

COMMONWEALTH OF PENNSYLVANIA

Theresa Schifano : State Civil Service Commission  
 :  
 v. :  
 :  
 Pennsylvania Department of :  
 Transportation : Appeal No. 30626

George Daniels  
Indispensable Party<sup>1</sup>

John P. Smarto  
Attorney for Appellant

Denise H. Farkas  
Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Theresa Schifano challenging her non-selection for promotion to the position of Roadway Programs Specialist (#I-2020-69830) with the Pennsylvania Department of Transportation. Hearings were held on April 5 and May 9, 2022, via video, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony, exhibits introduced at the hearings, and the Briefs submitted by the parties. The issue before the Commission is whether the appointing authority did not select appellant for reasons motivated by discrimination.

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<sup>1</sup> In recognition of the due process requirements noted in *Jefferson County Assistance Office, Department of Public Welfare v. Wolfe*, 582 A.2d 425 (Pa. Commw. Ct. 1990), the individual currently occupying the challenged position was given the opportunity to participate in the proceedings, which he accepted. Comm. Exs. C, C-1.

FINDINGS OF FACT

1. By email dated September 2, 2020, appellant was informed she was not selected for the position of Roadway Programs Specialist (hereinafter “RPS”) 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. Appellant is currently employed by the appointing authority as a Roadway Programs Technician 2.  
N.T. p. 268; AA Ex. 3.
4. Appellant has held the position of Roadway Programs Technician 2 since September 2018. N.T. p. 268.
5. Appellant was twice promoted by the appointing authority when she was over fifty years of age. N.T. pp. 291-293.

6. In or around July 10, 2020, appellant applied for a RPS position with the appointing authority. AA Ex. 3 (p. 1).
7. There were no seniority rights to the RPS position. N.T. pp. 384-385.
8. The appointing authority simultaneously posted the RPS position internally and externally. N.T. p. 363; AA Exs. 1, 2.
9. The RPS position was simultaneously posted internally and externally to reach the largest number of potential applicants. N.T. pp. 47, 49
10. At the time the RPS position was posted, the appointing authority did not know who would apply. N.T. p. 47.
11. At the time the RPS position was posted, there were very few Roadway Programs Technician positions in the district where the vacancy was located and there was no guarantee the employees in those positions would apply. N.T. pp. 49-50, 393.

12. To qualify under the internal posting, applicants must have held regular civil service status as a Roadway Programs Technician 1 or Roadway Programs Technician 2. AA Ex. 1 (p. 3).
13. At the time the RPS position was posted, the appointing authority was concerned the geographic location of the RPS position would deter employees in other districts from applying because of the drive. N.T. pp. 49, 393-394.
14. Appellant and two other applicants were deemed eligible for the RPS position under the internal posting. N.T. pp. 370, 373.
15. The indispensable party and two other applicants were deemed eligible for the RPS position under the external posting. N.T. p. 43.
16. The indispensable party was the only applicant who did not currently work for the appointing authority. N.T. pp. 42-43, 45.
17. Five applicants were interviewed for the position, including appellant and the indispensable party. N.T. pp. 58, 373.

18. District Maintenance Manager Ryan Medvitz, Roadway Programs Manager Ronald Howell, and Roadway Programs Coordinator Susan Howard served on the interview panel. N.T. pp. 90, 375, 425.
19. All candidates were asked the same twelve interview questions. N.T. pp. 205, 439; AA Exs. 6A, 6B, 7A, 7B.
20. The interview questions asked the candidates about their experience with various inventory processes for which the RPS position is responsible, to include inventory management, inventory audits, and recovery of monies for repairs. N.T. pp. 107, 171-172, 481-482, 500-501, 522-524; AA Exs. 6A, 6B, 7A, 7B.
21. The inventory processes which were discussed during the interviews are not unique to the appointing authority. N.T. pp. 439-440.
22. Question No. 5 asked:

The RPS works with the counties to ensure they are managing inventory correctly. What is your experience in

managing inventory. What would you do to ensure the counties are successful at this?

AA Exs. 6A, 6B, 7A, 7B.

23. In response to Question No. 5, appellant discussed her experience working in the storeroom which consisted of ensuring the inventory matched and reorder points were justified. N.T. pp. 96-97.
24. In response to Question No. 5, the indispensable party indicated he had experience counting the inventory monthly, reporting the result, making necessary adjustments to the inventory, and managing persons responsible for inventory. N.T. pp. 536-537.
25. The indispensable party was a Project Manager at Chevron and in that role, he was responsible for inventory control, audits of the inventory, and the recovery of monies for repairs, among other duties. N.T. pp. 493, 527-529.

26. Question No. 6 asked:
- Central Office scores the county's ability to manage their inventory using CMMT #10. Describe your knowledge of the CMMT process particularly CMMT #10.
- AA Exs. 6A, 6B, 7A, 7B.
27. CMMT is an acronym for County Maintenance Management Tool. N.T. pp. 98, 433.
28. CMMT #10 is the score assigned to each county based on where the county stands in the inventory process. N.T. p. 433.
29. Appellant's response to Question No. 6 was vague and did not focus on her experience related to CMMT #10. N.T. pp. 160, 207, 434-435, 453-454, 463, 473, 488-489.
30. In response to Question No. 6, the indispensable party discussed how he would hold people accountable, how he would involve the correct people to cross check for discrepancies, and the need to be well organized. N.T. p. 160.

31. Question No. 7 asked:

Bureau of Office Services visits each county every few years and conducts an audit called a PIMQAR (PennDOT Inventory Management Quality Assurance Review). What would you do to ensure the counties are prepared for this review?

AA Exs. 6A, 6B, 7A, 7B.

32. In response to Question No. 7, appellant discussed her experience with other types of audits unrelated to inventory. N.T. pp. 436-437.

33. In response to Question No. 7, the indispensable party conveyed his experience with inventory audits at Chevron and indicated he would use the same steps to prepare for the PIMQAR audit. N.T. pp. 116, 214, 488-489, 503, 538-540.

34. Question No. 9 asked:

The RSP will be the District RAR coordinator which will be responsible to work with the County RAR coordinators, Central Office, construction inspectors, and contractors to ensure the District is performing at the highest level.

Describe your knowledge of the RAR process and how you would assist the counties with this task.

AA Exs. 6A, 6B, 7A, 7B.

35. The RAR process is the appointing authority's process for obtaining reimbursements and recovering costs from accidents that occur on the roadways (*i.e.*, damage to guide rails, signs, etc.). N.T. pp. 112, 431.
36. In response to Question No. 9, appellant only discussed her field experience and told the interview panel she would need additional training on the RAR process. N.T. p. 432.
37. In response to Question No. 9, the indispensable party related his experience as a Project Manager with Chevron in which he recovered monies for repairs akin to what the RPS does as part of the RAR process. N.T. pp. 114, 165, 201, 503, 541-542.
38. Based on his responses to the interview questions and his work experience, the interview panel unanimously recommended the indispensably party for the RPS position. N.T. pp. 121 175, 130-131, 169, 175, 211-212, 216, 444-445.

39. Appellant was ranked second. N.T. pp. 121, 131, 168, 211, 216, 444, 487.
40. The interview panel was not directed by anyone to select the indispensable party. N.T. pp. 101-102, 129-130, 176-177, 185, 194-195, 210-211, 214-215, 403-404, 445, 495, 543.
41. At the time the interview panel made the selection recommendation, the interview panel did not know the indispensable party's age. N.T. p. 445.
42. None of the candidates participated in the interviews with video. N.T. pp. 100-101, 128, 374.
43. The interview panel did not see any of the candidates. N.T. pp. 445, 495, 531.
44. The interview panel did not base the selection recommendation on the sex of the candidates. N.T. pp. 177, 445, 496.
45. The interview panel selected the indispensable party because he had more work experience. N.T. p. 444.

## DISCUSSION

The issue before the Commission is whether appellant presented sufficient evidence to establish the appointing authority did not select her for promotion to Roadway Programs Specialist (hereinafter “RPS”) for reasons motivated by discrimination. Appellant could only bring this challenge through Section 3003(7)(ii) of Act 71 of 2018<sup>2</sup> (hereinafter “Act 71”) based upon an allegation that the appointing authority’s decision was motivated by discrimination in violation of Section 2704 of Act 71. 71 Pa.C.S. §§ 2704, 3003(7)(ii). Appellant alleges she was discriminated against based on her age, sex, and non-merit factors, to include the indispensable party was not a prior Commonwealth employee and he was preselected. Comm Ex. B. Appellant also alleges procedural discrimination based on the manner in which the vacancy was posted. Comm. Ex. B.

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

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

71 Pa.C.S. § 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 “procedural discrimination,” which involves a violation of procedures required pursuant to Act 71 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 procedural discrimination. Comm Ex. B.

At the hearing, appellant testified on her own behalf and presented the testimony of Human Resource Analyst 4 Mary Machesky,<sup>3</sup> Roadway Programs Manager Ronald Howell,<sup>4</sup> Roadway Programs Coordinator (hereinafter “RPC”) Susan Howard,<sup>5</sup> District Maintenance Manager Ryan Medvitz,<sup>6</sup> Assistant District

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<sup>3</sup> Machesky is currently employed as a Human Resource Analyst 4 within the Office of Administration’s (hereinafter “OA”) Infrastructure and Economic Development HR Delivery Center which provides services to the appointing authority. N.T. pp. 30-31, 354, 358. Machesky has held this position since February 2020 and has worked in Human Resources for over twenty-years. N.T. pp. 32, 355, 359. Prior to her position with OA, Machesky served for thirteen years as the Labor Relations Coordinator for the appointing authority’s District 12. N.T. p. 359. Machesky was responsible for posting the position at issue in the present appeal. N.T. pp. 35-36.

<sup>4</sup> Howell is employed by the appointing authority as the Roadway Programs Manager for District 12. N.T. pp. 80-81, 477, 479. Howell has worked for the appointing authority for approximately twenty-nine years and has served as the Roadway Programs Manager for approximately thirteen years. N.T. pp. 477, 479. Howell is the immediate supervisor for the position at issue in the present appeal and served on the interview panel. N.T. pp. 36, 86, 480.

<sup>5</sup> Howard is employed by the appointing authority as an RPC. N.T. pp. 137-138. Howard has held this position for twelve years and had a total of thirty years of Commonwealth service. N.T. pp. 138-139. Howard served on the interview panel for the position at issue in the present appeal. N.T. pp. 142-143.

<sup>6</sup> Medvitz is employed by the appointing authority as the District Maintenance Manager for District 12. N.T. pp. 421-422. Medvitz is the second level supervisor for the RPS position at issue in the present appeal and served on the interview panel. N.T. pp. 36, 86, 422, 424. Medvitz has supervised the RPS position for six years. N.T. p. 422.

Executive for Maintenance Robb Dean,<sup>7</sup> RPC Juliann Monteparte,<sup>8</sup> and the indispensable party. The appointing authority also presented testimony from Machesky, Medvitz, and Howell. The indispensable party testified on his own behalf. The evidence presented by the parties is summarized below.

Appellant is currently employed by the appointing authority as a Roadway Programs Technician 2 (hereinafter “RPT2”).<sup>9</sup> N.T. p. 268; AA Ex. 3. Appellant has held this position since September 2018. N.T. p. 268. In her position as a RPT2, appellant is responsible, in part, for conducting field reviews of the “accident reimbursable process.” N.T. pp. 270, 455. Appellant also works with inventory related to the appointing authority’s storeroom. N.T. p. 270.

In or around July 10, 2020, appellant applied for a RPS position with the appointing authority. AA Ex. 3 (p. 1). The appointing authority simultaneously posted this position internally and externally. N.T. p. 363; AA Exs. 1, 2. Appellant, along with three other employees (Colleen Martin, Michael McKittrick and Ben West), applied for the position under the internal posting. N.T. pp. 40, 56-57.

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<sup>7</sup> Dean is employed by the appointing authority as the Assistant District Executive for Maintenance. N.T. pp. 36, 219. Dean has worked for the appointing authority for approximately seventeen years and is Medvitz’s second level supervisor. N.T. pp. 185, 220. Dean was responsible for working with the Human Resource Analyst to fill the RPS position which is the subject of the present appeal. N.T. p. 222.

<sup>8</sup> Monteparte is employed by the appointing authority as the RPC for District 12. N.T. pp. 315, 317. Monteparte has held this position for approximately six years and worked for the Commonwealth for over twenty-four years. N.T. pp. 316, 318. Monteparte is appellant’s direct supervisor. N.T. p. 318. Monteparte did not have any involvement in the hiring action which is the subject of the present appeal. N.T. pp. 318-320, 323-324.

<sup>9</sup> Appellant began her employment with the appointing authority as a Clerk Typist in December 2003. N.T. pp. 266, 268, 290; AA Ex. 3. In May 2016, she laterally transferred to a stock clerk position, and in November of 2016, she was hired as a Roadway Programs Technician 1 (hereinafter “RPT1”) in the storeroom. N.T. pp. 266, 268, 291.

To be found eligible under the internal posting, applicants were required: 1) to meet one of the listed recruitment methods; 2) to have held regular civil service status in one of the two listed lower classifications (RPT1 or RPT2); and 3) to satisfy the minimum training and experience requirements (hereinafter “METs”). N.T. pp. 50-52, 365; AA Ex. 1 (p. 3). Appellant, Colleen Martin, and Michael McKittrick met the required criteria and were deemed eligible for the position. N.T. pp. 370, 373. Ben West was deemed ineligible. N.T. p. 57.

In addition to the three internal applicants, there were three individuals (Michael McKittrick, Daniel Wymer, and the indispensable party) who applied for the position under the external posting. N.T. p. 43. To be found eligible under the external posting, applicants were required to: 1) satisfy the METs;<sup>10</sup> 2) complete the examination questions; and 3) receive an examination score within the Rule of Three.<sup>11</sup> N.T. pp. 43, 366; AA Ex. 2 (pp. 2-3). The three applicants who applied under the external posting satisfied the METs and since there were only three, all three were interviewed.<sup>12</sup> N.T. pp. 44, 371, 373.

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<sup>10</sup> The METs for the internal and external postings were the same. AA Exs. 1 (p. 3), 2 (p. 2).

<sup>11</sup> Human Resource Analyst 4 Mary Machesky explained pursuant to the Rule of Three, the appointing authority must interview the three highest scoring applicants who applied under the external posting. N.T. p. 44. We note OA is responsible for certifying the names of the three highest-ranking applicants. 71 Pa.C.S. § 2401(b)(1).

<sup>12</sup> Machesky mistakenly testified the Commission was responsible for processing the external applications. N.T. pp. 41, 43. Contrary to Machesky’s testimony, the duties and responsibilities for civil service employment in Pennsylvania were transferred to OA effective on March 28, 2019. 71 Pa.C.S. § 2201. With that said, we note Machesky’s misstatement does not affect our review because appellant is not claiming the external applications were improperly reviewed, nor is she claiming the indispensable party was not qualified under the criteria listed in the external posting. Furthermore, appellant’s procedural discrimination claim was limited to the manner in which the vacancy was posted, not the determination of who qualified under the postings to interview. Comm. Ex. B.

In total, five applicants were interviewed for the position—appellant, Colleen Martin, Michael McKittrick,<sup>13</sup> Daniel Wymer, and the indispensable party. N.T. pp. 58, 373. Four of the five applicants were employed by the appointing authority at the time they applied for the position. The indispensable party was the only applicant who did not currently work for the appointing authority. N.T. pp. 42-43, 45.

Human Resource Analyst 4 Machesky, who was responsible for posting the RPS position, testified the position was posted both internally and externally to reach the largest number of potential applicants. N.T. p. 47. Machesky explained at the time the position was posted, the appointing authority did not know who would apply. N.T. p. 47.

Machesky stated positions may be limited to internal postings only if the appointing authority suspects there may be enough internal candidates who meet the criteria. N.T. pp. 35-36, 39. Machesky noted there were very few Roadway Programs Technician positions in the district where the vacant position was located and there was no guarantee that the employees in those positions would apply. N.T. pp. 49-50, 393. Also, there was a concern that the location of the position would deter employees in other districts from applying because of the drive. N.T. pp. 49, 393-394. Therefore, Machesky stated Human Resources recommended the position be posted both internally and externally to reach the largest candidate pool. N.T. p. 49.

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<sup>13</sup> McKittrick qualified under both the internal and external postings. N.T. p. 48.

Machesky further explained sometimes there are candidates who work for the agency who do not meet the criteria under the internal posting but may meet the criteria under an external posting. N.T. p. 40. Machesky stated for example the employee may not be in the next lower classification,<sup>14</sup> may not be eligible under the recruitment methods, or may be working in a non-civil service Commonwealth position. N.T. pp. 41-42. By posting the position externally, the appointing authority can also reach other civil and non-civil service Commonwealth employees, thereby expanding the hiring pool. N.T. pp. 40-41.

After the applicants were deemed eligible under the posting requirements, they were referred to the appointing authority for interviews.<sup>15</sup> District Maintenance Manager Ryan Medvitz,<sup>16</sup> Roadway Programs Manager Ronald Howell,<sup>17</sup> and RPC Susan Howard<sup>18</sup> were selected to serve on the interview panel. N.T. pp. 90, 375, 425.

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<sup>14</sup> Applicant Daniel Wymer, who works for the appointing authority as a Transportation Construction Inspector, was not eligible under the internal posting criteria because his position was not one of the next lower classifications listed on the posting. N.T. pp. 40-41. However, he was eligible under the external posting because he satisfied the METs and was within the Rule of Three. N.T. pp. 40-41.

<sup>15</sup> The names of applicants who are deemed ineligible are not provided to the interview panel. N.T. p. 58.

<sup>16</sup> Medvitz was asked to serve on the interview panel because he is the second level supervisor for the position. N.T. pp. 424-425.

<sup>17</sup> Howell was asked to serve on the interview panel because he is the immediate supervisor for the position and has been so for twelve years. N.T. pp. 86, 88, 484.

<sup>18</sup> Howard was selected to be on the interview panel because she regularly interacts with the RPS position. N.T. p. 375.

All of the eligible candidates, with the exception of appellant, were interviewed on August 13, 2020. N.T. pp. 374, 378, 427, 531-532. Appellant asked to reschedule due to a conflict. N.T. pp. 374, 379, 427. Therefore, her interview was held on August 12, 2020. N.T. pp. 374, 378, 427.

The interviews were conducted over a Skype telephone call. N.T. pp. 147, 203, 255, 377-378, 531. None of the candidates participated with video. N.T. pp. 100-101, 128, 374. Therefore, the interview panel did not see any of the candidates. N.T. pp. 445, 495, 531. Nor was the interview panel visible. N.T. pp. 531-532. Only the interview questions were on the screen during the Skype telephone call. N.T. pp. 255-256, 531.

During the interviews, all candidates were asked the same twelve questions. N.T. pp. 205, 439; AA Exs. 6A, 6B, 7A, 7B. The main focus of these questions was the candidate's experience with various inventory processes for which the RPS position is responsible.<sup>19</sup> AA Exs. 6A, 6B, 7A, 7B.

After the interviews were completed, the interview panel met to discuss the candidates. N.T. pp. 429, 441. The interview panel unanimously recommended the indispensable party for the position. N.T. pp. 175, 445. Appellant was ranked second. N.T. pp. 444, 487.

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<sup>19</sup> Generally, the RPS is responsible for posting monthly inventory counts, entering new materials into the computer system, obtaining reimbursements and recovering costs from accidents that occur on the roadways. N.T. pp. 107, 481-482, 500-501, 522-524.

District Maintenance Manager Medvitz testified out of the five candidates, the indispensable party best conveyed his experience with inventory management, inventory audits, and the reimbursement process which were the focus of the interviews. N.T. pp. 439-440; AA Exs. 6A, 6B, 7A, 7B. Medvitz explained these processes are not unique to the appointing authority. N.T. pp. 439-440. The indispensable party was a Project Manager at Chevron and in that role, he was responsible for inventory control, audits of the inventory, and the recovery of monies for repairs, among other duties. N.T. pp. 493, 527-528. With respect to inventory control, the indispensable party was responsible for ordering materials, monitoring usage, and addressing surplus materials by reallocating them to future jobs to save money, if possible. N.T. pp. 528-529.

Roadway Programs Manager Howell and RPC Howard also recalled the indispensable party provided very good examples of his work experience in response to the appointing authority's questions even though he was unfamiliar with specific systems used by the appointing authority. N.T. pp. 161-162, 493, 502-504, 513. Additionally, Medvitz stated he believed the indispensable party's extensive experience with inventory outside of the appointing authority was particularly valuable because it would bring an outside perspective which may lead to improvements with the appointing authority's current processes. N.T. pp. 442-443. Medvitz was also impressed with the indispensable party's experience working with Excel, Microsoft Office, and spreadsheets which are a large part of the RPS job duties. N.T. pp. 440-441.

In comparison, appellant was unable to expand on her experience during the interview even though she was working with inventory in her current position. N.T. pp. 488, 513. Medvitz noted candidates are responsible for conveying

their relevant experience to the interview panel during the interview. N.T. p. 460. Medvitz stated the interview panel is not required to have an understanding of each candidate's current job responsibilities. N.T. pp. 459-460. This information should be conveyed by the candidate. N.T. p. 460. Medvitz, Howell, and Howard provided several examples of instances where appellant failed to convey her experience to the interview panel.

For example, appellant's answer to Question No. 5 was less expansive than the indispensable party's answer. Question No. 5 asked:

The RPS works with the counties to ensure they are managing inventory correctly. What is your experience in managing inventory. What would you do to ensure the counties are successful at this?

AA Exs. 6A, 6B, 7A, 7B. In response to this question, appellant discussed her experience working in the storeroom which consisted of making sure the inventory matched and reorder points were justified. N.T. pp. 96-97.

In contrast, the indispensable party provided examples from his job history managing persons responsible for inventory and holding them accountable. N.T. p. 536. The indispensable party also indicated when he worked for Chevron, he counted the inventory monthly, reported the result, and made any necessary adjustments. N.T. p. 537. The indispensable party further noted he had experience with "hard deadlines" and ensuring inventory was present so that the projects could move forward and bills could be paid. N.T. p. 537.

Appellant also failed to directly answer Question No. 6. N.T. pp. 434-435. Question No. 6 asked:

Central Office scores the county's ability to manage their inventory using CMMT #10. Describe your knowledge of the CMMT process particularly CMMT #10.<sup>[20]</sup>

AA Exs. 6A, 6B, 7A, 7B. District Maintenance Manager Medvitz characterized appellant's answer to this question as "rambling." N.T. pp. 435, 473. Medvitz stated appellant failed to focus on her experience related to CMMT #10 which is the inventory part of the CMMT process. N.T. pp. 207, 434-435, 453-454, 463, 473. Medvitz noted this is an area appellant should be familiar with based on her current position. N.T. pp. 461, 465. Roadway Programs Manager Howell and RPC Howard agreed with Medvitz's assessment of appellant's response to Question No. 6. N.T. pp. 158-158, 488-489.

Howell also noted appellant's answer to Question No. 6 was vague whereas the indispensable party provided a detailed response. N.T. p. 160. Howell recalled appellant merely indicated she was familiar with CMMT. N.T. p. 160. In contrast, the indispensable party discussed how he would hold people accountable, how he would involve the correct people to cross check for discrepancies, and the need to be well organized. N.T. p. 160.

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<sup>20</sup> CMMT is an acronym for County Maintenance Management Tool which is the process for reviewing and scoring each county. N.T. pp. 98, 433. CMMT #10 is the score assigned to each county based on where the county stands in the inventory process. N.T. p. 433. This system is no longer used by the appointing authority. N.T. pp. 99, 483. A different system is now used. N.T. p. 483. The new system is called MAPPE. N.T. p. 500.

Additionally, the interview panel found appellant failed to provide a focused answer to Question No. 7. N.T. pp. 213-214, 435-437. Question No. 7 asked:

Bureau of Office Services visits each county every few years and conducts an audit called a PIMQAR (PennDOT Inventory Management Quality Assurance Review). What would you do to ensure the counties are prepared for this review?

AA Exs. 6A, 6B, 7A, 7B. Medvitz recalled in response to this question, appellant discussed her experience with other types of audits unrelated to inventory. N.T. pp. 436-437. Medvitz noted appellant should have been familiar with the PIMQAR audit based on her position with the appointing authority. N.T. pp. 438-439. However, she did not have any understanding of this type of audit. N.T. p. 462. Howell agreed with Medvitz's assessment. N.T. pp. 488-489.

Howell and Medvitz further indicated the indispensable party, unlike appellant, conveyed his experience with inventory audits. N.T. pp. 116, 214, 488-489, 503. After clarifying what the acronym PIMQAR stood for, the indispensable party explained, unlike the appointing authority's inventory audits, the inventory audits at Chevron were spontaneous which meant he needed to always be prepared. N.T. pp. 214, 538-539. The indispensable party explained in preparing for the spontaneous audits, he ensured the numbers were "lined up" and the correct people were properly managing their inventory. N.T. pp. 214, 538. The indispensable party indicated he would use the same steps for the PIMQAR audit. N.T. pp. 538-540.

There was also a contrast between appellant and the indispensable party's answers to Question No. 9. Question No. 9 asked:

The RSP will be the District RAR coordinator which will be responsible to work with the County RAR coordinators, Central Office, construction inspectors, and contractors to ensure the District is performing at the highest level. Describe your knowledge of the RAR process and how you would assist the counties with this task.

AA Exs. 6A, 6B, 7A, 7B. The RAR process is the appointing authority's process for obtaining reimbursements and recovering costs from accidents that occur on the roadways (*i.e.*, damage to guide rails, signs, etc.). N.T. pp. 112, 431. The RPS position is required to know this process. N.T. p. 432.

In response to Question No. 9, appellant only discussed her field experience. N.T. p. 432. Appellant also told the interview panel she would need additional training on the RAR process. N.T. p. 432.

In contrast, the indispensable party related his experience with a similar process as a Project Manager with Chevron. N.T. pp. 114, 165, 201, 503, 541. The indispensable party explained some of Chevron's sites were in rural areas where damage might occur from "kids running around on quads" or other activities. N.T. p. 541. When damage occurred, he was responsible for investigating, holding the party who caused the damage responsible, and ensuring the damage was fixed. N.T. p. 542. This was no different than what the RPS would do during the RAR process. N.T. pp. 541-542. Like the RAR process, the indispensable party was recovering monies for repairs. N.T. pp. 541-542.

Based on his responses to the interview questions, the interview panel unanimously ranked the indispensable party as the first choice. N.T. pp. 121 175, 130-131, 169, 211-212, 216, 445. Appellant was ranked second. N.T. pp. 121, 131, 168, 211, 216. The interview panel reached this consensus after all interviews were conducted. N.T. pp. 120-121, 128, 167-168, 210, 216. At the conclusion of the last interview, the interview panel discussed the candidates and ranked them. N.T. pp. 120-121, 128, 167-168, 210, 216. This occurred over Skype without video. N.T. p. 128.

In support of the interview panel's decision, District Maintenance Manager Medvitz explained the indispensable party had an excellent interview and answered all of the questions with specific examples based on his prior work experience. N.T. p. 212. Roadway Programs Manager Howell and RPC Howard also noted the indispensable party had experience managing high dollar projects, previously led people, knew the process of assessing inventory needs, gave relevant examples of his experience in response to every interview question, was more confident than appellant, and did not hesitate in answering any of the questions. N.T. pp. 131, 169-171.

Howard stated appellant did not show the same confidence as the indispensable party, nor did she provide any examples in response to the interview questions. N.T. p. 174. Rather, appellant merely gave vague answers. N.T. p. 174. Howard further stated she did not see the same leadership qualities in the appellant as she did in the indispensable party. N.T. p. 171.

Howard explained the RPS is responsible for navigating four counties and compiling four sets of information, which requires the RPS to solve problems related to the various inventory processes. N.T. pp. 171-172. Howard further noted the RPS, while not a supervisor, is responsible for leading several RPTs within the four counties. N.T. p. 172. Howard also explained, even though her position is a higher pay grade, she relies on the RPS to address inventory problems as well as problems with new systems. N.T. p. 173.

While the interview panel felt appellant would be able to handle the inventory duties related to the storeroom, Medvitz and Howell were concerned about appellant's ability in a couple of areas which are part of the RAR process. N.T. pp. 164, 201, 430-431, 464, 491. In contrast, the indispensable party had more work experience which is why he was ranked over appellant. N.T. p. 444.

After the interview panel unanimously determined the indispensable party was the best candidate, Medvitz sent the interview panel's recommendation to his direct supervisor, Adam Smith. N.T. p. 446; AA Ex. 9. The recommendation was subsequently forwarded to Assistant District Engineer for Maintenance Robb Dean and then to District Executive William Kovacs who is responsible for approving hiring of all positions in the District Office. N.T. pp. 46, 63. The Human Resources Delivery Center was also notified of the selection on August 18, 2020. N.T. p. 374.

A conditional offer was then made to the indispensable party pending a background check which the indispensable party successfully completed. N.T. pp. 379-383; AA Exs. 5A, 5B. A final offer was made to the indispensable party and the other applicants, including appellant, were notified they were not selected for the position. Comm. Ex. A; N.T. p. 383.

Appellant asserts her non-selection was the result of traditional and procedural discrimination. Comm. Ex. B. Appellant alleges traditional discrimination based on her sex, age, and non-merit factors (*i.e.*, the indispensable party was not a prior Commonwealth employee and he was preselected). Comm. Ex. B. Additionally, appellant alleges procedural discrimination based on the manner in which the vacancy was posted. Comm. Ex. B. We will address appellant's traditional discrimination claims first.

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). 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 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 non-selection was based on her sex, age, or a non-merit factor.

Appellant argues she was discriminated against based on her sex and age because: 1) a younger male was hired for the position; 2) the chain of command for the position consists of three males; 3) in 2019, a male was hired for the RPS position; and 4) the 2019 hiring action was only posted internally which prevented her from applying. Ap. Bf., p. 9. We find these observations are inadequate to establish traditional discrimination based on sex or age.

While it is undisputed the indispensable party is a younger male<sup>21</sup> and the chain of command is male, there is no credible<sup>22</sup> evidence tying these facts to the selection process. Indeed, a female (RPC Howard) was asked to serve on the panel for the purpose of ensuring fair consideration of female applicants. N.T. p. 187. We also note appellant was twice promoted by the appointing authority and at the time of each promotion, appellant was over fifty years of age. N.T. pp. 291-293.

Additionally, there is no evidence of a correlation between the 2019 hiring action and appellant's non-selection. There is also no evidence to suggest the 2019 vacancy was posted internally to prevent appellant from applying. Nor is there any evidence appellant would have been eligible had she applied under an external posting. Appellant merely testified she did not qualify for the position in 2019 because she did not have one year of service as an RPT2. N.T. p. 274.

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<sup>21</sup> The indispensable party is thirty-eight years old. N.T. p. 534. The appellant is fifty-nine years old. N.T. p. 285.

<sup>22</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. 1986).

Furthermore, the interview panel denied any knowledge of the indispensable party's age. N.T. p. 445. The interview panel also denied basing its selection on sex. N.T. pp. 177, 445, 496. Rather, the interview panel selected the indispensable party because he had more work experience. N.T. p. 444.

Accordingly, we find appellant did not present sufficient evidence to establish a *prima facie* case of sex or age discrimination. We further find had appellant established a *prima facie* case of discrimination the appointing authority presented a legitimate non-discriminatory explanation for the employment action—the indispensable party's work experience.

Next, we turn to appellant's non-merit factor discrimination claim. In support of this claim, appellant argues: 1) she was held to a higher standard; and 2) the indispensable party was preselected for the RPS position. Ap. Bf., pp. 11-13. We are not persuaded by these arguments.

Appellant believes she was held to a higher standard because she was a Commonwealth employee. Ap. Bf., p. 12. Appellant asserts the indispensable party's unfamiliarity with the appointing authority's inventory systems was improperly viewed as a positive. Ap. Bf., p. 11. There is no support for this claim in the record.

Contrary to appellant's belief, the indispensable party was familiar with the various inventory processes discussed during the interview. He merely used different systems to accomplish the same tasks. For example, as a Project Manager for Chevron, the indispensable party used IMS which is almost identical to the appointing authority's Business Warehouse system. N.T. pp. 106, 535.

Furthermore, the interview panel credibly testified the indispensable party provided relevant examples of his experience during the interview and articulated how his experience would be beneficial to the position. N.T. pp. 466-468, 471.

In comparison, appellant failed to expand on her experience and merely gave vague and sometimes irrelevant responses to the interview questions. N.T. pp. 156-158, 160, 435, 488, 513. Also, appellant acknowledged she does not have supervisory experience which the indispensable party has. N.T. p. 277. As a Project Manager for Chevron, the indispensable party had twenty-five to forty people reporting to him at various points in time. N.T. p. 248. Furthermore, as discussed in detail above, the appointing authority based its decision on the indispensable party's extensive experience with inventory management, audits of inventory, as well as other relevant experience. Thus, we find there is no evidence appellant was held to a higher standard.

We also find there is no evidence of preselection. There is no evidence anyone directed the interview panel to select the indispensable party, nor is there any evidence the interview panel knew the indispensable party prior to the interview. The evidence presented by both parties was to the contrary. N.T. pp. 101-102, 129-130, 176-177, 185, 194-195, 210-211, 214-215, 403-404, 445, 495, 543.

Nonetheless, appellant believes District Maintenance Manager Medvitz's interview notes suggest the indispensable party was preselected. AA Ex. 6C; Ap. Bf., p. 13. The interview notes to which appellant is referring were completed by Medvitz in preparation for the interview panel's discussion after the

interviews were completed. N.T. p. 429. Medvitz explained the notes are highlights from the interviews that he intended to discuss with the interview panel. N.T. p. 429. The highlights from the indispensable party's interview read:

- Vast knowledge of inventory control outside of PennDOT, could be valuable to have an outside perspective on this.
- Has management experience in road construction and maintenance.
- Excellent interview!
- Holds himself accountable for his actions and lets results speak for themselves.
- For being outside of PennDOT, he was able to answer the questions and relate them to relevant work experience that he has had.
- Would need training on PennDOT systems, but should not take long to pick up.
- Has SAP experience outside of PennDOT, so he knows his way around the system.
- No issues working with any computer software.

AA Ex. 6C.

We find all of the above highlights from the indispensable party's interview are merit-related considerations. Contrary to appellant's belief, none of these reasons on their face suggest the indispensable party was preselected. The comment regarding the indispensable party's outside experience is a superfluous anecdote at most. The focus of the selection determination was the indispensable party's experience.

The highlights from appellant's interview are also merit related. The highlights from appellant's interview read:

- Would do well with the inventory aspects of this position.
- Would need to be trained and helped with the RAR process, but has some past experience in this area.
- Would need to be brought up to speed on what CMMT 10 is and how it affects the county.

AA Ex. 6C.

Medvitz explained the first bullet point references appellant's understanding of the appointing authority's storeroom inventory. N.T. p. 464. Medvitz stated during her interview, appellant indicated she had experience as a stock clerk in the storeroom which demonstrated her understanding of that aspect of inventory. N.T. p. 464. Medvitz stated the last bullet point references appellant's understanding of the inventory management aspects of CMMT. N.T. pp. 463, 465. Medvitz recalled appellant mostly discussed non-inventory aspects of CMMT during her interview. N.T. p. 463. We find these highlights are all merit-related considerations. Therefore, we find Medvitz's notes are not suggestive of preselection. We further find appellant has not presented any other evidence of preselection. Accordingly, we find appellant has failed to establish a *prima facie* case of non-merit factor discrimination.

We next turn to appellant's procedural discrimination claim based on the manner in which the RPS position was posted. Specifically, appellant alleges the appointing authority improperly posted the position externally because: 1) in 2019, the position was only posted internally; and 2) there were three eligible

internal candidates which is a large enough pool from which to select a candidate. Ap. Bf., pp. 9-10. Appellant also suggests by posting the position externally, the appointing authority improperly denied her a promotion which is a natural progression for her career. Ap. Bf., p. 9-10. We are not persuaded by appellant's claims.

To establish a claim of "procedural discrimination," the employee must show she was harmed because of the procedural noncompliance with the Act, or that, because of the peculiar nature of the procedural impropriety, she could have been harmed, but there is no way to prove that for certain. *Price, supra*. No showing of intent is required. *Price, supra*. We find appellant has failed to establish any such violation.

There are no provisions of Act 71 or the Merit System Employment Regulations (hereinafter "MSER")<sup>23</sup> which require a civil service position to be posted in the same manner it was previously posted. Nor has appellant pointed to any other policies or procedures which would require the RPS position to be posted in a particular manner.

The MSER provides wide latitude in posting civil service positions. Section 602.13 of the MSER provides, in pertinent part:

The Office of Administration will determine the content, method, and scope of publication for each examination announcement...The scope of publication will be based on

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<sup>23</sup> In accordance with 2203(b) of Act 71, OA promulgated temporary regulations which were referred to as the MSER. On March 12, 2022, OA rescinded the MSER which were published at 4 Pa. Code Chapters 601-607. The MSER were replaced by temporary regulations set forth in 4 Pa. Code Chapters 601a-607a. The new temporary regulations are referred to as the Rules of Classified Service Employment. For purposes of this adjudication, the Commission will focus on the applicable sections of the MSER which were in effect at the time of the non-selection.

the geographic availability of positions and potentially qualified and available applicants and may be regional or Statewide and may include both in-State and out-of-State locations.

4 Pa. Code § 602.13 (expired March 12, 2022).

Here, the evidence presented in appellant's case-in-chief established the RPS position was simultaneously posted internally and externally to ensure the greatest number of applicants because the appointing authority did not know how many internal candidates might apply. N.T. pp. 40-42, 49, 223-224. This concern was based on the geographic location of the position and limited regional positions within the next lower classification. N.T. pp. 49-50, 393-394. Such considerations are clearly permissible under the MSER as noted above.

Furthermore, there is no evidence appellant was improperly denied a promotion because the position was simultaneously posted internally and externally. Generally, employees are not entitled to promotions. With that said, we note Section 2401(b)(2) of Act 71 provides:

If a labor agreement covering promotions in the classified service exists, the terms and procedures of the labor agreement relative to the procedures for promotion shall control.

71 Pa.C.S. § 2401(b)(2). Appellant failed to present any such labor agreement or other policy or procedure which would require the RPS position to be limited to internal candidates for the purpose of promotion. To the contrary, the evidence

established there were no seniority rights to the RPS position.<sup>24</sup> N.T. pp. 384-385. Thus, we find appellant failed to establish procedural discrimination.

In addition to the above, appellant raised a second procedural discrimination claim in her Brief. Specifically, appellant alleged the interview was an improper examination. Ap. Bf., pp. 9, 10-15. This claim was not raised on appellant's appeal form. Comm. Ex. B. As such, the claim has been waived. Nonetheless, we find there was insufficient evidence to support this new claim.

In determining whether the challenged interview process is an examination, as opposed to an interview, a review of the totality of the circumstances is required. Specifically, the following should be reviewed: 1) the nature of the questions asked during the interview; 2) the context in which those questions were asked; and 3) how the questions were utilized during the selection procedure at issue. *See Ronald Sheposh, et al. v. Department of General Services*, SCSC Appeal Nos. 25371, 25372, 25443, and 25444, pp. 29-30.

Here, the candidates were asked the same twelve interview questions. N.T. pp. 205, 439; AA Exs. 6A, 6B, 7A, 7B. These questions asked the candidates to describe: 1) their computer skills; 2) their experience with inventory management, various inventory systems, and SAP software; 3) an unsafe work-related situation and how they resolved the issue; 4) an example of a recent job situation where they disagreed with someone and how they handled it; and 5) any additional information they wished to add or any questions. AA Exs. 6A, 6B, 7A, 7B.

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<sup>24</sup> Unlike the RPS position, the position currently held by appellant (RPT2) is a seniority-bid position, meaning the most senior RPT1 within the seniority unit is entitled to the position. N.T. p. 385.

The interview questions were open-ended and did not suggest an answer. Nor did the questions test the candidates' technical knowledge by asking the candidates to perform specific functions in the various inventory systems or SAP. Also, none of the questions were graded. Rather, the nature of the questions and how they were utilized suggest their purpose was to determine the relative suitability of the candidates which is the purpose of an interview. *See Chiricos v. Department of General Services*, SCSC Appeal No. 24425, p. 30 (explaining an interview is an opportunity for the appointing authority to determine the relative suitability of candidates that have already been deemed qualified for the position whereas an examination is a structured assessment of the candidate's level of technical knowledge and/or performance). As such, we find the interview questions were not an improper examination.

Nonetheless, appellant asserts the interview questions were an improper examination because RPC Howard and District Maintenance Manager Medvitz were concerned with her lack of understanding of the inventory systems which were the subject of Question Nos. 6, 7, and 9. Ap. Bf., pp. 12-15. We are not persuaded by appellant's claim.

As previously discussed, the evidence established the focus of the interviews was the candidates' experience. Appellant's lack of familiarity with the inventory systems is a byproduct of her lack of experience. This is evidenced by her responses to Question Nos. 6, 7, and 9. *See Findings of Fact 29, 32, 36.* Furthermore, the comments by Medvitz and Howard about appellant's lack of understanding are merely observations tied to her lack of experience.

We further note the word “knowledge” was consistently used by the interview panel as a synonym for “experience.” This is particularly evident by the interview panel’s comparison of appellant and the indispensable party’s responses to the interview questions which were discussed in detail previously. Thus, we find the interview questions were not an improper examination. Accordingly, we find appellant failed to establish procedural discrimination based on this claim.

Following the presentation of appellant’s case-in-chief, the appointing authority made a Motion to Dismiss for failure to establish a *prima facie* case. N.T. p. 327. Ruling on the Motion was deferred pending review by the full Commission. N.T. pp. 327-328. Following our review, the Motion is hereby granted.

For the reasons articulated above, the Commission finds appellant has failed to present sufficient evidence of traditional or procedural discrimination. Specifically, we find appellant presented insufficient evidence to establish a *prima facie* case of traditional discrimination based on sex, age, or non-merit factor discrimination. We find appellant also failed to establish procedural discrimination based on the manner in which the RPS position was posted and the propriety of the interview questions.

We further find even if appellant had established a *prima facie* case of discrimination, the appointing authority presented a legitimate non-discriminatory reason for selecting the indispensable party, that being his more extensive work experience. Accordingly, we enter the following:

CONCLUSION OF LAW

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 two of its members,<sup>25</sup> dismisses the appeal of Theresa Schifano challenging her non-selection for promotion to the position of Roadway Programs Specialist (#I-2020-69830) with the Pennsylvania Department of Transportation and sustains the action of the Pennsylvania Department of Transportation in not selecting Theresa Schifano for promotion to the position of Roadway Programs Specialist (#I-2020-69830).

State Civil Service Commission

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Maria P. Donatucci  
Chairwoman

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Gregory M. Lane  
Commissioner

Mailed: 1/25/23

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<sup>25</sup> Commissioner Pamela M. Iovino, who took office on December 22, 2022, did not participate in the discussion of or decision for this appeal.