

COMMONWEALTH OF PENNSYLVANIA

David J. Bertoty : State Civil Service Commission
 :
 v. :
 :
 State Correctional Institution at :
 Somerset, :
 Department of Corrections : Appeal No. 30665

David J. Bertoty Joseph M. Gavazzi
Pro Se Attorney for Appointing Authority

ADJUDICATION

This is an appeal by David J. Bertoty challenging his removal from probationary Corrections Officer Trainee employment with the State Correctional Institution at Somerset, Department of Corrections. A hearing was held on September 9, 2021, via video 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 appellant established his removal was motivated by discrimination.

FINDINGS OF FACT

1. On December 10, 2020, appellant was informed he was removed from his probationary Corrections Officer Trainee (hereinafter “COT”) employment with the appointing authority, effective December 11, 2020. Comm. Ex. A; AA Ex. 11.

2. The December 10, 2020, removal letter provides the following reason for appellant’s removal:
 - Violation of DOC Policy 5.1.1, Section 4.5 b
 - Violation of DOC Policy 5.1.1, Section 4.5 e
 - Unsatisfactory PerformanceSpecifically, you have not passed your Phase 3 test with a 70% after three tries. Also, your performance as a Corrections Officer Trainee has been unsatisfactory based on failures and partials during training.

Comm. Ex. A; AA Ex. 13.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. C.

4. As a COT, appellant must pass each end of phase examination with a minimum score of 70% after the following training phases: Phase 2, Phase 3, and Phase 4. N.T. p. 38; AA Ex. 4.
5. Appellant took the Phase 3 test in Captain Fred Walter's office twice. N.T. pp. 42, 76-77.
6. Appellant failed his Phase 3 test twice. N.T. p. 39.
7. On October 28, 2020, appellant received a pre-disciplinary conference (hereinafter "PDC") for failing the Phase 3 test for the second time. N.T. p. 39; AA Exs. 5, 6.
8. During his PDC, appellant informed the appointing authority he suffered from Attention Deficient Hyperactivity Disorder (hereinafter "ADHD") and could have performed better with an accommodation. N.T. p. 39; AA Exs. 5, 6.
9. On October 29, 2020, the appointing authority provided appellant with information to apply for an accommodation. N.T. pp. 35, 39-40; AA Ex. 7.

10. On November 2, 2020, appellant applied for an accommodation due to his ADHD to take the Phase 3 test in a quiet location without distractions. N.T. pp. 35, 39-40; AA Exs. 7, 8.
11. On November 12, 2020, appellant received a confirmation letter from the appointing authority that his requested accommodation was approved. N.T. pp. 35, 41; AA Ex. 8.
12. The appointing authority communicated to appellant that he was scheduled to retake the Phase 3 test in a quiet location without any distractions pursuant to the approved accommodation. N.T. pp. 35, 41; AA Ex. 8.
13. On November 25, 2020, appellant took his Phase 3 test in the conference room of the security administration building with Walters overseeing the examination. N.T. pp. 42, 71-72; AA Ex. 9.
14. Walters was not on his computer when appellant took the Phase 3 test for the third time. N.T. pp. 74, 76.

15. Walters immediately stopped an inmate worker from vacuuming at the security administration building's entrance while appellant was taking the Phase 3 test. N.T. pp. 79-80.
16. Appellant had two hours to take the Phase 3 test. He completed the test within one hour and fifteen minutes. N.T. pp. 51, 81.
17. Appellant left answers blank on the Phase 3 test. N.T. pp. 46, 51-52, 81.
18. Appellant never expressed he was distracted to Walters during or after completing the Phase 3 test. N.T. p. 80.
19. Appellant told Walters he did not want to go back over the Phase 3 test when he submitted his answers. N.T. p. 81.
20. On December 8, 2020, the appointing authority conducted appellant's second PDC for failing the Phase 3 test for the third time. N.T. pp. 58-59; AA Exs. 11, 12.

21. Appellant did not express during his second PDC that he was distracted while taking the Phase 3 test for the third time. N.T. pp. 58-59; AA Exs. 11, 12.

DISCUSSION

The issue in the present appeal is whether appellant established his removal from probationary Corrections Officer Trainee (hereinafter “COT”) employment with the appointing authority was the result of discrimination. Before this Commission, appellant could only bring this challenge through Section 3003(7)(ii) of Act 71 of 2018 based upon an allegation the decision to remove him was due to discrimination in violation of Section 2704 of Act 71. 71 Pa. C.S.A. §§ 2704, 3003(7)(ii).¹ Specifically, appellant alleges the appointing authority failed to provide his approved accommodation for his Attention Deficit Hyperactivity Disorder (hereinafter “ADHD”) to take the COT’s Phase 3 test. Comm. Ex. B.²

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).

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

² In his Appeal Request Form and during the hearing, appellant only challenged his failure to pass the Phase 3 test in violation of DOC Policy 5.1.1, Section 4.5 b and Section 4.5 e. Appellant did not challenge the charge of Unsatisfactory Performance. Comm. Exs. A, B.

Accordingly, the sole question for determination by this Commission is whether appellant has presented evidence sufficient to establish his claims 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 non-merit factors.

71 Pa.C.S.A § 2704.³ The prohibition set forth in this section encompasses two general types of discrimination. First, “traditional discrimination” encompasses claims of discrimination based on race, gender, religion, disability, political, partisan or labor union affiliation, 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, this appeal involves a claim of traditional discrimination.

³ 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. Section 905.1 provides:

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.

71 P.S. § 741.905a.

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, 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).

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.

At the hearing, appellant⁴ testified on his own behalf. In response, the appointing authority presented the testimony of Captain Fred Walters.⁵

⁴ Appellant was appointed to probationary COT employment with the appointing authority on February 18, 2020. N.T. p. 37; AA Ex. 1.

⁵ Walters is employed by the appointing authority as an RHU/DTU Captain. N.T. p. 68. Walters was a Training Lieutenant at the time appellant took the Phase 3 test on November 25, 2020. N.T. p. 70.

Appellant argues the appointing authority failed to provide his approved disability accommodation for his ADHD to take the Phase 3 test in a quiet room without distractions. N.T. p. 42. As a COT, appellant is responsible for passing COT phase testing. Departmental Policy 5.1.1, Staff Development and Training Procedures Manual, outlines a COT's responsibilities regarding COT phase testing. Specifically, Departmental Policy 5.1.1, Section 4 – First Year Training Requirements, provides a COT must pass an end-of-phase examination after each training phase. An end of phase examination will be conducted after the following training phases: Phase 2, Phase 3, and Phase 4. A COT has the opportunity to take each phase test once. The minimum passing score is 70%. If a COT fails, then he or she will be permitted one retest. If a COT fails the retest, then the appointing authority must remove the employee. N.T. p. 38; AA Ex. 4.

Initially, appellant took the Phase 3 test twice in Walters' office. N.T. p. 42. Appellant failed the Phase 3 test twice. Consequently, appellant received a pre-disciplinary conference (hereinafter "PDC") on October 28, 2020, for failing the Phase 3 test for the second time. During his PDC, appellant expressed how he had ADHD and could have performed better with an accommodation. N.T. p. 39; AA Exs. 5, 6. On October 29, 2020, appellant received information from the appointing authority for him to apply for an accommodation. On November 2, 2020, appellant applied for an accommodation to take the Phase 3 test in a quiet room without distractions. N.T. pp. 35, 39-40; AA Exs. 7, 8. On November 12, 2020, appellant received a confirmation letter from the appointing authority that his requested accommodation was approved. Specifically, the appointing authority communicated to appellant that he was scheduled to retake the Phase 3 test in a quiet location without any distractions. N.T. pp. 35, 41; AA Ex. 8.

On November 25, 2020, appellant's third attempt at taking the Phase 3 test occurred in the security administration's conference room (hereinafter "conference room"). N.T. p. 42. The appointing authority's conference room is a rectangular room ten feet wide by thirty feet long. N.T. pp. 41-42. Appellant testified he took the Phase 3 test near the entrance. Meanwhile, appellant claimed Walters sat fifteen feet away from appellant in the middle of the room. N.T. p. 43.

Appellant testified Walters was typing on his computer while appellant was taking the Phase 3 test. Appellant stated Walters was on the computer the whole-time appellant took the Phase 3 test. N.T. p. 44. When asked how long Walters typed during appellant's Phase 3 test, appellant acknowledged "I couldn't tell you. I just know he was on the computer and typing away." N.T. p. 46. Appellant believed Walters typed on his computer for twenty minutes. N.T. p. 50. Appellant articulated he was more focused on trying to take the test than count how long Walters typed on his computer. N.T. p. 50.

Additionally, appellant further testified there was an inmate worker vacuuming the security administration's hall outside the conference room's entrance. Appellant could not recall when the inmate worker began vacuuming but believed it was during the beginning of the test. N.T. pp. 52-53. Appellant believed he heard the vacuuming for about two minutes. N.T. p. 54. Once the inmate's vacuuming could be heard, appellant observed Walters immediately stop the inmate worker. N.T. p. 54. The vacuuming did not start again throughout the duration of appellant's Phase 3 test. N.T. p. 55.

Appellant had two hours to complete the test but completed it in an hour and fifteen minutes. N.T. p. 51. Appellant left questions blank on the Phase 3 test. N.T. pp. 46, 51-52. Appellant emphasized he felt disrupted by Walters's and the inmate worker's conduct. As a result, appellant stated he could not focus and pass the Phase 3 test because the appointing authority did not provide his approved accommodation. N.T. pp. 35-36, 41.

After appellant failed the Phase 3 test for the third time, the appointing authority conducted appellant's second PDC on December 8, 2020. During appellant's second PDC, he acknowledged he studied for the Phase 3 test but conceded he was a terrible test taker. Appellant admitted he did not explain he was distracted during his second PDC. N.T. pp. 58-59; AA Exs. 11, 12.⁶

In response to appellant's presentation, Walters testified that appellant confused the events from his second attempt in passing the Phase 3 test and his third attempt. N.T. p. 71. Walters explained when appellant took his Phase 2 test and his Phase 3 test for the second time, appellant took it in Walter's office. Walters clarified he was typing on his computer in his office when appellant took the Phase 3 test for the second time. N.T. pp. 76-77.

⁶ Following the presentation of appellant's case-in-chief, the appointing authority entered a motion to dismiss for failure of appellant to establish a *prima facie* case of discrimination. N.T. p. 62. Ruling on the motion was deferred at the hearing. N.T. p. 63. After careful consideration, the appointing authority's motion is denied.

Before appellant began his third attempt in passing the Phase 3 test in the conference room, Walters gave appellant a printout of the test, took appellant's radio from him, and turned appellant's radio off. N.T. pp. 71-72. Contrary to appellant's recollection, Walters testified appellant was placed on the far end of the conference room and not near its entrance.⁷ Meanwhile, Walters sat at the end of the conference room near its entrance. N.T. pp. 72, 76.

Notably, Walters emphasized he was not on his computer when appellant took his Phase 3 exam for the third time. N.T. pp. 74, 76. Similarly, Walters explained how he stopped the inmate worker from vacuuming while appellant took his Phase 3 test. Walters testified he stopped the inmate vacuuming when the inmate worker was at the security administration building's entrance and not when the inmate worker was at the conference room's entrance. N.T. p. 79. When he heard the vacuum, Walters immediately stopped the inmate worker because "I didn't want any distractions." N.T. p. 80. Walters believed the vacuuming lasted thirty seconds. N.T. p. 80.

⁷ Walters described the conference room where appellant took his Phase 3 test. Inside the conference room, there is a twenty-five foot table in the center of the room. N.T. p. 76. Walters also described the security administration's hallway outside the conference room. N.T. pp. 77-78. While the security administration building is mostly tile, there is a carpet area by the floor entrance that is approximately thirty feet away from the conference room's entrance. N.T. pp. 78, 80.

Walters testified appellant never expressed he was distracted. N.T. p. 80. When appellant completed the Phase 3 test, Walters asked appellant if he wanted to go back over the test and appellant responded “no.” N.T. p. 81. After appellant turned in his Phase 3 test, Walters emailed Human Resource Analyst Christine Grimm the following:

COT Bertoty took his Phase 3 test in the conference room this morning on 11-25-20 and scored a 68%. The test started at 0607 and he completed with not [sic] interruptions at 0720. COT Bertoty is saying that he wrote stuff down in the wrong order on one question and that he doesn't agree with another answer on another question. If you have any questions, please give me a call or send me an email.

N.T. pp. 83, 85. AA Ex. 9. Walters confirmed appellant completed the test before the requisite two hours but left answers blank. N.T. p. 81.

Having carefully reviewed the record, we now turn to whether appellant successfully established his claim of disability discrimination. When making a claim of “traditional discrimination,” an appellant must initially present a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. *Henderson, supra*. Appellant's *prima facie* case cannot be an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. 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. *Nwogwugwu*, 594 A.2d at 850.

Regarding appellant's disability discrimination claim, the American with Disabilities Act (hereinafter "ADA") prohibits discrimination not only by adverse actions motivated by prejudice and fear of disabilities, but also when an employer fails to make reasonable accommodations for an appellant's disabilities. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d, 296, 306 (3rd Cir. 1999). Specifically, the ADA provides an employer discriminates against a qualified individual with a disability when the employer does "not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer]." *Id.* citing 42 U.S.C. § 12112(B)(5)(A).

As such, to establish a *prima facie* disability discrimination claim of failure to accommodate, appellant must demonstrate "(1) he was disabled and his employer knew it; (2) he requested an accommodation or assistance; (3) his employer did not make a good faith effort to assist; and (4) he could have been reasonably accommodated." *Dreibelbis v. County of Berks*, 438 F. Supp. 3d 304, 315-16 (E.D. Pa. 2020) citing *Capps v. Mondelez Glob.*, 847 F. 3d 144, 157 (3rd Cir. 2017) (quoting *Armstrong v. Burdette Tomlin Mem'l Hosp.*, 438 F. 3d 240, 246 (3rd Cir. 2006)). Reasonable accommodation includes the "employer's reasonable efforts to assist the employee and to communicate with the employee in good faith." *Williams v. Phila. Hous. Auth. Police Dep't.*, 380 F. 3d 751, 761 (3rd Cir. 2004).

There is no dispute between the parties that appellant demonstrated that his disability, ADHD, affected his abilities to successfully pass the Phase 3 test. Furthermore, during his first PDC, appellant informed the appointing authority of

his ADHD. After being informed, the appointing authority was aware of appellant's ADHD and provided him with the appropriate information for him to request an accommodation. Appellant requested an accommodation, and the appointing authority approved his accommodation request to take the Phase 3 test in a quiet room without distractions.

Upon review of appellant's presentation, appellant successfully established a *prima facie* case because of his asserted distractions on November 25, 2020. Appellant argues the appointing authority did not make a good faith effort to assist in providing a quiet room without distractions. Specifically, appellant claims Walters typing on his computer during his third attempt qualified as a distraction. N.T. p. 46. Additionally, appellant claims the inmate worker's vacuuming during his Phase 3 test was a distraction to his test performance. As a result, appellant asserts if he could have had a quiet room without any distractions, then he would have passed the Phase 3 test.

While appellant established a *prima facie* case, we find the appointing authority properly provided a reasonable accommodation to appellant in good faith. Walters credibly explained how the appointing authority took reasonable efforts to ensure appellant took the Phase 3 test without distractions.⁸ Contrary to appellant's assertion that Walters was typing on his computer while he took the Phase 3 test, it is more probable that Walters was not on his computer because of his expressed

⁸ 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).

concern of not having any distractions for appellant's examination. Furthermore, appellant's testimony corroborated how Walters immediately stopped the inmate worker from vacuuming at the security administration building's entrance. Although appellant may have heard the inmate worker's vacuuming for a moment, the appointing authority is not required to provide the accommodation appellant requests or prefers but an accommodation that is reasonable. *Hofacker v. Wells Fargo Bank Natl. Assn.*, 179 F. Supp. 3d 463, 469 (E.D. Pa. 2016); *See, Yovtcheva v. City of Phila. Water Dept.*, 518 Fed. Apex. 116, 122 (3rd Cir. 2013) (unpublished); *Mastronicola v. Principi*, 2006 WL 3098763, *5 (W.D. Pa. Oct. 30, 2006).

Moreover, appellant was provided the opportunity to complete the Phase 3 test within two hours. After appellant left answers blank and submitted his responses to Walters, Walters asked appellant whether he wanted to review his responses. Appellant not only declined Walters's suggestion but also left with forty-five minutes remaining to complete the Phase 3 test. Appellant further never told the appointing authority that he was distracted during the Phase 3 test. Based on Walters's multiple efforts to assist appellant, we find the appointing authority took reasonable efforts under the circumstances to ensure appellant was in a quiet room without distractions for him to retake the Phase 3 test. Even with a reasonable accommodation, appellant received a score of 68% and failed the Phase 3 test for the third time. As a result, the appointing authority properly proceeded to remove appellant from his probationary COT position in accordance with Departmental Policy 5.1.1, Sections 4.5b and 4.5e. *Nwogwugwu, 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 David J. Bertoty challenging his removal from probationary Corrections Officer Trainee employment with the State Correctional Institution at Somerset, Department of Corrections, and sustains the action of the State Correctional Institution at Somerset, Department of Corrections in the removal of David J. Bertoty from probationary Corrections Officer Trainee employment, effective December 11, 2020.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: December 21, 2021