliation argument that his overall rating of Satisfactory was based upon his appeal of his non-selection for promotion to the Professional Geologist Manager position, Brown, Patel, and Moseley credibly explained how appellant's EPR was based solely on appellant meeting the

¹¹ 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*, 95 Pa. Commw. 475, 478, 505 A.2d 339, 341 (1986).

performance objectives of a Licensed Professional Geologist. Although Brown and Patel were aware of Brown's possession of Payne's supervisory files regarding appellant's performance, Moseley credibly established the comments and ratings within appellant's EPR were fairly and objectively based upon appellant's job performance during the finite rating period. We also note appellant's overall rating of Satisfactory is not considered a negative EPR. Appellant did not receive a corrective rating of Needs Improvement or a negative rating of Unsatisfactory. As such, the appointing authority presented credible, legitimate, non-discriminatory reasons for providing an overall rating of Satisfactory for appellant's EPR for the rating period of August 1, 2018 to August 1, 2019. Furthermore, appellant has failed to persuade this Commission that the appointing authority's legitimate, non-discriminatory reasons are merely pretextual. *Henderson, supra*. 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 Ayman Ghobrial challenging his Employee Performance Review for the rating period from August 1, 2018, to August 1, 2019,

in his position as a Licensed Professional Geologist, regular status, and sustains the action of the Department of Environmental Protection, in the Employee Performance Review of Ayman Ghobrial for the rating period from August 1, 2018, to August 1, 2019, in his position as a Licensed Professional Geologist, regular status.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: October 26, 2020