

FINDINGS OF FACT

1. On February 23, 2021, appellant received her annual Employee Performance Review (hereinafter, “EPR”) for the time period of January 1, 2020 to December 31, 2020. The appointing authority provided appellant with ratings of: “Commendable” for “Job Knowledge/Skills”; “Satisfactory” for “Work Results” and “Initiative/Problem Solving”, and; “Needs Improvement” for “Communications”, “Interpersonal Relations/Equal Employment Opportunities (EEO)”, “Work Habits”, and “Supervision/Management”. Appellant received an Overall Rating of “Needs Improvement”. Comm. Ex. A.

2. On February 23, 2021, appellant signed her EPR, indicating she disagreed with the rating and would like to discuss the rating with her Reviewing Officer. Comm. Ex. A.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. B.¹

¹ Appellant filed two appeal request forms. The first appeal request form is signed February 25, 2021 and contains allegations of discrimination based upon sex, disparate treatment, retaliation, and violation of the Civil Service Act/Rules. Appellant’s second appeal request form is signed March 2, 2021 and contains the additional discrimination claims of age and disability.

4. Appellant has been employed by the Department of Human Services, the Office of Long-Term Living (hereinafter, “appointing authority”) as a Human Services Program Specialist Supervisor for approximately four years and has worked in the classified service for approximately eighteen years. N.T. p. 20.
5. Welfare Program Executive 1 Tyrone Williams is appellant’s supervisor and the Rater for appellant’s annual EPRs. N.T. pp. 214, 223-224.
6. Welfare Bureau Executive 2² Michael Kasputis was the Reviewing Officer for appellant’s 2020 annual EPR. N.T. pp. 472, 474.
7. Williams has been appellant’s supervisor and Rater for her annual EPRs for three years. N.T. pp. 223-224.
8. Williams gave appellant an overall “Satisfactory” rating for her 2018 and 2019 annual EPRs. N.T. p. 224; Comm. Ex. B.

² The Commission notes that Kasputis testified that his Civil Service title is Welfare Bureau Executive 2, however, his official Commonwealth job title is Welfare Program Executive 2.

9. Appellant's job and responsibilities did not change between the 2018 rating period and the 2020 rating period. N.T. p. 224.
10. In 2018 and 2019 appellant's ability, competency, and skill level met the level of satisfactory, however, there were some issues related to her communications and interpersonal relations. N.T. p. 228.
11. In 2020, appellant's issues related to communications and interpersonal relations deteriorated into a pattern of unnecessary conflicts when appellant received feedback regarding her work assignments that created a barrier to doing effective work within the unit. N.T. pp. 228-229, 476-477, 482-483, 485-486, 549-551; Comm. Ex. A.
12. On March 25, 2020, Williams advised appellant to be more mindful and concise in her business writing after appellant sent a highly technical email regarding a data collection system to an individual unfamiliar with the system. N.T. pp. 238-251; AA. Ex. 1.

13. On March 25, 2020, appellant responded to Williams via email stating “[t]hank you for verifying that details are relevant and still need to be provided.” N.T. pp. 238-251; AA. Ex. 1.

14. On June 25, 2020, the following email exchange took place between Williams and appellant:

Williams: Are you able to train and educate the staff on doing PIA profiles?

Appellant: Is this a question in addition or separate to the update I’m to give you on 6/30?

Williams: It’s a simple yes or no answer. Thanks.

Appellant: I disagree. Before creating a profile-which is the easy part that is referenced in the Navigation Manual, you must rule out duplicates.

N.T. pp. 269-271; AA. Ex. 2.

15. On June 25, 2020, Williams’ forwarded the above email exchange to Kasputis voicing his frustration, and informed Kasputis that during a subsequent meeting with the unit staff regarding this matter appellant remarked “when you train me, I will train staff.” N.T. p. 271; AA. Ex. 2.

16. On October 14, 2020, Williams emailed appellant and cc'd Kasputis asking appellant if she had been recording their conversations without his knowledge. N.T. pp. 254-256; AA. Ex. 5.
17. On October 14, 2020, appellant responded to Williams' recorded conversations email stating "I appreciate the reminder Tyrone. Perhaps you'd forgotten that I signed, scanned, and emailed you a Temporary Teleworking Agreement back on March 16th." N.T. pp. 257-258; AA. Ex. 5.
18. Following appellant's response, Williams and Kasputis discussed appellant's response, and on October 16, 2020, Kasputis sent appellant a follow-up email stating "Concerned – was there any recording done of conversations?" N.T. pp. 258-261; AA. Ex. 5.
19. On October 16, 2020, appellant sent the following emailed response to Kasputis's follow-up email:

Of course not, I reviewed the Management Directive and signed the form on 3/16/2020. If Tyrone [Williams] feels he has evidence of recording & disclosure and pursues disciplinary action, termination, civil damages, and/or criminal

prosecution then the burden of proof is his and I have to wait for the evidentiary disclosure.

N.T. pp. 258-61, AA. Ex. 5.

20. During the 2020 rating period, Williams received emails from at least two of appellant's direct reports who raised concerns appellant was condescending and demeaning, and very little constructive happened during their status meetings. N.T. pp. 277-280; Comm. Ex. A.
21. During the 2020 rating period, Williams instructed appellant, as a best practice, to have regularly scheduled meetings with her supervisees on her calendar. N.T. pp. 454-455.
22. Appellant responded to Williams' instruction by stating she would take his suggestion into consideration. N.T. p. 455.

DISCUSSION

At issue before the Commission is whether the appointing authority discriminated against appellant when issuing her January 2020 to December 2020 Employee Performance Evaluation (hereinafter "EPR"). Appellant alleges the

appointing authority violated the Civil Service Act/Rules. Appellant also alleges she was discriminated against based upon age, sex, disparate treatment, disability, and retaliation.

Appellant testified on her own behalf. The appointing authority presented the testimony of Welfare Program Executive 1 Tyrone Williams, Welfare Program Executive 2 Michael Kasputis, and Chief of Staff Jill Vovakes.

We first address appellant's allegations of discrimination based upon age, sex, disparate treatment, disability, and retaliation. Section 2704 of Act 71 of 2018 prohibits discrimination. 71 Pa.C.S.A. § 7104. Specifically, 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, sex, religion, disability or political, partisan or labor union affiliation or other non-merit 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.³ This includes prohibiting “traditional” discrimination which encompasses claims based upon disparate

³ 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.

treatment and retaliation. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988); 71 P.S. § 2704.

In claims of traditional discrimination, the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence which, if believed and otherwise unexplained, indicates it is 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. Appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason is merely a pretext for discrimination. *Henderson* at 126 Pa. Commw. 607, 560 A.2d 859.

We will begin with appellant's assertions that she was subjected to age discrimination, sex discrimination, and disparate treatment. Appellant did not present any testimony or evidence regarding her age or the age of any other employee. Furthermore, she did not provide any testimony or evidence comparing herself to either a male or female Human Services Program Specialist Supervisor. In fact, appellant testified she was the only person under Williams supervision during the rating period. N.T. pp. 104, 127, 623, 695-696; Ap. Ex. 13. Perhaps due to the lack of similarly situated co-workers with whom to compare herself, appellant improperly attempts to compare the way she believes she was treated by Williams to the way she treated her direct reports. N.T. pp. 122-125. Specifically, appellant alleges her direct reports had engaged in conduct that would have justified a needs improvement rating on their EPRs, but went on to say “. . . under no circumstances,

was I not going to put satisfactory as the overall for them all. I felt it was the right and fair thing to do.” N.T. p. 123. Appellant believes Williams should have given her the same deference she gave her direct reports. N.T. pp. 123-25. Appellant sums up her sex discrimination and disparate treatment claims with, “I don’t know if [the treatment] was due to my sex or was disparate treatment, but I have absolutely heard him [Williams] give the benefit of the doubt to every single staff person in this unit.” N.T. p. 150. Accordingly, appellant has not presented any evidence of discrimination based upon her age, sex, or disparate treatment as related to her January 1, 2020 to December 31, 2020 EPR ratings.

We will now turn to appellant’s assertion she was discriminated against based upon a disability. Appellant testified that on November 1, 1995, at the age of sixteen, appellant was in a car accident and suffered a traumatic brain injury. N.T. pp. 31 -33. The injury caused appellant to process information differently and made “conceptualization” difficult. N.T. pp. 31-33. Appellant did not present any testimony or evidence indicating her EPR ratings were based upon any disability. More importantly, appellant failed to establish either Williams or Kasputis was aware she suffered from any disability. Therefore, neither Williams nor Kasputis could have used her disability as the basis for the EPR ratings since they had no knowledge she suffered from any disability. Accordingly, appellant has not presented evidence of discrimination based upon a disability.

We next address appellant’s allegation of discrimination based upon an assertion of retaliation. The Commission utilizes the same legal standard used to evaluate a *prima facie* case of retaliation before the Pennsylvania Human Relations Commission (hereinafter “PHRC”). To prevail before the PHRC, a complainant must show: 1) he was engaged in a protected activity; 2) the employer was aware of

the protected activity; 3) subsequent to participation in the protected activity, he was subjected to an adverse employment action; and 4) there is a causal connection between his participation in the protected activity and the adverse employment action. *Circle Bolt & Nut Company, Inc. v. Pennsylvania Human Relations Commission*, 954 A.2d 1265, 1268-1269 (Pa. Commw. 2008), (citing *Robert Wholey Company, Inc. v. Pennsylvania Human Relations Commission*, 146 Pa. Commw. 702, 606 A.2d 982, 983 (1992)). Appellant has not presented any testimony or evidence that she engaged in any protected activity, of which the appointing authority was aware nor has she shown any casual connection between any protected activity and the ratings in her January 1, 2020 to December 31, 2020 EPR. Thus, appellant has not established a *prima facie* case of discrimination based upon retaliation. *Id.*

Finally, we discuss appellant's assertion of discrimination based upon a violation of the Civil Service Act and/or Rules. Act 71 of 2018 addresses "procedural" discrimination. "Procedural 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. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988) 71 Pa.C.S.A. § 2704. Where a procedural violation of the Act constitutes the alleged discrimination, no showing of intent is required. *Price, supra*. However, to obtain relief, 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*.

Appellant's first allegation is the EPR at issue violated the Civil Service Act and/or Rules because it was based on events that occurred outside the rating period. Appellant testified that on March 26, 2021, she received a written reprimand from Vovakes for a timekeeping incident that occurred in January 2021. N.T. pp. 65-67. Appellant testified she first reported the timekeeping issue to Williams, and asserts this timekeeping issue was a factor used by Williams to justify the "Needs Improvement" ratings. N.T. pp. 65-67. Appellants ratings and Williams' comments in appellant's 2020 EPR neither mention nor reference any events that occurred outside the rating period to include either the timekeeping incident or written reprimand. Appellant does not present any evidence or testimony to connect the timekeeping incident to her "Needs Improvement" ratings, and the fact the ratings were issued after the January 2021 timekeeping incident is not sufficient evidence to connect the two. Accordingly, appellant's argument is an assumption insufficient to establish any violation of the Civil Service Act and/or Rules.⁴

Appellant's final procedural discrimination claim is the EPR did not satisfy the criteria outlined in an EPR workshop attended by appellant. N.T. pp. 116-121, Ap. Ex. 1. Specifically, appellant complains she never received written performance standards, and the EPR did not take into consideration the changes to

⁴ In her written Post Hearing Brief, appellant cites to a comment to her "Needs Improvement" rating under "Supervision/Management" stating the nature of her interactions with her direct reports "has affected morale within the unit." Comm. Ex. A. Appellant asserts in her Brief, she had raised the issue of low morale with Williams and Kasputis in January 2021, after her rating period, and this allegation of low morale was improperly used to justify her "Needs Improvement" rating under "Supervision/Management." The Commission notes that appellant neither attempted to raise this issue during the hearing, nor did appellant present any evidence or elicit any testimony regarding this claim. The Commission cannot consider facts outside the record/hearing. Accordingly, to the extent the appellant is claiming the reference to low morale on her EPR was procedural discrimination, we find that claim waived.

her job duties caused by the pandemic. N.T. pp. 110, 16-121, 619-21; Ap. Ex. 1. Initially, there is no indication the appointing authority utilized either an improper EPR form or procedure for issuing the EPR that deviated from the Act. Further, both the EPR and the testimony elicited at the hearing clearly established the basis for the “Needs Improvement” ratings were not related to changes of job duties related to the pandemic. The first sentence of the comments to the “Needs Improvement” rating under “Supervision/Management” state “[r]ecognizing the challenges of supervising staff while teleworking Kerry has done a good job with holding consistent meetings with her direct reports to review assignments and foster general engagement.” Comm. Ex. A. The EPR addressed the difficulties due to the pandemic and praised appellant’s ability to adapt to those changes. The “Needs Improvement” ratings related to the way appellant communicates with her co-workers and the manner in which she carries out her job duties, and not that she does not know her job duties. Appellant’s past and present EPR’s reflect she knows her job duties, and she, in the past, has carried out her job duties in a satisfactory manner.⁵ Accordingly, appellant has not established any procedural discrimination.

After the presentation of appellant’s case-in-chief, the appointing authority entered a Motion to Dismiss stating there was no *prima facie* case of discrimination. N.T. pp. 209-210. When making a claim of “traditional discrimination,” an appellant must initially present a *prima facie* case of discrimination by producing sufficient evidence which, if believed and otherwise

⁵ In 2018 and 2019, appellant received individual ratings of either “Satisfactory” or “Commendable” with an overall rating of “Satisfactory”. Comm. Ex. B. Additionally, appellant’s 2020 EPR reflected individual ratings of either “Commendable” or “Satisfactory” in the categories of “Job Knowledge/Skills,” “Work Results,” and “Initiative/Problem Solving.” Comm. Ex. A.

unexplained, indicates it is more likely than not discrimination has occurred. *Henderson, supra; Nwogwugwu, supra*. We have been advised, “[g]iven the critical role of circumstantial evidence in discrimination proceedings, the *prima facie* case cannot be an onerous one.” *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Here, appellant has not met her initial burden. Specifically, as explained above, appellant has not presented any evidence of discrimination based on age, sex, disparate treatment, disability, or retaliation. Accordingly, the Commission grants the appointing authority’s Motion to Dismiss based upon a failure to establish a *prima facie* case of discrimination.⁶

In conclusion, upon review of the record, the Commission finds appellant has not provided sufficient evidence to support a claim of discrimination based upon any violation of the Civil Service Act and/or Rules. Further, appellant has not established discrimination based upon age, sex, disparate treatment, disability, or retaliation. Accordingly, we enter the following:

⁶Moreover, had the burden of proof shifted, the appointing authority presented legitimate, non-discriminatory rationale for the overall “Needs Improvement” rating and the individual “Needs Improvement” ratings in the categories of “Communications,” “Interpersonal Relations/Equal Employment Opportunities (EEO),” “Work Habits,” and “Supervision/Management.” Specifically, Williams credibly testified that during the 2020 rating period, appellant’s issues related to communications and interpersonal relations deteriorated into a pattern of unnecessary conflicts whenever appellant received feedback regarding her work assignments that created a barrier to doing effective work within the unit. Additionally, both Kasputis and Vovakes credibly testified they agreed with the 2020 ratings. N.T. pp. 481-483, 549-551. Specifically Vovakes credibly testified that she felt the “Need Improvement” rating as to “Communications” was “pretty much spot on” and further testified “I have had challenges communicating with Kerry in the past . . .” and “. . . I think that it was a fair assessment and . . . pretty much demonstrated what, you know, some experiences that I’ve had in the past.” N.T. pp. 550-551. The Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *McAndrew v. State Civil Service Commission (Department of Community and Economic Development)*, 736 A.2d 26 (Pa. Commw. 1999).

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 Kerry L. Hendricks challenging her Employee Performance Review for the rating period from January 1 2020, to December 31, 2020 in her position as a Human Services Program Specialist Supervisor, regular status, and sustains the action of the Department of Human Services, in the Employee Performance Review of Kerry L. Hendricks for the rating period from January 1, 2020, to December 31, 2020, in her position as a Human Services Program Specialist Supervisor, regular status.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

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