

COMMONWEALTH OF PENNSYLVANIA

Catherine A. Rothaug	:	State Civil Service Commission
	:	
v.	:	
	:	
Department of Labor and Industry	:	Appeal No. 30704
	:	
Gerald R. Clarke		Peter Von Getzie
Attorney for Appellant		Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Catherine A. Rothaug challenging her January 1, 2020 to December 31, 2020 Employee Performance Review for her regular Appeals Referee employment. Hearings were held on November 23, 2021, April 19, 2022, May 11, 2022, May 19, 2022, August 1, 2022, and August 2, 2022, via video, before Commissioner Gregory M. Lane

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing as well as the Briefs submitted by the parties. The issue before the Commission is whether appellant's 2020 Employee Performance Review was motivated by discrimination.

FINDINGS OF FACT

1. On February 20, 2021, appellant received and signed her 2020 Employee Performance Review for her regular Appeals Referee (hereinafter “Referee”) employment with an overall rating of “needs improvement.” Comm. Ex. A; N.T. pp. 686, 1103, 1105; Ap. Ex. 3; AA Exs. 53, 58.
2. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Exs. C, E G J.
3. Appellant is employed as Referee for the appointing authority’s Unemployment Compensation Board of Review, assigned to the Bucks County Referee Office in Bristol, Pennsylvania. N.T. pp. 27-28, 382.
4. As a Referee, appellant is responsible for conducting quasi-judicial hearings, assessing credibility, reviewing evidence and testimony, applying the law to issue decisions, writing decisions, and supervising clerical staff. N.T. pp. 33, 1523-1524.

5. Appellant is responsible for supervising her assigned clerk. N.T. pp. 1522-1523.
6. Appellant is responsible for meeting the Performance Evaluation Standards for Unemployment Compensation Referees (hereinafter “Referee Standards”). N.T. p. 335; Ap. Ex. 6.
7. Pursuant to the Referee Standards, a “Referee will hold hearings at an equivalent rate of 6 hearings a day on average each week in at least 3 quarters during the rating period.” N.T. p. 1530; Ap. Ex. 6.
8. A Referee must “dictate decisions within 5 working days, including the day of hearing, with not more than 2 exceptions during each quarter of the rating period.” N.T. pp. 446, 610, 1075, 1087, 1555; Ap. Ex. 6.
9. A Referee “will not exceed a backlog of 7 decisions to be dictated at the end of a week more than 2 times in each quarter of the rating period.” N.T. pp. 446, 1087; Ap. Ex. 6.

10. A Referee is required to “issue an average of 25-30 decisions per week in at least 3 quarters during the rating period.” N.T. p. 1532; Ap. Ex. 2.
11. Appellant received the Referee Standards on January 13, 2020, and on November 3, 2020. Comm. Ex. A; N.T. pp. 625, 842-843; Ap. Ex. 3; AA Exs. 53, 58.
12. Referees begin conducting hearings as early as 8:00 a.m. or as late as 9:00 a.m. N.T. p. 1528.
13. Referees are required to upload their digital files, such as dictations and decisions, into the P-drive daily. N.T. p. 1033.
14. Referees are required to ensure their decisions are correct to be issued to the Unemployment Compensation Service Center. N.T. pp. 1049-1050, 1058.
15. The -number of cases Referees receive is dependent on the amount of appeals filed in their area. N.T. p. 1642.

16. The -number of two-party hearings assigned to Referees varies because they are assigned at random. N.T. p. 1562.
17. During the COVID-19 pandemic, the Bristol Office required only half the staff to be in the office at a time. N.T. pp. 1071, 1395, 1567.
18. Staff members would need prior approval from their supervisor to enter the office on days they were not their scheduled day to be in the office. N.T. pp. 1567, 1577.
19. Appellant did not volunteer to be a Pandemic Unemployment Assistance Referee. N.T. pp. 1597, 1868.
20. For the rating period January 1, 2020 through December 31, 2020, Program Manager Abolade Akomolede was appellant's supervisor and the rater for appellant's 2020 EPR. Comm. Ex. A; N.T. pp. 31, 383, 755, 1000-1001, 1091; Ap. Ex. 3; AA Exs. 53, 58.
21. Appellant never filed a grievance against Akomolede during the rating period. N.T. p. 634.

22. Akomolede referred to the Referee Standards when evaluating appellant's work performance. N.T. pp. 1088, 1222, 1251; Ap. Ex. 6.
23. Akomolede rated appellant's work performance on the following job factors: job knowledge and skills, work results, communications, initiative and problem solving skills, interpersonal relations and equal employment opportunity, work habits, and supervision and management skills. Comm. Ex. A; Ap. Ex. 3; AA Exs. 53, 58.
24. For each subject, Akomolede had the following ratings to evaluate appellant's work performance: outstanding, commendable, satisfactory, needs improvement, and unsatisfactory. Comm. Ex. A; Ap. Ex. 3; AA Exs. 53, 58.
25. Upon reviewing appellant's work performance throughout 2020, Akomolede rated appellant's job knowledge and skills as "commendable," work results as "needs improvement," communication skills as "satisfactory," initiative and problem solving skills as "satisfactory," interpersonal relations and equal employment opportunity as "needs improvement," work habits as "needs improvement," and supervision and management

skills as “needs improvement.” Comm. Ex. A; N.T. p. 650, 659, 688, 730, 1092-1093, 1095, 1097, 1099, 1100, 1102; Ap. Ex. 3; AA Exs. 53, 58.

26. Appeals System Administrator Brian Parr was the reviewing officer for appellant’s 2020 EPR and signed her EPR. Comm. Ex. A; N.T. pp. 1229, 1584; Ap. Ex. 3; AA Exs. 53, 58.

Appellant’s Work Performance Issues

27. Akomolede rated work results as “needs improvement” because of appellant’s work performance issues with meeting the standards of quality and quantity for her decisions and with maintaining an appropriate backlog of decisions to be dictated. N.T. pp. 1003, 1092, 1117, 1120-1121, 1555-1561, 1638.
28. During the rating period, Akomolede received notices appellant’s decisions and orders contained errors on the following dates: January 15, 2020, January 31, 2020, June 4, 2020, June 15, 2020, June 24, 2020, June 25, 2020, June 30, 2020, July 7, 2020, July 22, 2020, August 24, 2020. N.T. pp. 1050-1051; AA Ex. 48.

29. Appellant's errors in her decisions included 1) failing to include documents; 2) incorrectly issuing orders describing whether the UC claim was affirmed or reversed; 3) incorrectly citing to UC law; 4) incorrectly dating her orders; 5) failing to address the payment in an appeal; and 6) incorrectly attaching orders to two separate appeals with the same Claimant. N.T. pp. 1051-1058, 1171; AA Ex. 48.
30. In response to these errors, Akomolede would remind appellant it is her responsibility to ensure her issued decisions were correct and instructed her to revise the decisions. N.T. pp. 1058, 1172.
31. During the rating period, appellant's backlog exceeded the requirements set forth in the Referee Standards. N.T. p. 1557; AA Ex. 68.
32. For the week of January 3, 2020, appellant did not meet the Referee Standards because she had nine decisions to be dictated at the end of the week. N.T. pp. 1555, 1638; Ap. Ex. 6; AA Ex. 67.

33. For the week of January 17, 2020, appellant did not meet the Referee Standards because she had ten decisions to be dictated at the end of the week. N.T. p. 1557; AA Ex. 68.
34. For the week of March 6, 2020, appellant did not meet the Referee Standards because she had ten decisions to be dictated at the end of the week. N.T. p. 1557; AA Ex. 69.
35. For the week of March 13, 2020, appellant did not meet the Referee Standards because she had ten decisions to be dictated at the end of the week. N.T. p. 1558; AA Ex. 70.
36. For the week of June 5, 2020, appellant did not meet the Referee Standards because she had fifteen decisions to be dictated at the end of the week. N.T. p. 1559; AA Ex. 71.
37. For the week of June 12, 2020, appellant did not meet the Referee Standards because she had ten decisions to be dictated at the end of the week. N.T. p. 1560; AA Ex. 72.

38. For the week of June 19, 2020, appellant did not meet the Referee Standards because she had ten decisions to be dictated at the end of the week. N.T. p. 1560-1561; AA Ex. 73.
39. For the week of October 9, 2020, appellant did not meet the Referee Standards because she had nineteen cases to be dictated at the end of the week. N.T. pp. 53, 236, 248, 444-445, 448, 598, 606, 776, 1003; Ap. Exs. 3 (p. 10), 15.
40. Akomolede rated appellant's work habits as "needs improvement" because of appellant's unresponsiveness to Skype and other forms of communication throughout the rating period. N.T. pp. 1027-1029, 1100-1101, 1207-1208, 1258.
41. From April 2020 to July 2020, appellant was daily unavailable on Skype from the start of her workday at 8:30 a.m. until 10:15 a.m. when she would conduct her hearings. N.T. pp. 1028, 1258.
42. Appellant was unresponsive to instant messaging, emails, and Skype messages. N.T. p. 1027.

43. Appellant received instruction to contact IT to remedy any technological issues she experienced from her personal laptop. N.T. p. 1208.
44. On November 2, 2020, and November 4, 2020, appellant was unreachable and unresponsive from 8:30 a.m. until 10:30 a.m. when she reported to the office despite being scheduled to work from home and without informing Akomolede. N.T. pp. 711, 764-765, 1071, 1355-1356, 1568-1569, 1645.
45. Akomolede rated appellant's supervision and management skills as "needs improvement" because appellant 1) failed to approve her clerk's time in ESS; 2) failed to provide her clerk with decisions and dictations in a timely manner and overwhelming her clerk with too many decisions to review at a time; and 3) failed to upload her dictations on the P-drive. N.T. pp. 688, 1103, 1152-1153, 1260-1261.
46. Appellant reported her clerk's work performance to Akomolede, Clerical Supervisor April Neal-Young, and Human Resource Analyst 3 Caitlin

McDonough throughout the rating period. N.T. pp. 731-733, 808, 1790; Ap. Exs. 3 (pp. 23, 29, 33, 37) 9, 10 (pp. 2-3), 13 (p. 11), 14 (p. 6); AA Exs. 49 (p. 2), 60.

47. Appellant failed to approve her clerk's time in ESS on January 6, 2020, January 31, 2020, May 8, 2020, June 11, 2020, June 29, 2020, August 3, 2020, August 10, 2020, August 31, 2020. N.T. pp. 521, 1045-1046, 1047-1048, 1166-1168, 1253; Ap. Ex. 3 (p. 25); AA Ex. 47.
48. During the rating period on June 2, 2020, appellant held three days' worth of cases and submitted twenty-one case files to her clerk at once. N.T. pp. 1033, 1037; Ap. Ex. 13 (pp. 12-13).
49. During the rating period on October 15, 2020, appellant submitted fifteen cases at once to her clerk for production after having nineteen cases in her backlog. N.T. p. 458; Ap. Ex. 3 (p. 9).
50. In response to appellant's backlogs, Akomolede instructed appellant to not hold more than one day's worth of hearings at the end of the week. N.T. pp. 1074, 1089, 1120-1121.

51. Appellant did not upload her decisions onto the P-drive for her clerk's review but emailed the decisions to her clerk directly. N.T. pp. 959, 980-982, 1034-1035; Ap. Ex. 13 (pp. 12-13).
52. Akomolede rated appellant's interpersonal relations and equal employment opportunity as "needs improvement" because appellant's activities in the office deterred relations. N.T. pp. 1097, 1099.
53. During the rating period on November 16, 2020, Parr instructed Referees, including appellant, to schedule six hearings a day instead of five hearings a day. N.T. pp. 276, 408, 1038-1039, 1156, 1827, 1860.
54. When appellant's clerk asked appellant for an acceptable time to schedule her sixth hearing, appellant instructed her clerk to submit an incomplete hearing schedule and she would give her clerk a time for the sixth hearing later. N.T. pp. 276-278, 300-301, 409-410, 1827, 1860.
55. Appellant's clerk contacted Akomolede for guidance because appellant's instruction did not comply with Parr's request. N.T. pp. 411, 1039, 1042, 1156-1157; Ap. Ex. 16.

56. On November 17, 2020, appellant recorded a conversation with her clerk without her clerk's consent about why her clerk did not submit an incomplete hearing schedule pursuant to appellant's instructions and why her clerk contacted Akomolede. N.T. pp. 284-285, 287, 721, 828.

Appellant's Accommodation Request

57. On November 2, 2020, appellant submitted an accommodation request to work from home and submitted a doctor's note. N.T. pp. 214-216, 221, 551, 574, 710, 1451, 1454; Ap. Ex. 4.
58. Appellant's doctor's note provided "appellant has a serious health condition, which would make her seriously ill if she were to contact COVID-19, so she is only allowed to work from home until further notice." Ap. Ex. 4.
59. After appellant submitted her accommodation request, Akomolede allowed appellant to work from home until the determination for her request was finalized. N.T. pp. 221, 554, 1010, 1085, 1199, 1569.

60. Akomolede and Parr did not receive other accommodation requests from Referees to work from home. N.T. pp. 1243, 1599.
61. On November 4, 2020, Human Resource Analyst Lisa Petrina was assigned to review appellant's accommodation request and asked appellant for her doctor to complete a medical questionnaire and for appellant to complete a Health Insurance Portability and Accountability Act release form. N.T. pp. 221, 552, 1454-1455; AA Ex. 13.
62. Appellant did not respond to Petrina's request until December 10, 2020. N.T. p. 1459.
63. Petrina contacted Parr to review the Bristol office's business operations, and appellant's employment information, including whether there were any issues that would negate appellant being able to work from home. N.T. pp. 1459, 1462-1463; AA Exs. 22, 45.
64. On December 24, 2020, Petrina received appellant's validated performance, appellant's documented issues with time and attendance, and appellant's 2015, 2017, 2018, 2019 EPRs. N.T. pp. 1466-1471, 1485; AA Ex. 63.

65. Petrina did not have appellant's 2020 EPR. N.T. pp. 1466, 1503.
66. Petrina was not consulted during the preparation of appellant's 2020 EPR. N.T. p. 1466.
67. On January 5, 2021, Petrina received appellant's medical questionnaire and HIPAA release form. N.T. pp. 1459-1460; AA Ex. 46.
68. On January 6, 2021, Petrina and Akomolede engaged in email correspondence regarding the Bristol Office's operations. AA Ex. 45.
69. During the January 6, 2021 correspondence, Petrina asked whether Akomolede knew whether appellant's 2020 EPR would be below "satisfactory." AA Ex. 45.
70. Akomolede's response was "Not known at this time." AA Ex. 45.
71. On January 7, 2021, appellant received her final determination that her accommodation request was unable to be approved. N.T. pp. 221-222, 319, 554, 1473-1474; AA Ex. 26.

Appellant's Communications with Union Representative

72. During the rating period, appellant communicated with Union Representative Rose Betti regarding her conversations with Parr and her intentions of filing a grievance against Akomolede. N.T. pp. 557-558, 588-589, 778-779; Ap. Exs 1 (pp. 7-8), 2(pp. 7-8).
73. During the investigation into appellant's time and attendance violations on November 2, 2020 and November 4, 2020, McDonough took an email capture of appellant's emails. N.T. p. 1371; AA Ex. 42.
74. McDonough did not share any of appellant's emails or its contents with Akomolede. N.T. pp. 1375, 1400; AA Ex. 42.
75. Akomolede did not see appellant's emails with her union representative. N.T. pp. 1022, 1215, 1231.

Appellant's Request to Meet the Reviewing Officer

76. After receiving appellant's 2020 EPR, appellant checked off "I would like to discuss this rating with my reviewing officer." N.T. pp. 328, 752, 1225, 1601-1602, 1897; AA Ex. 53.

77. Appellant did not receive a meeting with Parr, who was appellant's reviewing officer for her 2020 EPR. N.T. pp. 329, 333, 752-753, 820.

DISCUSSION

The present appeal challenges the Employee Performance Review (hereinafter "EPR") issued to appellant for the rating period January 1, 2020 to December 31, 2020 for her regular Appeals Referee (hereinafter "Referee") employment. Before this Commission appellant could only bring this challenge through Section 3003(7)(ii) of Act 71 of 2018¹ based upon an allegation the ratings on her EPR were due to discrimination in violation of Section 2704 of Act 71 of 2018. 71 Pa.C.S.A. § 3003(7)(ii). Specifically, appellant alleges her 2020 EPR was motivated by traditional and technical discrimination. 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 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

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

or any other personnel action with respect to the classified service because of race, gender, religion, disability or political, partisan or labor union affiliation or other nonmerit factors.

71 Pa.C.S.A § 2704.² 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, 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 claims of traditional discrimination and technical discrimination.

In analyzing claims of discrimination under Section 2704 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence, 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.*

² 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

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). When there is an allegation of technical discrimination, no showing of intent is required. There must be evidence, however, to show appellant was harmed by the technical noncompliance or that because of the peculiar nature of the procedural impropriety that he or she could have been harmed but there is no way to prove that for certain. *Pronko*, 114 Pa. Commw. at 439, 539 A.2d at 462.

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.

On appeal, appellant argues her “needs improvement” ratings on her 2020 EPR were motivated by 1) mistake of fact discrimination; 2) retaliation; 3) disparate treatment; 4) union affiliation discrimination; and 5) technical discrimination in violation of Act 71 of 2018.

In support of her appeal, appellant testified on her own behalf and presented the testimony of Clerical Supervisor April Neal-Young.³ In response, the appointing authority presented the testimony of Program Manager Abolade

³ Neal-Young is employed by the appointing authority as a Clerical Supervisor. N.T. p. 868, 974. Neal-Young became a Clerical Supervisor in July 2017. N.T. p. 870. Prior to becoming a Clerical Supervisor, Neal-Young was a Clerk Typist 3 working inside the Bristol Referee’s Office. N.T. p. 871. Neal-Young supervises the Clerk Typist 3s in the Philadelphia area. N.T. pp. 916, 974.

Akomolede,⁴ Enterprise Architect Asgar Rizwan,⁵ Human Resource Analyst 3 Caitlin McDonough,⁶ Human Resource Analyst Lisa Petrina,⁷ Appeals System Administrator Brian Parr,⁸ and Administrative Officer 3 Jill Miller.⁹ Rebutting the appointing authority's presentation, appellant testified on her own behalf and presented the testimony of Akomolede.

⁴ Akomolede is employed by the appointing authority as a Program Manager for the Eastern Sector of Pennsylvania. N.T. p. 994. Prior to becoming a Program Manager, Akomolede was an Appeals Referee from 2011-2019. N.T. p. 995. As a Program Manager, Akomolede supervises Appeal Referees and his support staff. N.T. pp. 999-1000. Akomolede supervises eighteen Appeals Referees. N.T. p. 1014. Program Administrator Brian Parr is Akomolede's supervisor. N.T. p. 999.

⁵ Rizwan is employed as an Enterprise Architect for the messaging environment. Rizwan's responsibilities include managing the Commonwealth's email system and other private exchanges. N.T. pp. 1303, 1306.

⁶ McDonough is employed as a Human Resource Analyst 3 by the Office of Administration (hereinafter "OA"). N.T. pp. 1318-1319. During 2020, McDonough was employed by OA as a Human Resource Analyst 3 with the Employment Banking and Revenue Human Resource Delivery Center supporting the Department of Labor and Industry. N.T. p. 1324. As a Human Resource Analyst 3, McDonough was responsible to address employee concerns about performance, policy violations, investigations, union contract issues, representation issues, and grievances. McDonough assisted the appointing authority as one of her program areas. N.T. p. 1324.

⁷ Petrina is employed as a Human Resource Analyst for the Office of Administration's Bureau of Talent Management and Planning. N.T. p. 1446. During 2020, Petrina was an Equal Employment Specialist for OA's Bureau of Equal Employment, Policy, and Appeals. N.T. p. 1449. As an Equal Employment Specialist, Petrina was responsible for equal opportunity investigations and handled COVID-19 accommodation requests. N.T. p. 1450.

⁸ Parr is employed as an Appeals System Administrator. N.T. p. 1513. Parr has been employed with the Commonwealth for forty years. N.T. p. 1513. Prior to being an Appeals System Administrator, Parr was an Appeals Referee for the UC Office in March 1993. N.T. p. 1519. Parr was a Referee for over twenty years until January 2014 when he became an Assistant Appeals System Administrator and a Capital Sector Program Manager. N.T. p. 1519.

⁹ Miller is employed as an Administrative Officer 3 with the appointing authority. N.T. p. 1710. Miller's responsibilities include handling hiring actions, disciplinary actions, and approval processes. Miller also acts as the Human Resources Liaison. N.T. p. 1712.

Summary of the Evidence

Appellant is employed as Referee for the appointing authority's Unemployment Compensation Board of Review, assigned to the Bucks County Referee Office in Bristol, Pennsylvania. Appellant has held this position since December 29, 2007.¹⁰ N.T. pp. 27-28, 382.

As a Referee, appellant is responsible for conducting quasi-judicial hearings, assessing credibility, reviewing evidence and testimony, applying the law to issue decisions, writing decisions, and supervising clerical staff. N.T. pp. 33, 1523-1524. Appellant only supervises her assigned clerk.¹¹ N.T. pp. 1522-1523. Appellant must access Employee Self-Service (hereinafter "ESS")¹² at least once or twice a day to approve her clerk's time entries. N.T. pp. 1045, 1254, 1277.

As a Referee, appellant is responsible for adhering to the Performance Evaluation Standards for Unemployment Compensation Referees (hereinafter "Referee Standards").¹³ N.T. p. 335; Ap. Ex. 6. The Referee Standards are used to hold Referees accountable for their work performance and to set the standard for

¹⁰ Appellant's SAP system assignment history reflects appellant's assignments. N.T. p. 1331; AA Ex. 2. Appellant's work history reflects appellant has been working at the appointing authority's Bristol Referee Office from 2008 through 2022. N.T. p. 1332.

¹¹ For the purposes of this adjudication and to preserve the privacy of appellant's clerk, we will refer to this individual as "appellant's clerk."

¹² ESS is a Commonwealth system that maintains employees time and attendance. N.T. p. 1045.

¹³ All Referees have access to the Referee Standards through either an email sent in August 2014, or through the P-drive. N.T. p. 1532, 1716.

satisfactory work performance. N.T. pp. 1648, 1702-1703. Pursuant to the Referee Standards, a “Referee will hold hearings at an equivalent rate of 6 hearings a day on average each week in at least 3 quarters during the rating period.” N.T. p. 1530; Ap. Ex. 6. A Referee will also “dictate decisions within 5 working days, including the day of hearing, with not more than 2 exceptions during each quarter of the rating period.” N.T. pp. 446, 610, 1075, 1087, 1555; Ap. Ex. 6. A Referee “will not exceed a backlog of 7 decisions to be dictated at the end of a week more than 2 times in each quarter of the rating period.” N.T. pp. 446, 1087; Ap. Ex. 6. “A Referee will issue an average of 25-30 decisions per week in at least 3 quarters during the rating period.” N.T. p. 1532; Ap. Ex. 2; *See Findings of Fact # 7-10.*

Referees begin conducting their hearings as early as 8:00 a.m. or as late as 9:00 a.m. N.T. p. 1528. When Referees conduct an appeal hearing, they use an Olympus audio recorder.¹⁴ Afterwards, the Referee’s clerk is responsible for uploading the audio file into the appointing authority’s database for audio files. N.T. p. 1540. Referees are also required to upload their digital files, such as dictations and decisions, into the P-drive daily.¹⁵ N.T. p. 1033. The reason for this requirement is not to overload the P-drive’s bandwidth and the assigned clerk is able to perform her job duties. N.T. p. 1034. Referees are also responsible for uploading their Weekly Activity Report (hereinafter “WAR”) by the end of the week.¹⁶ N.T. p. 258.

¹⁴ The Olympus audio recorder creates an audio file that a Referee uploads onto the P-drive. N.T. p. 1536.

¹⁵ The P-drive is the central drive where the Referees would submit their digital hearings and decisions into the folders. N.T. pp. 979-980. The P-drive allows clerks to have easy access to their assigned Referee’s decisions. N.T. p. 981.

¹⁶ A WAR is a report that Referee offices submit to the Program Manager. The WAR records the Referee’s and the clerk’s weekly activities. N.T. pp. 1005.

Furthermore, Referees are responsible to ensure their decisions and orders are correct to be issued. N.T. p. 1058. Referees are required to issue their decisions to the parties and the Unemployment Compensation Service Center (hereinafter “UC Service Center”). The Service Center has the duty to complete the Referee’s orders and execute it in their system. When the Service Center identifies errors in the Referee’s decision and order, the UC Service Center notifies the assigned Program Manager. N.T. pp. 1049-1050; AA Ex. 48. Upon receipt, the assigned Program Manager reviews the errors and contacts the Referee who issued the decision in order to correct the errors. N.T. p. 1050.

Prior to the COVID-19 pandemic, Referees were required to conduct six hearings a day. N.T. p. 1528; Ap. Ex. 6. Once the pandemic began, Referees were instructed to cancel their hearings on March 13, 2020. N.T. p. 1533. In the following weeks, Referees were given laptops in order to telework. N.T. p. 1533. Between March 13, 2020 and April 7, 2020, Referees were unable to conduct hearings. N.T. p. 1542. On April 5, 2020, Program Manager Akomolede informed Referees the office would reopen on April 6, 2020 and instructed Referees, including appellant, to begin working remotely and scheduling three appeals per day. N.T. pp. 160, 1079-1080; Ap. Ex. 17 (p. 4). As a result, Referees and staff were responsible to be logged into Skype and be responsive to calls, instant messages, and emails during work hours. N.T. pp. 1025, 1209. Referees were further responsible for conducting telephone hearings through Skype. N.T. p. 1208. On April 7, 2020, Referees were able to conduct telephone hearings. N.T. p. 1542. As the pandemic progressed, Referees were required to schedule five hearings per day. N.T. p. 1040.

During the pandemic, the Bristol Office required only half of the staff to be in the office at a time. N.T. pp. 1071, 1395, 1567. Staff members would need prior approval from their supervisor to enter the office on days they were not scheduled to be in the office. N.T. pp. 1567, 1577. As a result, instructions were given to staff, including Referees, to self-certify before entering the office. N.T. p. 1274.

For the rating period January 1, 2020 through December 31, 2020, Program Manager Akomolede was appellant's supervisor and the rater for appellant's 2020 EPR.¹⁷ Comm. Ex. A; N.T. pp. 31, 383, 755, 1000-1001, 1091; Ap. Ex. 3; AA Exs. 53, 58. Akomolede reviewed appellant's work performance throughout the four quarters of the rating period.¹⁸ Akomolede rated appellant's work performance on the following job factors: job knowledge and skills, work results, communications, initiative and problem solving skills, interpersonal relations and equal employment opportunity, work habits, and supervision and management skills. The relevant ratings for each subject were outstanding, commendable, satisfactory, needs improvement, and unsatisfactory. Comm. Ex. A; Ap. Ex. 3; AA Exs. 53, 58. When he rated appellant's performance, Akomolede took the Referee Standards into account. N.T. pp. 1088, 1222, 1251; Ap. Ex. 6.

¹⁷ Akomolede has been appellant's supervisor for over three years. N.T. p. 31.

¹⁸ The quarters of a rating period are broken down into the following: January, February, and March are first quarter; April, May, and June are second quarter; July, August, and September are third quarter; and October, November, and December are fourth quarter. N.T. p. 1555.

Appellant received and signed her 2020 EPR on February 20, 2021. Upon reviewing appellant's 2020 EPR, Akomolede rated appellant's job knowledge and skills as "commendable", work results as "needs improvement," communication skills as "satisfactory," initiative and problem solving skills as "satisfactory," interpersonal relations and equal employment opportunity as "needs improvement," work habits as "needs improvement," and supervision and management skills as "needs improvement." Comm. Ex. A; N.T. pp. 650, 659, 688, 730, 1092-1093, 1095, 1097, 1099, 1100, 1102; Ap. Ex. 3; AA Exs. 53, 58. For appellant's overall rating, Akomolede rated appellant as "needs improvement" for the 2020 rating period. Comm. Ex. A; N.T. pp. 686, 1103, 1105; Ap. Ex. 3; AA Exs. 53, 58. The Reviewing Officer for appellant's 2020 EPR was Appeals Systems Administrator Parr, who signed appellant's EPR. N.T. pp. 1229, 1584.

Akomolede rated work results as "needs improvement" because of appellant's work performance issues with meeting the standards of quality and quantity for her decisions and with maintaining an appropriate backlog of decisions to be dictated. N.T. pp. 1003, 1092, 1117, 1120-1121, 1555-1561, 1638. Akomolede rated appellant's work habits as "needs improvement" because of appellant's unresponsiveness to Skype and other forms of communication throughout the rating period. N.T. pp. 1027-1029, 1100-1101, 1207-1208, 1258. Akomolede rated appellant's supervision and management skills as "needs improvement" because appellant improperly supervised her clerk by 1) failing to approve her clerk's time in ESS; 2) failing to provide her clerk with decisions and dictations in a timely manner and overwhelming her clerk with too many decisions to review at a time; and 3) failing to upload her dictations on the P-drive. N.T. pp. 688, 1103, 1152-1153, 1260-1261. Akomolede rated appellant's interpersonal relations and equal employment opportunity as "needs improvement" because her

activities in the office did not encourage or promote relations, including but not limited to appellant recording a conversation with her clerk without her clerk's permission. N.T. pp. 1097, 1099.

Appellant asserted her 2020 EPR's "needs improvement" ratings impede her opportunity as a prospective candidate for future employment. N.T. p. 347. Appellant's desired remedy is for the 2020 EPR to be redone or removed from her personnel file. N.T. pp. 347-348. The Commission will address each of appellant's discrimination claims below.¹⁹

Appellant's Mistake of Fact Claim

Appellant argued her EPR is not reflective of her work performance but reflective of the clerk's interference in her job duties. N.T. pp. 107, 333. In fact, appellant argues her EPR reflects only isolated incidents and was not based upon her work performance. N.T. pp. 719, 1790. As a result, appellant argued Akomolede made a mistake in assessing and interpreting her work performance. N.T. p. 1794.

¹⁹ At the conclusion of appellant's presentation, the appointing authority moved to dismiss appellant's appeal for her failure to present a *prima facie* case of discrimination. N.T. p. 992. Ruling was deferred at the hearing. N.T. p. 993. In addition to the claims articulated above, appellant raised the following claims on her Appeal Request Form: age discrimination, gender discrimination, and whistleblower status. Comm. Ex. B. During these proceedings and in her subsequent Brief, appellant did not present evidence in support of these claims. As such, the appointing authority's motion to dismiss is granted in part regarding appellant's raised age discrimination claim, gender discrimination claim, and whistleblower status discrimination claim. The remaining claims will be addressed below.

Appellant explained how a Referee and an assigned clerk would complete an appeal's decision. A Referee would conduct a hearing. After the hearing, she would dictate her decision. N.T. pp. 43-44, 415. After dictating the decision, the Referee sends the dictation to her assigned clerk to write the decision within an approved formatted template. After the decision is written, the clerk submits it to the Referee for her review. After the Referee makes any corrections or additions, she approves the decision, and the clerk sends the approved decision to the parties. N.T. pp. 43-44, 415-416, 422, 426.

Appellant asserted working with her clerk impacted her workload because she performed her clerk's job duties in addition to her own. N.T. pp. 166-168. Appellant argued her clerk did not provide her decisions for submission in accordance with the deadlines. N.T. p. 434. Appellant explained there were two deadlines for submitting decisions. A typing deadline of seven days and a federal deadline that varies between thirty, sixty, or ninety days. N.T. pp. 66, 460, 1817. Appellant would label her seven-day deadline decisions with a "T". N.T. p. 1817. Appellant admitted she did not contact her clerk to see whether she needed additional support in understanding appellant's organization method of labeling dictations to meet deadlines. N.T. p. 441. Nevertheless, appellant claimed if she revised a decision, her clerk did not format the decision or untimely submitted it. N.T. pp. 426, 433.

Appellant claimed her work performance and poorly issued decisions were not her fault but her clerk's fault due to the clerk's work performance. N.T. p. 105. Appellant asserted her time was consumed by fixing her clerk's mistakes on

her decisions before they are submitted to the parties. N.T. p. 103. Appellant explained she would make the final determination in a case and send dictated decisions to her clerk to type the decision. N.T. p. 41. Appellant argued the errors in her cases were caused by her clerk improperly formatting her decisions and failing to input her corrections before sending them to the service center. N.T. p. 824. Appellant asserted if she did not have to constantly address her clerk's work performance issues, then she would be able to perform her duties as a Referee. N.T. pp. 106, 257.

Appellant claimed to assist her clerk's work performance and improve her own by using the program known as Dragon, where appellant dictated her decisions into the program. Then, the program converted appellant's dictation into a written format. Once the dictation has been captured by the Dragon program in a Microsoft Word document, appellant sent it to her clerk for it to be formatted and reviewed for any corrections. N.T. pp. 44, 125-126, 416, 802, 823, 910, 923. When appellant was unable to submit her dictations into the P-drive, she would email her dictated decisions to her clerk. N.T. p. 429.

Appellant admitted the errors on the original decisions were her mistakes. N.T. p. 825. Appellant acknowledged that after correcting any mistakes, there were decisions that still had errors. As a result, appellant would vacate the decision and issue another decision. N.T. pp. 103-104. Nevertheless, appellant argued she met the Referee Standards related to exceeding a dictated decision backlog. N.T. p. 728.

Appellant further argued Akomolede erroneously rated appellant's time and attendance. Appellant contended her time and attendance, and work performance was affected by the technical difficulties she experienced from working from home during the pandemic. N.T. pp. 38-39, 153-154, 1797-1798. Appellant voluntarily chose to use her personal laptop in order to conduct telephone hearings online.²⁰ N.T. pp. 402, 1800. However, appellant asserted she had technological issues working from home because she was unable to log into Skype. N.T. pp. 38-39, 153-154, 1797-1798. For example, appellant was unable to log into Skype at 8:30 am between March 2020 and April 2020 because she could not download the program on her personal laptop. N.T. pp. 845, 1797. As a result, appellant used Microsoft Teams. N.T. pp. 845, 1797.

Appellant asserted she emailed and demonstrated to Akomolede her technological difficulties related to appearing available on Skype while working from home. N.T. p. 239; Ap. Ex. 13. On April 9, 2020 appellant informed Akomolede she was having technological difficulties downloading Skype for Business. N.T. pp. 1024, 1206; Ap. Ex. 13 (p. 17). Appellant acknowledged Akomolede instructed her to download Skype for Business in April, May, and June of 2020. N.T. pp. 852, 1797. On June 2, 2020, appellant emailed Akomolede asking for instructions to enter a training meeting because she was not using Skype but Microsoft Teams. N.T. p. 1798; Ap. Ex. 21 (p. 4). On November 12, 2020, appellant emailed Akomolede reporting that Skype showed she was busy. In response, Akomolede instructed appellant "if you were logged on to Skype and it shows up at

²⁰ Akomolede stated appellant did not have a Commonwealth laptop not because one was unavailable but because she elected to buy one for herself. N.T. p. 1205.

my end that you are away like it did earlier today, you need to report this situation to OIT as soon as possible.” N.T. pp. 238-240; Ap. Ex. 13 (p. 1). Appellant admitted that after she sought help for her technical difficulties at the end of her rating period, she overcame her technological difficulties. N.T. pp. 240, 748.

On November 12, 2020, appellant informed Akomolede she was starting her hearings at 9:45 a.m. N.T. pp. 1030-1031, 1141-1142; Ap. Ex. 13 (p. 3). Appellant attempted to explain to Akomolede that between 8:30 a.m. to 9:45 a.m. she would do the following: turn on her computer, test Wi-Fi connection, sign into Skype, check her emails, take breaks, and prepare for hearings with last minute entries of appearance and contact changes. N.T. pp. 1030, 1147, 1149-1150; Ap. Ex. 13 (p. 3). Appellant admitted Akomolede instructed her to be signed into Skype at 8:30 a.m. N.T. p. 240. Appellant acknowledged she was not appearing available on Skype while she worked from home. N.T. p. 236.

Responding to appellant’s claims about her clerk’s errors, Neal-Young testified when appellant uploaded the decisions and the Word documents were finalized to go, she never asked her clerk to review them again before submission. N.T. p. 924. Neal-Young explained appellant did not review or edit her decisions before they went out. N.T. pp. 924-925, 928, 950-951. Neal-Young asserted appellant would submit unformatted Word documents to her clerk. Afterwards, appellant’s clerk would then be responsible for placing the Word document into the decision template. N.T. p. 926. Neal-Young explained it is not the clerk’s responsibility to check the decision for spelling errors once the finalized document is sent to her by the Referee. N.T. p. 911. Neal-Young affirmed she was not aware of any incidents where appellant’s clerk sent out uncorrected versions of appellant’s decisions. N.T. p. 912.

In response to appellant's mistake of fact claims, Akomolede emphasized he did not consider appellant's clerk's work performance in appellant's ratings. Instead, Akomolede rated appellant's work results, work habits, supervision and management skills, and interpersonal relations and equal employment opportunity as "needs improvement" because of appellant's work performance issues throughout the rating period. N.T. pp. 1097, 1152-1153, 1191.

Upon reviewing appellant's work results, Akomolede noted appellant's difficulties with meeting standards of quality and quantity with her decisions being issued and uploaded. Because of appellant's errors, her pending dictations resulted in a backlog. N.T. pp. 1092, 1117. Akomolede testified he received notices from the UC Service Center that appellant's decisions and orders had errors within them and instructed appellant to issue amended decisions throughout her rating period. *See Findings of Fact # 28, 29.* Akomolede emphasized he requested appellant to fix these errors because it is her responsibility to ensure her issued decisions are correct with the requisite documents. N.T. pp. 1058, 1172. As a result, Akomolede considered appellant was not providing the work results required for her experience as a Referee. N.T. p. 1140.

Additionally, appellant's backlog of decisions to be dictated existed from the beginning of her rating period. Upon reviewing her WARs, appellant consistently did not meet the Referee Standards regarding decisions to be dictated throughout the rating period.²¹ *See Findings of Fact # 31-39.* Parr explained since

²¹ Appellant's backlog accounted for the majority of the total backlog in comparison to other Referees from the Eastern Sector of Pennsylvania. During the week of January 3, 2020, appellant's backlog accounted for nine out of the total fourteen cases for the Eastern Sector. N.T. p. 1553. During the week of January 17, 2020, appellant's backlog accounted for ten cases out of the total twenty-two cases for the Eastern Sector. N.T. p. 1557. For the week of June 5, 2020, appellant's backlog accounted for fifteen out of the total twenty cases for the Eastern Sector. N.T. p. 1559.

appellant had a backlog of decisions to be dictated more than two times during the same quarter, appellant did not meet the Referee Standards for the first and second quarter of the rating period. N.T. pp. 1557-1558, 1561. In response to appellant's consistent backlog, Akomolede instructed appellant to only hold a backlog to the number of cases she would hold in a day. N.T. pp. 1120-1121. Parr emphasized appellant's dictation backlog reflected upon her work performance and appellant's "needs improvement" rating was appropriate because she was not performing as well as she can. N.T. pp. 1673-1674.

Concerning appellant's work habits, Akomolede noted appellant had repetitive incidents of being tardy, being unresponsive on Skype, and being unresponsive to messages sent to her. N.T. pp. 1100-1101, 1207-1208. Appellant was not logged into Skype when she began her workday from April 2020 to July 2020. N.T. p. 1026. Akomolede emphasized appellant had opportunities to contact IT to remedy any technological issues she had. N.T. p. 1208.

Akomolede explained appellant's unresponsiveness to instant messaging, emails, or Skype messages hindered appellant's clerk in communicating with her in order to respond to continuance requests and motions. N.T. p. 1027. After July 2020, Akomolede noted appellant began to log into Skype on time regularly. N.T. p. 1028. Nevertheless, Akomolede emphasized appellant's unresponsiveness persisted throughout her rating period. N.T. p. 1210.

While Akomolede noticed appellant utilized Skype to conduct hearings, she was unresponsive and showed as unavailable from 8:30 a.m. to 10:15 a.m. until she would begin conducting hearings. N.T. pp. 1028, 1258. In between hearings, Akomolede further noticed appellant would be off Skype. N.T.

p. 1258. Appellant asserted that from 8:30 a.m. to 10:15 a.m. she would perform technological diagnostic checks, prepare for cases, and dictate decisions before conducting her hearings. N.T. pp. 566-567, 569. Akomolede did not find appellant's reasoning sufficient for her inactivity or her delay in conducting hearings at 10:15 a.m. Typically, a Referee answers emails, takes phone calls, reviews the hearing schedule, motions, and subpoenas, and communicates with her clerk. N.T. pp. 1018-1019. Referees would complete their morning preparations for hearings within a half hour. N.T. p. 1526. As a result, Akomolede did not know whether appellant was working or active between 8:30 a.m. and 10:15 a.m. N.T. pp. 1029, 1258.

To remedy appellant's inactivity and her delay in conducting hearings, on October 27, 2020, Akomolede met and informed appellant she would be returning to the office on a telework schedule and there would be a change to her hearing schedule. N.T. pp. 208-209, 217-218, 407. On October 28, 2020, Akomolede instructed appellant to notify her clerk hearings will start at 8:45 a.m. instead of appellant's normal start time of 10:15 a.m. N.T. pp. 1014-1015, 1136; Ap. Ex. 2 (p. 5). Akomolede explained he changed appellant's work schedule to start her hearings at 8:45 a.m. instead of 10:15 a.m. because appellant did not provide a sufficient reason for starting her hearings so late in the day. N.T. pp. 1015-1016, 1138-1139. Appellant acknowledged Akomolede informed appellant the reason for changing her hearing schedule was because it would assist her in overcoming her backlog.²² N.T. pp. 253, 413.

²² After her changed hearing schedule, appellant requested to change her work schedule from 9:00 to 5:00. Akomolede denied her request to change her work schedule. N.T. pp. 218-220, 632. Appellant alleged she asked Akomolede whether all Referees were required to begin their hearings 15 minutes after their day begins when she never began her hearings between the proposed times. N.T. pp. 228, 562. Appellant acknowledged other Referees scheduled their hearings to begin between 8:30 to 9:30. N.T. p. 560.

Shortly after her hearing schedule changed, appellant experienced time and attendance issues on November 2, 2020 and November 4, 2020. Specifically, appellant was unreachable and unresponsive on November 2, 2020 and November 4, 2020 from the beginning of her shift until between 10:00 a.m. and 10:30 a.m. at which point she appeared in the office despite being scheduled to be working from home. N.T. pp. 711, 764-765, 1071, 1355, 1568-1569, 1645. Appellant also reported to the office unilaterally without seeking permission and without informing her supervisor she was going to the office. N.T. p. 1356; *See* Findings of Fact # 44. Consequently, appellant received a fact-finding meeting regarding the events on November 2, 2020 and November 4, 2020, on December 3, 2020, and subsequently received a written reprimand on January 22, 2021, for failing to follow time and attendance policies and failing to notify her manager that she would be going into the office unscheduled on November 2, 2020 and November 4, 2020 from 8:30 a.m. to 10:00 a.m.²³ N.T. pp. 1069-1070, 1192, 1255, 1273; AA Ex. 27.

Akomolede further explained appellant's supervision and management skills were rated as "needs improvement" because she was not supervising her clerk properly. N.T. pp. 1152-1153, 1188. Akomolede noted appellant did not consistently and properly supervise her clerk throughout the rating period by: 1) failing to approve her clerk's time in ESS; 2) failing to provide her clerk with decisions and dictations in a timely manner and overwhelming her clerk with too many decisions to review at a time; and 3) failing to upload her dictations on the P-drive. N.T. pp. 688, 1103, 1152-1153, 1260-1261.

²³ Appellant's written reprimand was a form of progressive discipline because appellant received an oral reprimand in the past for similar misconduct. N.T. p. 1378. An employee may receive progressive discipline when their misconduct is successive and similar in nature. An employee's progressive discipline would increase in the following steps: 1) oral reprimand, 2) written reprimand, 3) one-day suspension, 4) three-day suspension, 5) five-day suspension with final warning, and 6) removal. N.T. pp. 1378-1379.

Regarding appellant's failure to approve her clerk's time in ESS, Akomolede received numerous notifications that appellant failed to approve her clerk's time entries and instructed her to approve them. *See* Findings of Fact # 47. Akomolede acknowledged appellant's clerk could have submitted her time into ESS after appellant left on Friday but contended appellant could check ESS first thing Monday morning like other Referees. N.T. pp. 1167, 1170. Even if the clerk's time on ESS rolled over to him, appellant is still responsible to go into ESS and approve her clerk's time. N.T. pp. 1170, 1255. Akomolede instructed appellant on how to enter ESS and approve her clerk's time entries before the weekend. N.T. pp. 1045-1047; Ap. Ex. 3 (p. 25).

Regarding appellant overwhelming her clerk with too many decisions to review at a time, Akomolede recalled how appellant would "dump" decisions onto her clerk during the rating period. For example, on June 2, 2020, Akomolede received a complaint from appellant's clerk asking if appellant could send her digital files daily instead of holding dictations for three days. N.T. p. 1033; Ap. Ex. 13 (p. 13). Akomolede reviewed and discovered appellant would hold numerous cases to be submitted to her clerk instead of submitting the digital files daily. N.T. p. 1033. Akomolede testified he informed appellant that sending twenty-one digital files to her clerk at once was unacceptable.²⁴ N.T. p. 1037; Ap. Ex. 13 (p. 12).

²⁴ Akomolede testified in September 2020, he instructed appellant not to send only six dictations all week and then dump over twenty decisions onto her clerk the next week. N.T. p. 1130.

Similarly, regarding appellant's nineteen case backlog, as stated above, appellant submitted fifteen dictations at once to her clerk for production on October 14, 2020. Ap. Ex. 3 (p. 9). On October 15, 2020, Akomolede warned appellant that sending fifteen decisions to her clerk would overwhelm her and "in the present case, I did not find that [appellant's clerk] has any part to play in the delay sending dictations from your end." N.T. p. 458; Ap. Ex. 3 (p. 9). Akomolede also reminded appellant it is unacceptable to hold a large number of cases pending dictation and to notify him when she was holding more than one day's worth of hearings pending dictation. N.T. pp. 53, 444-445, 448, 1003; Ap. Ex. 3 (p. 10).

Rebutting Akomolde's explanation, appellant asserted she was not holding decisions but giving herself the luxury she had always given herself to think about a couple of them and not do a snap decision immediately. N.T. pp. 773, 1821-1822. Appellant explained she stopped allowing herself to hold seven cases in a backlog. N.T. p. 773. Appellant admitted Akomolede provided this instruction twice during her rating period. N.T. pp. 457-458.

Regarding appellant's inability to upload her dictations onto the P-drive, appellant would email her clerk directly. N.T. pp. 959, 980-981. Neal-Young recalled there were times appellant uploaded into the P-drive and times when she did not. N.T. p. 980. Neal-Young explained when appellant would email decisions to her clerk instead of submitting them into the P-drive, the decisions were not accessible in case appellant needed clerical assistance. N.T. pp. 981-982. Additionally, Akomolede discovered appellant would email her clerk decisions on the weekends. As a result, Akomolede instructed appellant to upload her digital files

into the P-drive on a daily basis. N.T. pp. 1034-1035; Ap. Ex. 13 (pp. 12-13). Akomolede emphasized he has instructed appellant to upload her dictations and decisions into the P-drive in the past. N.T. p. 1035. Appellant's inability to upload dictations onto the P-drive affected Akomolede's supervision of appellant because the P-drive was a way he could see outstanding decisions in order to know how to help Referees. N.T. p. 1261. If appellant properly uploaded her decisions into the P-drive instead of sending her decisions to her clerk through e-mail, Akomolede would have been able to see whether the decisions lacking documents were appellant's or her clerk's fault. N.T. pp. 1172-1173.

Upon reviewing appellant's impact in the office, Akomolede testified appellant's interpersonal relations and equal employment opportunity rating was "needs improvement" because her activities in the office did not encourage or promote positive work relationships. N.T. p. 1097. For instance, Akomolede received a report from staff that appellant would enter the office in the morning and groom herself in the lunchroom. Additionally, Akomolede recalled appellant informing her clerk that she was under investigation, which resulted in hostile relations in the office. Most disturbingly, Akomolede emphasized appellant recorded her clerk without her clerk's permission during the rating period. N.T. p. 1099.

On November 16, 2020, Parr sent Referees, including appellant, an email ordering referees to conduct six hearings a day instead of five hearings a day. N.T. pp. 276, 408, 1038-1039, 1156, 1827, 1860. Appellant recalled her clerk asked her for an acceptable time to schedule her sixth hearing on November 16, 2020, at

4:45 p.m. Appellant's shift ended at 4:30 p.m. and appellant did not see the email until the next morning on November 17, 2020. N.T. p. 276. Appellant acknowledged receiving a second email from her clerk asking for an acceptable time for scheduling her sixth hearing while she was conducting a hearing. N.T. pp. 276-277, 409. In response, appellant instructed her clerk to send out an incomplete hearing schedule and she would give her a time for the sixth hearing in the future. N.T. pp. 277-278, 300-301, 409-410, 1827, 1860.

In the interim, appellant's clerk contacted Akomolede regarding appellant's instruction and for guidance because appellant did not provide her information for scheduling the sixth hearing in compliance with Parr's instruction. N.T. pp. 411, 1039, 1042, 1156-1157; Ap. Ex. 16. In response, Akomolede instructed appellant's clerk to schedule appellant's sixth hearing. N.T. p. 1039.

On November 17, 2020, appellant confronted her clerk about why she was not complying with her instructions to submit an incomplete hearing schedule and for contacting Akomolede. N.T. pp. 284-285. During this telephone meeting, appellant recorded her clerk's conversation without her consent.²⁵ N.T. pp. 287, 721, 828. Appellant never informed her clerk she was being recorded. N.T. p. 287.

²⁵ In March 2021, Rizwan received a request to track whether appellant received two emails regarding the prohibition against recording an individual without permission in 2020. N.T. pp. 1307-1308; AA Exs. 6, 8. Rizwan discovered appellant blocked emails from ra-opaofficeofadmin@pa.gov, which resulted in the aforementioned emails being redirected to her quarantine box instead of her inbox. Rizwan confirmed only appellant could have blocked the emails. N.T. pp. 1313-1314.

On November 17, 2020, Akomolede received an email from appellant alleging her clerk was insubordinate by failing to call her after going to the bathroom. N.T. pp. 280-282, 641-642, 855, 1042-1043, 1155-1156; Ap. Ex. 16 (p. 2). In response, Akomolede instructed appellant to detail her clerk's alleged insubordination. N.T. p. 1043; Ap. Ex. 16 (p. 1). On November 18, 2020, Appellant provided the following instances of alleged insubordination: 1) appellant's clerk did not follow her instructions to send out a schedule with only five hearings scheduled, and 2) appellant's clerk failed to contact her after going to the restroom. N.T. pp. 280-282, 641-642, 855, 1044, 1154; Ap. Ex. 16 (p. 1). Appellant further reported to Akomolede about how her clerk complained to him about appellant not providing necessary information.²⁶ N.T. p. 282; Ap. Ex. 16.

Akomolede explained appellant was responsible for providing her clerk with a time for her sixth hearings to be scheduled. N.T. pp. 1041, 1158. Akomolede explained appellant's instruction hindered the time for when hearing notices were being sent to parties. N.T. pp. 1041-1042, 1157, 1160. Akomolede emphasized his instruction to appellant to schedule a sixth hearing was an instruction from her supervisor. N.T. p. 1157.

Appellant attempted to excuse her recording by stating it was a "one time thing." N.T. p. 828. Appellant expressed she did not believe Akomolede would use the recording for her EPR rating because it was an isolated incident. N.T. p. 828. Appellant argued Akomolede improperly provided a "needs improvement" rating

²⁶ Akomolede testified in his experience, appellant's allegations of insubordination are not considered insubordination. N.T. p. 1044.

because of her recording incident. N.T. p. 721. Rebutting appellant's claim, McDonough explained that while supervisors are guided to not specifically mention the employee's discipline in an EPR, it is appropriate to consider the employee's behavior that led to the discipline. N.T. p. 1382.

We now turn to whether appellant established her "needs improvement" ratings were the result of Akomolede's mistake of fact regarding appellant's work performance. To establish a claim of mistake of fact, appellant must show the appointing authority's decision was based upon an erroneous interpretation of the facts. *See State Correctional Institution at Graterford, Department of Corrections v. Goodridge*, 87 Pa. Commw. 527, 487 A.2d 1036 (1985); and *State Correctional Institution at Albion v. Bechtold*, 670 A.2d 224 (Pa. Commw. Ct. 1996). Where a decision is based upon an erroneous interpretation of the facts, the decision is based on a non-merit factor. *Bechtold*, 670 A.2d at 226 (holding removal of Corrections Officer Trainee based upon a mistaken factual assumption was based upon a non-merit factor, and therefore constitutes discrimination). In a mistake of fact case, appellant is not required to prove the appointing authority's decision was motivated by discrimination, just that it was based upon mistaken factual information. *Goodridge*, 87 Pa. Commw. 527, 487 A.2d 1036; *Bechtold*, 670 A.2d 224. As noted previously, non-merit factor discrimination is expressly prohibited by the antidiscrimination provision of Act 71.

Upon review of the record, the Commission finds Akomolede did not erroneously interpret appellant's work performance during the 2020 rating period. Specifically, we find the testimony of Akomolede, Parr, and Neal-Young credible

and persuasive in describing appellant's work results, work habits, supervision and management skills, and interpersonal relations and equal employment opportunity throughout the rating period.²⁷

While appellant raises numerous complaints regarding whether her clerk improperly performed her duties, appellant was her clerk's direct supervisor and was responsible for her own work product in producing her decisions and dictations. We are not persuaded by appellant's attempted deflections from her own inadequate work performance. As Neal-Young, Parr, and Akomolede credibly present, appellant's errors in her own decisions and her backlog throughout the rating period's quarters negatively reflected upon her work performance as a Referee in failing to meet the Referee Standards. As such, we find Akomolede did not commit a mistake in fact in rating appellant's work results in her 2020 EPR. *Goodridge, supra*.

Furthermore, we find Akomolede did not erroneously interpret appellant's work habits throughout the rating period. Appellant claimed her time and attendance issues were erroneously interpreted because she suffered technological difficulties outside of her control. However, appellant always had the opportunity to contact technological support to remedy her technological issues. Appellant further acknowledged she was not appearing available on Skype while working from home, despite using Microsoft Teams to substitute her technology. While appellant may have issues in responding to Skype messages because of her

²⁷ It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 505 A.2d 339, 341 (Pa. Commw. Ct. 1986).

technological difficulties, there is no excuse for appellant's unresponsiveness to other forms of communication. Akomolede credibly noted how appellant's unresponsiveness to messaging and emails hindered her clerk's performance and how her unresponsiveness persisted throughout the rating period.

Notably, Akomolede also credibly described how appellant remained unavailable and unresponsive from 8:30 a.m. to 10:15 a.m. until conducting her hearings late into the morning in comparison to other Referees. Although appellant argued she was actively preparing for her hearings, Referees would complete their morning routines within a half-hour, which raised credible concerns about whether appellant was working during this period of time. Appellant also failed to follow time and attendance policies and failed to inform Akomolede of her presence in the office on November 2, 2020, and November 4, 2020. Based upon appellant's time and attendance issues and her unresponsiveness throughout the rating period, we find Akomolede did not commit a mistake of fact in rating appellant's work habits. *Goodridge, supra*.

We further find Akomolede did not commit a mistake of fact rating appellant's supervision and management skills. While appellant contended her supervision of her clerk was hindered by her clerk's work performance and errors, we are not convinced. Akomolede and Parr credibly presented how appellant consistently failed to approve her clerk's time in ESS, failed to provide her clerk decisions in a timely and appropriate manner, and failed to upload dictations onto the P-drive. An appointing authority can require its managerial employees be held to the highest level of conduct. *Woodbridge v. Commonwealth, Department of Revenue*, 435 A.2d 300, 302 (Pa. Commw. 1981). Furthermore, a management employee must strictly adhere to standards and set an example for his subordinates.

Id. Here, appellant was unable to meet her responsibilities as a Referee in relation to supervising her assigned clerk. As such, we find Akomolede credibly did not make an erroneous interpretation of appellant's supervision and management skills when conducting appellant's 2020 EPR. *Goodridge, supra.*

Lastly, although appellant described her tenuous relationship with her clerk, Akomolede credibly presented how appellant received a rating of "needs improvement" because of her inability to foster positive working relations. As articulated above, appellant struggled to provide sufficient support to her assigned clerk. Moreover, Akomolede and McDonough emphasized how appellant recorded her clerk without her permission. While appellant argued Akomolede's relied too heavily on this incident, McDonough provided supervisors may consider their subordinate's behavior. Indeed, given the egregious nature of appellant's recording, Akomolede properly referred to appellant's misconduct in the 2020 EPR. We find Akomolede did not commit a mistake of fact when rating appellant's interpersonal relations and equal employment opportunity as "needs improvement." Therefore, we hold appellant failed to establish her 2020 EPR was motivated by mistake of fact discrimination. *Goodridge, supra.*

Appellant's Retaliation Claims

Appellant argues on appeal that her 2020 EPR's rating were motivated by three forms of retaliation. First, appellant claims Akomolede retaliated against her for reporting her clerk to him and others throughout the rating period. Second, appellant claims Akomolede retaliated against her for submitting an accommodation request to work from home. Third, appellant claims Akomolede retaliated against her for attempting to file a grievance. We will discuss each claim below.

A. Appellant's Reporting Retaliation Claim

Appellant argued Akomolede retaliated against her for repetitively reporting her clerk to him, Neal-Young, and McDonough throughout her rating period. N.T. pp. 731-732, 733, 808, 1790. Appellant argued she would report her clerk's short-comings and expressed how her ability to perform her job duties were affected by her clerk's mistakes. N.T. p. 257. Appellant emphasized she reported her clerk to Akomolede and others to illustrate how effective she was as a supervisor and to inform him of her difficulties with her clerk. N.T. p. 732.

First, appellant reported her clerk's poor work performance to Akomolede. On May 28, 2020 and on November 24, 2020, appellant reported to Akomolede and Neal-Young about her clerk's cell phone usage and her clerk using illegible copies of hearing schedules, policies and procedures.²⁸ N.T. pp. 113-114, 129-131, 513-516, 733-734, 808, 895-896, 1060-1061, 1182, 1184; Ap. Ex. 3 (pp. 23, 33); AA Ex. 49 (p.2). On November 16, 2020, appellant reported to Akomolede how her assigned clerk mislabeled decisions as pending when they had been withdrawn, remanded, or transferred. Additionally, appellant explained to Akomolede how she provided instructions to her clerk about sending out her dictations and to correct improperly labeled decisions. Akomolede responded

²⁸ Akomolede explained it would take a minute to remedy the illegible copies on the notices for hearings and would not delay appellant from performing her duties. N.T. pp. 1189-1190.

acknowledging his receipt of appellant's email. N.T. pp. 122-123, 125-129, 519-520; Ap. Ex. 3. (p. 29). On November 23, 2020, appellant sent an email to Akomolede alleging her clerk lied to her about not being able to finish the decision on time. N.T. pp. 63-66; Ap. Ex. 9. Appellant acknowledged her clerk told her that she did not give her enough time to complete the task. N.T. p. 68.

Appellant also provided complaints to Neal-Young regarding her clerk's work performance. Including her clerk's use of illegible copies, on May 29, 2020, appellant reported to Neal-Young that she came into the office unannounced and witnessed her clerk goofing off. N.T. pp. 98-100, 513-514, 808; Ap. Ex. 3. (p. 37). On November 9, 2020, appellant reported to Neal-Young that her clerk was unable to use the Olympus System to split digital files. N.T. pp. 176-177; Ap. Ex. 13 (p. 11). On November 13, 2020, appellant emailed Neil-Young regarding her clerk's work performance. N.T. pp. 268-270; Ap. Ex. 14 (p. 6). Appellant explained she would call Neil-Young regarding her clerk's work performance issues and mistakes. N.T. p. 269.

Furthermore, on November 23, 2020, appellant reported to Neal-Young that her clerk did not format her dictated decisions on November 20, 2020, when appellant provided her the dictated decision for the first time at the end of the workday. Appellant attempted to excuse her late email by asserting her clerk had an hour and a half to format, spellcheck, and review the decision to submit it for the federal deadline. N.T. pp. 66, 462-463; Ap. Ex. 9. Appellant acknowledged she could have notified her clerk about the federal deadline. N.T. p. 469.

Appellant's complaints to McDonough were regarding her clerk's alleged cell phone use. On February 18, 2020 and in July 2020, appellant reported to McDonough about how she believed her clerk was violating the Commonwealth's policy regarding having no recording devices in the workplace. N.T. pp. 485-486, 493-494, 497-499, 702, 1334-1335; Ap. Ex. 10 (pp. 2-3); AA Ex. 60. Specifically, appellant alleged she caught her clerk taking photos of herself in the office and posting them on her Facebook account. N.T. pp. 497-499, 702. In response, McDonough asked appellant to send documentation she had of the incident in question.²⁹ N.T. p. 1335.

In response to appellant's retaliation claim, Akomolede testified appellant's reports to him about her clerk's work performance did not affect his ability to rate appellant's work performance. N.T. pp. 1061, 1089-1090. In fact, Akomolede rated appellant's work performance upon review of her work performance issues throughout the rating period, as stated above.

We now turn to whether appellant established a *prima facie* case of retaliation. A retaliation claim is a specific subcategory of the broader category of non-merit factor discrimination. In a retaliation case, appellant may establish a *prima facie* case by proving 1) she engaged in a protected activity; 2) the appointing authority was aware of the protected activity; 3) that subsequent to participation in

²⁹ On December 10, 2020, appellant submitted to McDonough screenshots of her clerk's Facebook page reflecting pictures from inside the office and her clerk's acknowledgement of the cell phone use policy that was put in place in 2004. N.T. pp. 501, 1336-1337; Ap. Ex. 10 (p. 1); AA Ex. 60. Appellant did not provide documentation noting her clerk understood or acknowledged the appointing authority's current cell phone use policy. N.T. p. 1398. Ultimately, in late 2021, McDonough concluded appellant's clerk's actions did not rise to the level of discipline and sent appellant an email in July 2020 reflecting the determination. N.T. pp. 501, 1337-1338, 1398; Ap Ex. 10 (p. 1).

the protected activity, appellant was subjected to an adverse employment action by the appointing authority; and 4) there is a causal connection between participation in the protected activity and the adverse employment action. *Robert Wholey Co., Inc. v. Pennsylvania Human Rel. Commn.*, 606 A.2d 982, 983 (Pa. Commw. 1992) citing *Brown Transport Corp. v. Pennsylvania Human Rel. Commn.*, 578 A.2d 555 (Pa. Commw. 1990). When participation in a protected activity and the occurrence of an adverse employment action occurs within close proximity in time, causation is inferred. *Id.* at 984.

Upon review of the record, appellant established a *prima facie* case of retaliation for the reports about her clerk's work performance. Appellant engaged in a protected activity in reporting her clerk to Akomolede, McDonough, and Neal-Young. Because Akomolede, McDonough, and Neal-Young received appellant's complaints, the appointing authority was aware of appellant's protected activity. Following appellant's numerous reports, appellant was subject to an adverse employment action in her 2020 EPR's "needs improvement" ratings. While her reports began in the beginning of the rating period, appellant's reporting persisted until late November 2021. This presents a causal connection between appellant's reports and her 2020 EPR's completion. As such, appellant successfully established a *prima facie* case of retaliation. *Robert Wholey Co., supra.*

Nevertheless, the appointing authority presented legitimate non-discriminatory reasons to support appellant's 2020 EPR. Specifically, Akomolede and Parr provided how appellant's work performance issues in failing to meet the Referee Standards throughout her rating period were noted in appellant's work

habits, work results, supervision and management skills, and interpersonal relations and equal employment opportunity. These reflections of appellant's work performance and subsequent "needs improvement" ratings, as articulated above, were merit-related reasons for appellant's 2020 EPR's rating and these reasons were not rebutted as pretextual. *Henderson, supra.*

B. Appellant's Accommodation Request Retaliation Claim

Appellant argued Akomolede rated appellant negatively in her 2020 EPR in retaliation for submitting an accommodation request. N.T. pp. 1790, 1794. On November 2, 2020, appellant submitted an accommodation request and a doctor's note to Akomolede requesting to work from home. The note stated "[appellant] has a serious health condition, which would make her seriously ill if she were to contract COVID-19, so she is only allowed to work from home until further notice." N.T. pp. 214-216, 221, 551, 574, 710, 1451, 1454; Ap. Ex. 4. After appellant submitted her request and doctor's note, Akomolede instructed appellant to contact Human Resource Analyst Petrina. Until the final determination was made, Akomolede allowed appellant to work exclusively from home. N.T. pp. 221, 554, 1010, 1085, 1199, 1569. Appellant continued to work from home until the appointing authority's determination regarding her request was complete. N.T. p. 710.

Appellant claimed if she had not made an accommodation request, Petrina would not be reviewing her EPRs or contacting Akomolede regarding her performance in 2020. N.T. p. 1791. As a result, appellant argues Akomolede's knowledge of appellant's accommodation and his conversations with Petrina, who reviewed her request, affected her 2020 EPR. N.T. p. 1794.

Upon receiving appellant's request, Human Resource Analyst Petrina emailed appellant for her doctor to complete a medical questionnaire³⁰ and for appellant to complete a Health Insurance Portability and Accountability Act (hereinafter "HIPAA") release form.³¹ N.T. pp. 221, 551-552, 1454-1455; AA Ex. 13. When appellant did not respond to her correspondence, Petrina emailed appellant again on November 24, 2020. Petrina reminded appellant to submit the two documents to her. N.T. p. 1457; AA Ex. 22 (p. 4).

Because she did not hear from appellant until December 10, 2020, Petrina contacted Parr for the office's business operations, including whether there were any changes in appellant's employment, whether appellant needed an accommodation anymore, and whether there were any issues with appellant that would negate her being able to telework full time. N.T. pp. 1459, 1462-1463; AA Exs. 22, 45. In response, Parr told Petrina that he would provide her the information and copied Akomolede. N.T. p. 1463.

On December 24, 2020, Petrina received information about appellant's work performance. Petrina explained she reviewed the documented issues of appellant's time and attendance. N.T. p. 1463. Petrina reviewed appellant's 2015, 2017, 2018, 2019 EPRs. N.T. pp. 1466-1471, 1485; AA Ex. 63. Petrina reviewed

³⁰ The medical questionnaire asks several questions, for an employee's medical healthcare provider, to provide an understanding of the employee's health condition. N.T. pp. 1455-1456.

³¹ A HIPAA release form is for the employee to consent to the release of her medical information. N.T. p. 1456.

appellant's former EPRs to see whether there was a pattern of work performance issues. N.T. p. 1493. Petrina confirmed she did not have appellant's 2020 EPR. N.T. pp. 1466, 1503. Petrina emphasized she was not consulted about appellant's 2020 EPR. N.T. p. 1466.

On January 5, 2021, Petrina received appellant's medical questionnaire and HIPAA release form. N.T. pp. 1459-1460; AA Ex. 46. After she received the documents, Petrina reviewed them to see if there was additional information that would inform her decision. N.T. p. 1460. Petrina testified appellant did not state her accommodation was related to her diabetes. Instead, the focus of appellant's accommodation was if she would catch COVID-19, then she would experience serious medical complications. N.T. p. 1477. Petrina also reviewed what available accommodations would be given to appellant, such as an office or work on a different floor. Petrina noted appellant's responsibilities as a supervisor and the fact that she already had an office. N.T. p. 1479. Parr noted the need for appellant to be in the office in part was to supervise her clerk. N.T. p. 1701. Appellant never suggested any other accommodations beside working from home. N.T. p. 1482.

On January 6, 2021, Petrina and Akomolede engaged in email correspondence regarding the status of the Bristol Office, including social distancing in the office, the telework schedule, and the need for Referees to be in the office to supervise their assigned clerks. AA Ex. 45. Additionally, Petrina asked Akomolede "Do you know if Cathy's overall EPR will be below "Satisfactory?" Akomolede responded "Not known at this time." AA Ex. 45.

On January 7, 2021, appellant received a final determination her accommodation request was unable to be approved. N.T. pp. 221-222, 319, 554, 1473-1474; AA Ex. 26. Specifically, “the agency has demonstrated a business operational need for you to report to the office on a part-time basis (working three days from the office one week and two days from the office the following week, coordinated and directed by Abolade (Bola) Akomolede), as the responsibilities of supervision cannot be done from home via telework.” AA Ex. 26. Additionally, Petrina cited appellant’s performance issues documented during appellant’s fact-finding meeting on December 3, 2020. N.T. pp. 222, 1474; AA Ex. 26. As a result, appellant was to report to the office on a partial telework schedule. N.T. pp. 1496-1497; AA Ex. 26. Petrina emphasized there were no other accommodations that would equate to appellant’s full-time telework request. N.T. p. 1506.

Rebutting appellant’s claims, Akomolede explained he allowed appellant to work from home until her accommodation request was finalized. N.T. pp. 1011, 1085, 1199. When he was contacted by Petrina, Akomolede did not attempt to cause appellant’s request to be denied. N.T. p. 1086. Akomolede did not take appellant’s denial of her accommodation request into consideration when rating her work performance for her 2020 EPR. N.T. p. 1087. Akomolede affirmed appellant’s accommodation request did not affect how he created appellant’s 2020 EPR or rated her performance.³² N.T. pp. 1086, 1215, 1223.

³² Akomolede did not participate in deciding appellant’s request would be granted or denied. N.T. p. 1198.

Upon review of the record, appellant established a *prima facie* case of retaliation for submitting an accommodation request to work from home. Appellant engaged in a protected activity by submitting an accommodation request. Because Akomolede and Petrina received notice of the accommodation request, the appointing authority was aware of appellant's protected activity. Following appellant's accommodation request, appellant was subjected to an adverse employment action when she received her 2020 EPR's "needs improvement" ratings. We further note appellant's accommodation request occurred on November 3, 2020 and appellant received her 2020 EPR on February 20, 2021. The timing of the occurrence between these two events are within a close proximity in time to infer causation. Therefore, appellant established a *prima facie* case of retaliation. *Robert Wholey Co., supra.*

However, the appointing authority presented legitimate non-discriminatory reasons illustrating how appellant's accommodation request had no relation to her 2020 EPR ratings. Akomolede credibly explained he allowed appellant to work from home until her accommodation request determination was complete. While Petrina contacted Akomolede regarding appellant's 2020 EPR's potential rating, Akomolede provided he did not know at the time of the correspondence. Petrina also did not review appellant's 2020 EPR at issue. Moreover, Akomolede explained appellant's ratings were the result of appellant's work performance issues, as articulated above. As such, we find Akomolede credible that appellant's accommodation request did not affect how he created

appellant's 2020 EPR. These merit-related reasons regarding appellant's ratings were not rebutted as pretextual. As such, we find the appointing authority established merit-related reasons supporting appellant's 2020 EPR.³³ *Henderson, supra.*

C. Appellant's Grievance Retaliation Claim

Appellant argued Akomolede retaliated against her because of her attempt to file a grievance. During the fact-finding meeting on December 3, 2020, appellant asserted Akomolede understood she was intending to file a grievance against him. N.T. p. 306; Ap. Ex. 1 (p. 1). Appellant contended her EPR is a reflection of her negative relationship with Akomolede. N.T. p. 1790. Appellant admitted she never filed a grievance. N.T. p. 634.

Akomolede testified he was not privy to appellant asking for a grievance on November 3, 2020. N.T. pp. 1001-1002; Ap. Ex. 1 (p. 1). Akomolede did not see appellant's November 3, 2020 email before preparing her EPR. N.T. p. 1001. Akomolede emphasized he was unaware appellant was contemplating filing a grievance against him. N.T. p. 1223. Akomolede confirmed appellant's desire to file a grievance was not considered when conducting her 2020 EPR because he was unaware of it when he created the EPR. N.T. pp. 1023-1024. Notably while he was aware appellant raised complaints to Parr about himself, Akomolede insisted they did not affect his judgment of appellant's work performance when creating her 2020 EPR. N.T. pp. 1084, 1225.

³³ Both parties in their closing briefs argued whether the appointing authority's denial of appellant's accommodation request was motivated by discrimination. Ap. Br; AA. Br. This issue is not before the Commission in this appeal. Rather, the issue before us is whether appellant's 2020 EPR was motivated by discrimination.

Upon review of the record, the Commission finds appellant has failed to establish a *prima facie* case of retaliation for her attempt to file a grievance. By appellant's admission, she never filed a grievance against Akomolede. While she insisted she had the intention to file a grievance against him, appellant did not engage in a protected activity to establish a *prima facie* case of retaliation. *Robert Wholey Co., supra*.

Furthermore, even if appellant did establish a *prima facie* case, the appointing authority presented legitimate non-discriminatory reasons to support appellant's 2020 EPR. Specifically, Akomolede rated appellant in relation to her work performance issues and difficulties in meeting the Referee Standards, as articulated above. These merit-related reasons were not rebutted by appellant as pretextual. *Henderson, supra*.

Appellant's Disparate Treatment Claims

Appellant further argued Akomolede's ratings of appellant's work performance is motivated by disparate treatment because of three reasons. First, appellant claimed Akomolede rated appellant differently than Pandemic Unemployment Assistance (hereinafter "PUA") Referees. Second, appellant claimed Akomolede treated appellant differently than another Referee who received an accommodation to work from home. Third, appellant claimed Akomolede held her to different standards than other similarly situated Referees.

A. Appellant's PUA Disparate Treatment Claim

Appellant argued she was treated differently than PUA Referees. N.T. pp. 147-148. Specifically, PUA Referees were permitted to telework from home.³⁴ N.T. pp. 1482, 1498, 1595. Appellant claims she was never trained regarding the PUA program. N.T. pp. 147-148. However, appellant did not volunteer to be a PUA Referee. N.T. pp. 1597, 1868.

To establish a disparate treatment claim, an employee must demonstrate that she was treated differently than others who were similarly situated. *Nwogwugwu*, 141 Pa. Commw. at 40, 594 A.2d at 851. Upon review of appellant's presentation, the Commission finds appellant did not establish a *prima facie* case of disparate treatment. While appellant asserted PUA Referees were permitted to work from home, appellant did not demonstrate how she as an Appeals Referee was similarly situated to PUA Referees. Additionally, while appellant asserted she never received PUA program training, she did not volunteer to be a PUA Referee. While the burden of proof for a discrimination claim cannot be onerous, appellant's presentation is insufficient to establish a *prima facie* case of disparate treatment in relation to other PUA Referees. *Nwogwugwu, supra*.

B. Appellant's Disparate Treatment Claim Related to Accommodation Requests

Related to how appellant's 2020 EPR was influenced by her accommodation request, appellant argued another referee requested to work exclusively from home and was granted the accommodation. N.T. pp. 320, 644,

³⁴ PUA is a program under the CARES Act that provides unemployment insurance for individuals who did not qualify for regular unemployment benefits. N.T. p. 1590. PUA was for self-employed individuals and business owners. N.T. p. 1590. All PUA cases were single-party cases. N.T. p. 1591. Due to the large upheaval in PUA cases and the fact regular Appeals Referees had their own offices, PUA Referees were permitted to telework five days. N.T. p. 1595.

784. While she claimed to have known the Referee and the Referee's circumstances in requesting to work from home, appellant could not identify whether the Referee conducted UC appeals and did not describe the details of this Referee's request. N.T. p. 645.

Through reviewing the Bristol Office's information, Petrina confirmed that "as far as we could tell in our system and the request that we had, no one else had requested full-time telework, and no one was eligible for full-time telework except for that unit." N.T. p. 1464. Notably, Akomolede and Parr did not receive or recall other Referees requesting an accommodation to work from home. N.T. pp. 1243, 1599.

Upon review of the record, we find appellant failed to establish a *prima facie* case of disparate treatment in relation to accommodation requests being approved. Appellant did not demonstrate how another Referee's accommodation request was similarly situated to her own accommodation request. Appellant did not describe the nature of this Referee's accommodation request or how this Referee is similarly situated to herself. Additionally, Petrina, Akomolede, and Parr confirmed no other Referee requested an accommodation to work from home from the Bristol Office. While appellant contends the denial of her accommodation request differentiates between another Referee's granted accommodation request, this fact alone is insufficient to establish a disparate treatment claim. *Nwogwugwu, supra*.

C. Appellant's Disparate Treatment Claim for Different Standards

Appellant argued Akomolede held her to a higher standard than other Referees. She claimed Akomolede did not want her to have a day's worth of appeals pending dictation at the end of her work week. N.T. pp. 725-726. Appellant further argued Akomolede would not permit her to have any cases in her backlog when other Referees would be permitted to have a backlog. N.T. p. 454. Appellant contended other Referees would have more time to conduct hearings and complete case dictations than her. N.T. pp. 800-801. Appellant claimed she held more two-party hearings than other Referees. N.T. p. 148. Appellant contended her office did not receive the same number of cases as other offices because there could be more employers in one office's location than another office. N.T. pp. 1825-1826. Appellant acknowledged she did not have any numbers to support her assertion but for her own work experience. N.T. p. 864.

In response, Akomolede testified he held appellant to the same standards as other Referees. N.T. p. 1119. Akomolede confirmed appellant did not receive more cases than other Referees. N.T. p. 1112. Specifically, the amount of appeals a Referee receives was dependent on the number of appeals filed in the Referee's area. N.T. p. 1642. Parr also explained the two-party hearings were assigned at random to Referees, including appellant. N.T. p. 1562. Akomolede emphasized he did not ask appellant to perform a task he did not ask of other Referees. N.T. p. 1263.

Akomolede recalled throughout her rating period, appellant would exceed the Referee Standard's limit of having a backlog at the end of most weeks. N.T. p. 1088. Akomolede explained the Referee Standards limited a Referee's backlog to seven decisions because traditionally, Referees would be conducting seven hearings a day. N.T. pp. 1088, 1121. Akomolede contended he did not hold appellant to the backlog of seven decisions because Referees were not holding seven hearings a day. Instead, Akomolede instructed appellant to not hold more than one day's worth of hearings at the end of the week. N.T. pp. 1074, 1089, 1120-1121. Akomolede emphasized he was attempting to coach appellant to be better because of her work performance issues related to dictations and issuing decisions. N.T. p. 1076.

On September 1, 2020, appellant met with Akomolede to discuss her work performance. N.T. p. 774. After the meeting, Akomolede emailed appellant providing her instructions to issue decisions in hearings that were late and did not go out and to be consistent in her work performance moving forward. N.T. pp. 1082, 1126-1127; Ap. Ex. 2 (p. 2).

Furthermore, on November 5, 2020, Akomolede, Jill Miller, and appellant met to discuss his instructions to appellant and to discuss appellant's problems with her accountability and work performance. N.T. pp. 324, 559, 1105-1106, 1233-1234, 1239, 1713; AA Ex. 14. Appellant asserted Akomolede gave her standards that were different than the Referee standards referenced during the meeting. N.T. p. 235. However, during the meeting Akomolede discussed with appellant the following work performance concerns: 1) appellant's failure to approve

her clerk's time and attendance, 2) appellant's outstanding decision and dictation backlog, 3) appellant sending her clerk all of her decisions at the end of the workday, 4) appellant's leave request and WARs being inconsistent and untimely,³⁵ and 5) appellant's supervisory responsibilities for her clerk. N.T. pp. 241, 244-251, 590-591; AA Exs. 14

Upon review of the record, we find appellant did not establish a claim of disparate treatment associated with appellant's compliance with the Referee Standards. Appellant did not present how she was treated differently than another similarly situated Referee. Although appellant argued Akomolede did not want appellant to have a backlog, Akomolede's instructions to appellant reflect how he held appellant to only having one day's worth of hearings at the end of the week. Indeed, while the Referee Standards dictate Referees are not to exceed a backlog of seven decisions to be dictated at the end of a week, Akomolede instructed appellant's backlog to be equivalent to the number of cases she was conducting in a day because Referees were not holding seven hearings a day due to the COVID-19 pandemic's restrictions. While appellant contends she did not receive the same amount of cases as other Referees because her office's location has more employers than other

³⁵ Referees are permitted to schedule a day without any hearings with their supervisor's permission. N.T. p. 1201. Akomolede recalled while he was reviewing Referees' schedules, he discovered appellant not having a schedule for a day on multiple occasions. N.T. p. 1093. For example, Akomolede discovered appellant decided to take herself off the schedule on September 15, 2020 without his approval when he was attempting to find Referees to fill in for a Referee that was out sick. N.T. pp. 1130, 1195-1196. Appellant chose not to schedule any hearings for a date without notifying Akomolede. N.T. p. 1200. Akomolede explained he discovered appellant scheduled herself out before the date occurred. N.T. p. 1200. Akomolede recalled emailing appellant about scheduling herself a day without hearings without his permission. N.T. p. 1204.

offices, we are not persuaded. Akomolede and Parr credibly explained appellant did not receive more cases in comparison to other Referees because they were assigned at random. Therefore, we find appellant was not held to different standards than other Referees. *Nwogwugwu, supra*.

Appellant's Union Affiliation Claim

Appellant asserted McDonough and Akomolede reviewed her work emails to her union representative, which influenced her EPR. N.T. p. 761. On October 29, 2020, appellant communicated with Union Representative Rose Betti regarding her conversations with Parr and also discussed whether appellant would file a grievance against Akomolede. N.T. pp. 588-589; Ap. Ex. 1 (pp. 7-8). On October 30, 2020, appellant drafted her email to Parr and sent it to Betti for her opinion. N.T. pp. 557-558, 572; Ap. Ex. 2 (pp. 7-8). On November 3, 2020, appellant expressed to Betti she wanted to file a grievance. N.T. pp. 778-779. Appellant acknowledged she, as a Commonwealth employee, has no expectation of privacy in her emails.³⁶ N.T. p. 856.

During the investigation into appellant's violations, McDonough took an email capture of appellant's email account.³⁷ N.T. p. 1371; AA Ex. 42. McDonough denied taking into consideration appellant's emails to her union representative. N.T. p. 1438. McDonough testified that while it is not against policy

³⁶ The IT Acceptable Use Policy states an employee should have no expectation of privacy when it comes to their Commonwealth email account. N.T. p. 1374.

³⁷ An email capture is a tool that takes a screenshot of an employee's Outlook email account at a particular point in time N.T. pp. 1372, 1386-1387. It is common to request an email capture when the employee is charged with theft of time. N.T. p. 1436. The scope of the email capture was whether appellant sent emails from her start time of 8:30 a.m. to 10:00 a.m. on November 2, 2020 and November 4, 2020. N.T. p. 1394.

for her to review emails between an employee and her union, she keeps that information separate from any of her investigations because of the sensitive content. N.T. pp. 1374-1375. McDonough testified she did not share any of the contents of the emails with anyone, especially Akomolede or Miller. N.T. pp. 1375, 1400; AA Ex. 42. McDonough emphasized that when she saw that there were emails between appellant and her union steward Betti, she kept them separate from the investigation. N.T. pp. 1375, 1389; AA Ex. 42.

Meanwhile, Akomolede testified he never saw any of appellant's correspondence with her union representative. N.T. pp. 1022, 1215, 1231. Akomolede emphasized he did not consider appellant's union affiliation or her relationship with her union representative when he rated her work performance in appellant's EPR. N.T. p. 1023.

Upon review of the record, we find appellant did not establish her union affiliation or correspondence to her union representative more likely than not impacted her 2020 EPR ratings. 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. *Nwogwugwu*, 141 Pa. Commw. at 38. Appellant argued McDonough and Akomolede's review of her emails to her union representative influenced her 2020 EPR ratings. However, McDonough explained when she performed the email capture of appellant's email account, she not only did not share any of the contents with another individual, but also kept appellant's emails to her union representative separate from the investigation. Furthermore, Akomolede provided credible

testimony he never reviewed appellant's emails to her union representative. Indeed, we find Akomolede credible that he did not consider appellant's union affiliation or her correspondence to her union representative in creating appellant's 2020 EPR. We further note appellant did not provide evidence on how Akomolede would review her emails to her union representative. Therefore, we find appellant did not establish her union affiliation more likely than not affected her 2020 EPR ratings. *Nwogwugwu, supra.*

Appellant's Technical Discrimination Claims

Appellant argues two claims of technical discrimination in violation of Act 71 of 2018. First, appellant asserted she did not receive the Referee Standards when she received her 2020 EPR. N.T. pp. 346, 723. Appellant contended since she did not receive the Referee Standards, she did not know whether her work performance throughout the rating period was rated in comparison to the Referee Standards. N.T. pp. 346, 719. Yet, appellant acknowledged receiving the Referee Standards before receiving her 2020 EPR on November 3, 2020. N.T. pp. 625, 842-843.

Appellant's second claim of technical discrimination is she never received a meeting with her reviewing officer. On February 20, 2021, appellant checked off "I would like to discuss this rating with my reviewing officer." N.T. pp. 328, 752, 1225, 1601-1602, 1897; AA Ex. 53. Pursuant to § 604.3, "the employee will be given an opportunity to review the performance evaluation with

the rater and reviewing officer.”³⁸ 4 Pa. § 604.3. Despite requesting a meeting, appellant did not have a meeting with Parr. N.T. pp. 329, 333, 752-753, 820. Appellant explained she did not receive a reason for why she did not receive a meeting with Parr. N.T. p. 754. Appellant also asserted she did not communicate with Parr after requesting a meeting because she feared retaliation for her complaints about Akomolede. N.T. pp. 1844, 1846. She contended if she was given the opportunity to meet with Parr, then her 2020 EPR ratings would have changed. N.T. p. 1795. Appellant acknowledged the issues she would have raised with Parr were articulated throughout the days of hearings before the Commission. N.T. pp. 756, 820.

In response, Parr emphasized he was unaware appellant wanted to meet with him to discuss her 2020 EPR’s ratings. N.T. pp. 1608-1609. Parr explained appellant never notified him she wanted to meet with him regarding her 2020 EPR. N.T. p. 1605. Parr testified even if he had met with appellant about her 2020 EPR, he would not have changed her 2020 EPR’s ratings.³⁹ N.T. p. 1606.

When there is an allegation of technical discrimination, no showing of intent is required. There must be evidence, however, to show appellant was harmed by the technical noncompliance or that because of the peculiar nature of the

³⁸ We note the cited Regulation was in effect from March 28, 2019 to March 11, 2022, at the time of appellant’s 2020 EPR.

³⁹ Parr explained appellant met with him on October 29, 2020 and January 8, 2021 regarding her work performance, his position on Akomolede’s requests as her supervisor, and any issues she wanted to raise with him. N.T. p. 1583, 1605. Parr acknowledged these meetings were before appellant received her 2020 EPR. N.T. p. 1606.

procedural impropriety that he or she could have been harmed but there is no way to prove that for certain. *Pronko*, 114 Pa. Commw. at 439, 539 A.2d at 462. We now turn to whether appellant established the appointing authority committed technical noncompliance that could have harmed her.

In reviewing appellant's first technical discrimination claim, appellant claims she did not know whether her work performance was being rated in comparison to the Referee Standards. Upon reviewing appellant's 2020 EPR, it's noted appellant received the Referee Standards on January 13, 2020, which is before the COVID-19 pandemic began. Comm. Ex. A; Ap. Ex. 3; AA Exs. 53, 58. Also, appellant's acknowledgement of receiving the Referee Standards before receiving her 2020 EPR on November 3, 2020 consistently places appellant on notice of the standards being used for evaluating her work performance throughout the pandemic. Additionally, appellant did not present how she could have been harmed by the Referee Standards not being attached. As such, appellant did not establish her first technical discrimination claim by failing to present how the appointing authority's failure to attach the Referee Standards could have harmed her. *Pronko, supra*.

Reviewing appellant's 2020 EPR, she did check off the section requesting a meeting with her reviewing officer. Appellant argued she did not receive a meeting with Parr, appellant's reviewing officer, and Parr admitted the meeting never took place. Nonetheless, the fact appellant did not meet with Parr as the reviewing officer to communicate appellant's concerns about her 2020 EPR was a harmless error. Appellant's inability to meet with her reviewing officer was cured during the course of the six-day hearing where appellant articulated arguments and

objections to the EPR's rating before this Commission and by effect Parr. Even if appellant met with Parr, Parr stated he would not change appellant's ratings because of her work performance issues articulated above. Accordingly, we find that while appellant has established the appointing authority committed a technical violation of the Act and Rules when Parr did not meet with appellant, the peculiar nature of this error resulted in a harmless error. *Pronko, supra*.

Conclusions

In summation, the Commission holds appellant's 2020 EPR was not motivated by discrimination. Appellant's 2020 EPR was not the result of Akomolede's mistake of fact regarding her work performance throughout the rating period. Furthermore, appellant's 2020 EPR ratings were not motivated by retaliatory motives for her reports, accommodation request, or intended grievance. Additionally, appellant's 2020 EPR was not motivated by disparate treatment, where appellant was held to the same standards as other Referees. We further conclude appellant's 2020 EPR was not influenced by her union affiliation or her correspondence with her union representative. Lastly, while appellant established a violation of the Act and Rules when she did not receive a meeting with her reviewing officer, this noncompliance was a harmless error that has been remedied by appellant's participation in this case. 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 Catherine A. Rothaug challenging her Employee Performance Review for the rating period January 1, 2020 to December 31, 2020, in her position as an Appeals Referee, regular status, and sustains the action of the Department of Labor and Industry, in the Employee Performance Review of Catherine A. Rothaug for the rating period from January 1, 2020 to December 31, 2020, in her position as an Appeals Referee, regular status.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Pamela M. Iovino
Commissioner

Mailed: March 20, 2023