

COMMONWEALTH OF PENNSYLVANIA

Catherine A. Rothaug	:	State Civil Service Commission
	:	
v.	:	
	:	
Office of Administration, Executive Offices	:	Appeal No. 30707
	:	
Gerald R. Clarke Attorney for Appellant		Kayla A. Hammond Anthony R. Holbert Attorneys for Office of Administration

ADJUDICATION

This is an appeal by Catherine A. Rothaug challenging the determination by the Office of Administration, Executive Offices that she was not eligible for Workers’ Compensation Judge employment (Job No. CS-20203150-07350). A hearing was held on November 12, 2021, via video, before Commissioner Bryan R. Lentz.

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 the Office of Administration’s determination that appellant was not eligible for Workers’ Compensation Judge employment was the result of discrimination.

FINDINGS OF FACT

1. By email dated March 4, 2021, appellant was informed she did not meet the minimum experience and training requirements (hereinafter “METs”) for Workers’ Compensation Judge, Job No. CS-20203150-07350 and was determined to be ineligible. Comm. Ex. A.

2. The March 4, 2021 email reads, in pertinent part:

We regret to inform you that you do not meet the minimum experience and training requirements for Workers’ Compensation Judge. The minimum experience and training requirements are listed below.

Five years of Workers’ Compensation practice before administrative agencies, or equivalent experience.

Your application does not show five years of Workers’ Compensation practice before administrative agencies; therefore, you do not qualify under the first option.

The equivalency means you can substitute specific experience in related areas of law. Examples of qualifying experience considered would be presiding over judicial or quasi-judicial proceedings as a judge, magistrate or hearing officer, acting as a legal representative in judicial or quasi-judicial proceedings or experience as a law clerk or opinion

writer. Related areas of law include social security disability, personal injury cases. Your application does not show any experience in a related area of law; therefore, you do not qualify under the equivalency.

Comm. Ex. A.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. C.
4. Appellant is currently employed as a Hearing Officer/Appeals Referee for the UC Board of Review. N.T. pp. 31-32, 36; OA Ex. 4 (p. 1).
5. On or about December 22, 2020, appellant applied for Workers Compensation Judge, Job Number CS-20203150-07350. N.T. p. 88; OA Ex. 4.
6. By email dated December 31, 2020, appellant was informed she was not eligible for the position because she did not have the required experience. No further explanation was provided. N.T. pp. 89-90; OA Ex. 5.

7. On January 2, 2021, appellant filed a challenge to the December 31, 2020 ineligibility decision. N.T. p. 91; OA Ex. 6.
8. By email dated March 4, 2021, appellant was informed she did not qualify for the position because she did not show any experience in a related area of law. N.T. pp. 92-93; Comm. Ex. A.

Minimum Experience and Training Requirements

9. The job posting for Workers' Compensation Judge, Job Number CS-20203150-07350 sets forth the qualifications for the position. OA Ex. 1 (p. 2).
10. The qualifications for Workers' Compensation Judge, Job Number CS-20203150-07350 are as follows: 1) meet the Pennsylvania residency requirement; 2) be an attorney in good standing before the Supreme Court of Pennsylvania; 3) satisfy the METs; and 4) be able to perform the essential job functions. OA Ex. 1 (p. 2).

11. The METs are set forth on the job posting for Workers' Compensation Judge, Job Number CS-20203150-07350 and the job specification for Workers' Compensation Judge. OA Exs. 1 (p. 2), 2 (p. 2).
12. The METs require applicants to have “[f]ive years of Workers' Compensation practice before administrative agencies, or equivalent experience.” OA Exs. 1 (p. 2), 2 (p. 2).
13. The term “equivalent experience” is not defined in the job posting for Workers' Compensation Judge, Job Number CS-20203150-07350 or the job specification for Workers' Compensation Judge. OA Exs. 1 (p. 2), 2 (p. 2).
14. The term “equivalent experience” is only defined in the Evaluation Guide for the Worker's Compensation Judge job title. N.T. pp. 180-182; OA Ex. 3.
15. Evaluation Guides are interpretive guides that assist evaluators in understanding the type of experience which qualifies for a particular position. N.T. pp. 160, 164.

16. Only the evaluators and the Human Resources Office have access to Evaluation Guides. N.T. p. 179.
17. Applicants do not have access to Evaluation Guides. N.T. p. 179.
18. Evaluation Guides are not publicized. N.T. p. 216.
19. Appellant did not see the Evaluation Guide for the Workers' Compensation Judge job title prior to the hearing on the present appeal. N.T. p. 43.
20. The Evaluation Guide for the Workers' Compensation Judge job title defines "equivalent experience" as "at least five years of experience practicing before administrative agencies or courts of record (e.g., Commonwealth Court) which involved related areas of law." OA Ex. 3 (p. 1).
21. The Evaluation Guide for the Workers' Compensation Judge job title defines "related areas of law" as "those which provide candidates with a basic understanding of medical terms and findings, treatment methods and probable results, and

particularly, the relationship between physical and psychological impairment and a person's ability to work e.g., social security disability, personal injury cases, etc.” OA Ex. 3 (p. 2)(emphasis omitted).

22. The Evaluation Guide for the Workers' Compensation Judge job title provides experience in a related areas of law must be in the capacity of one or a combination of the following: 1) presiding over judicial or quasi-judicial proceedings as a judge, magistrate, or hearing officer; 2) acting as a legal representative in judicial or quasi-judicial proceedings; or 3) experience as a law clerk or opinion writer. OA Ex. 3 (p. 2).
23. The Evaluation Guide for the Workers' Compensation Judge job title lists examples of typical duties for hearing officers, legal representatives, and opinion writers. OA Ex. 3 (p. 2).
24. Typical duties for hearing officers include: 1) conducting pre-hearing conferences to identify the issues, exchange or limit exhibits, limit the number of witnesses, etc.; 2) issuing subpoenas; 3) explaining hearing procedures; 4) controlling the course of the hearing; 5) listening to and analyzing

testimony and evidence; 6) examining the parties and their witnesses; 7) ruling on objections, motions, and the admissibility of evidence; 8) researching laws, rules, and precedent decisions; and 9) preparing written decisions. OA Ex. 3 (p. 2).

25. Typical duties for legal representatives include: 1) gathering facts and evidence to formulate defense or initiate legal action; 2) interviewing clients, witnesses and other parties involved; 3) developing strategy, arguments, and testimony in preparation for presentation of cases; 4) examining/cross-examining witnesses; 5) raising objections and motions; 6) requesting admission of evidence; and 7) preparing and filing legal briefs. OA Ex. 3 (p. 2).
26. Typical duties for opinion writers include: 1) analyzing testimony and evidence; 2) researching laws, rules, and precedent decisions; and 3) drafting legal opinions for a judge of a hearing body such as a board of review. OA Ex. 3 (p. 2).

Appellant's Qualifications

27. Appellant resides in Pennsylvania. N.T. p. 39; OA Ex. 4 (p. 1).
28. In 2004, appellant obtained her Juris Doctor degree from Penn State Dickinson School of Law. N.T. p. 34; OA Ex. 4 (p. 1).
29. Appellant is an attorney in good standing. N.T. p. 40; OA Ex. 4 (p. 2).
30. Appellant never practiced in the area of Workers' Compensation. N.T. pp. 40, 83.
31. On her application, appellant indicated she has experience in Unemployment Compensation Law. OA Ex. 4.
32. On her application, appellant indicated from 2007 to the present, she has presided over administrative hearings as an Appeals Referee for the UC Board of Review. OA Ex. 4 (p. 1).
33. As an Appeals Referee, appellant presided over four to seven hearings a day, five days a week for thirteen years. N.T. p. 55.

34. As an Appeals Referee, appellant must determine whether a claimant who is seeking unemployment compensation is able and available for suitable work as required by Section 401(d)(1) of the Unemployment Compensation Law, 43 P.S. § 801(d)(1). N.T. p. 69.
35. To be “able and available for suitable work,” claimants must be physically, psychologically, and legally able to do some kind of work that attaches them to the existing labor market. N.T. p. 69.
36. As an Appeals Referee, appellant must determine whether a claimant, who leaves their job, has a “qualifying separation,” as required under Sections 402(b) and (e) of the Unemployment Compensation Law, 43 P.S. §§ 802(b) and (e). N.T. pp. 71-72.
37. In determining whether claimants are “able and available for suitable work” or have a “qualifying separation, appellant frequently reviews medical documentation, doctor’s notes, and records from hospitals, urgent care facilities, rehabilitation hospitals, and substance abuse facilities. This review includes matters related to Workers Compensation injuries. N.T. pp. 71-76, 79-80.

38. On her application, appellant indicated she performs the following duties as an Appeals Referee: 1) reviews medical documents; 2) develops the record; 3) makes rulings on pre-hearing matters, pleadings, the admissibility of evidence, and scope of testimony; 4) examines witnesses; 5) issues subpoenas and enforces compliance; 6) conducts legal research; 7) maintains current knowledge of applicable laws and regulations, to include state and federal laws pertaining to labor, employment, and taxation; and 8) prepares written decisions and orders with findings of fact and conclusions of law. OA Ex. 4 (p. 1).

39. On her application, appellant indicated she served as Assistant Counsel for the UC Board of Review from August 2004 to December 2007. OA Ex. 4 (p. 1).

40. On her application, appellant indicated she performed the following duties as Assistant Counsel for the UC Board of Review: 1) reviewed medical documentation; 2) drafted and submitted briefs and motions to Commonwealth Court in support of UC Board of Review decisions; 3) reviewed counter pleadings for sufficiency and compliance with

Court rules; 4) conducted legal research; 5) maintained current knowledge of applicable laws and regulations, to include state and federal laws pertaining to labor, employment, and taxation; and 6) drafted written decisions and orders with findings of fact and conclusions of law. OA Ex. 4 (p. 2).

Review of Appellant's 2020 Application

41. Human Resource Analyst 2 Andrea Bentzel was responsible for evaluating appellant's 2020 application for Workers Compensation Judge. N.T. p. 167.
42. Bentzel determined appellant was ineligible for Workers Compensation Judge employment because she did not list any experience on her application showing she had a basic understanding of the relationship between physical and psychological impairment. N.T. p. 177.
43. In making her determination, Bentzel reviewed: 1) appellant's application; 2) appellant's response to the supplemental questions; 3) the job specification; and 4) the Evaluation Guide. N.T. pp. 167, 173.

44. Bentzel did not review appellant's responses to the Work Behavior Questions. N.T. pp. 176, 208.
45. Work Behavior Questions are only reviewed after a candidate has been made eligible. N.T. p. 206.
46. Work Behavior Questions are not reviewed due to the number of applications OA receives. N.T. p. 207.
47. Upon reviewing appellant's application, Bentzel concluded appellant failed to explain the term "medical documents" with sufficient clarity. N.T. pp. 210-211.
48. On her 2020 application, appellant did not use the terms "medical treatment methods," "probable results," or the phrase "developed an understanding of the relationship between physical or psychological impairment and an individual's ability to work." N.T. pp. 119, 121-123; OA Ex. 4 (pp. 1-2).
49. Bentzel concluded appellant's responses to Supplemental Question Nos. 5 and 6 were insufficient to satisfy the METs for the following

reasons: 1) appellant indicated she had less than five years of experience; 2) appellant did not use the phrase “relationship between physical and psychological impairment and a person’s ability to work” in the application section; and 3) appellant failed to explain how this phrase related to her job. N.T. pp. 168-170, 172-173.

50. Supplemental Question No. 5 asked applicants:

How many years of full-time experience practicing before administrative agencies or courts of record (e.g., Commonwealth Court) which involved related areas of law which involved the relationship between physical or psychological impairment and a person’s ability to work (e.g., social security disability, personal injury, etc.) do you possess?

- 5 years or more
- 4 years but less than 5 years
- 3 years but less than 2 years [sic]
- 2 years but less than 3 years
- 1 years but less than 2 years
- Less than 1 year
- None

OA Ex. 1 (p. 3), 4 (p. 5).

51. Appellant selected “3 years but less than 2 years” in response to Supplemental Question No. 5 to reflect the number of years she practiced as an Assistant Counsel. N.T. pp. 124, 127-128, 141-142; OA Ex. 4 (p. 5).
52. The pre-populated answer of “three, but less than two years” for Supplemental Question No. 5 was a typographical error. The answer should have read “three but less than four years.” N.T. p. 162.
53. Supplemental Question No. 6 provided applicants with an opportunity to expand upon their answer to Supplemental Question No. 5. OA Ex. 1 (p. 4), 4 (p. 5).
54. Supplemental Question No. 6 instructed applicants:
CS-MET2 If you are claiming experience in the above question, please list the employer(s) where you gained this experience in the text box below. The employer(s) and a description of the experience must also be included in the appropriate sections of your application if you would like the experience to be considered in the eligibility decision. If you claimed you do not have experience, type N/A in the text box below.

OA Ex. 1 (p. 4), 4 (p. 5).

55. Appellant responded to Supplemental Question No. 6 as follows:

EMPLOYER: Commonwealth of Pennsylvania, Unemployment Compensation Board of Review
DESCRIPTION OF EXPERIENCE: Draft Board Decisions/Orders and subsequent defense of them before Commonwealth Court including drafting pleadings, motions and briefs on matters of unemployment compensation law, which often involve the relationship between physical/psychological impairment and a person's ability to or availability for work.

OA Ex. 4 (p. 5).

56. Supplemental Question Nos. 5 and 6 did not address appellant's thirteen years of experience as a hearing officer. N.T. pp. 183-184.
57. There were no supplemental questions which asked applicants about their hearing officer experience. OA Ex. 1 (pp. 3-4), 4 (p. 5).
58. Only the Work Behavior Questions addressed hearing officer experience. OA Ex. 1 (pp. 4-7), 4 (pp. 5-7).

59. Upon finding appellant ineligible, Bentzel sent appellant an ineligibility notice. N.T. p. 174.
60. Appellant challenged Bentzel's ineligibility determination. N.T. pp. 174-175.
61. Challenges are reviewed by Bentzel's supervisor. N.T. p. 175.
62. OA's challenge process does not permit applicants to provide additional information. N.T. p. 175.
63. The same information is reviewed during the challenge process. N.T. p. 175.

Review of Appellant's 2013 Application

64. In 2013, appellant was found eligible for the position of Workers' Compensation Judge. N.T. pp. 95, 101.
65. Appellant's 2013 application was submitted to the State Civil Service Commission. N.T. p. 134; Ap. Ex. 9.

66. Human Resource Analyst 2 Bentzel evaluated appellant's 2013 application. N.T. pp. 102, 189-190; Ap. Ex. 8.
67. The job qualifications for the position of Workers Compensation Judge have not changed between 2013 and 2020. N.T. p. 145; OA Ex. 2.
68. The MET requirement that applicants have five years of Workers' Compensation or equivalent experience did not change between 2013 and 2020. N.T. p. 246; OA Ex. 2 (p. 2).
69. The job specification for the position of Workers Compensation Judge, which contains the job qualifications and METs for the position, was last updated November 11, 2006. OA Ex. 2 (p. 1).
70. In 2013, appellant's work experience and duties were the same, minus the number of years she served as an Appeals Referee. N.T. pp. 98-99, 102.

DISCUSSION

The present appeal challenges the March 4, 2021 determination by the Office of Administration, Executive Offices (hereinafter “OA”) in which OA found appellant ineligible for Workers’ Compensation Judge employment (Job No. CS-20203150-07350). Comm. Exs. A, B. Appellant alleges this determination was the result of discrimination on the grounds of mistake of fact. Comm. Ex. B. Specifically, appellant asserts she has sufficient qualifying experience to meet the minimum experience and training requirements (hereinafter “METs”) for Workers’ Compensation Judge employment. Comm. Ex. B.

In an appeal alleging discrimination, appellant bears the burden of establishing that the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989) *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990). Section 2704 of Act 71 of 2018 (hereinafter “Act 71”) provides:

An officer or employee of the Commonwealth may not discriminate against an individual in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of race, gender, religion, disability or political, partisan or labor union affiliation or other nonmerit factors.

71 Pa.C.S. § 2704. As expressly provided for in this section, the Commission has jurisdiction over claims of discrimination involving numerous actions that occur in the merit system, including “recruitment” and “examination.” 71 Pa.C.S. § 2704.

Under Section 3003(7)(ii) of Act 71, the Commission has authority to convene hearings when an individual aggrieved by an alleged violation of Section 2704 files a timely appeal. 71 Pa.C.S. § 3003(7)(ii).

The provisions of Section 2704 are substantially the same as the provisions in Section 905.1 of Act 286 (71 P.S. § 741.905a), and both sections of the respective acts use virtually the same language.¹ In applying this language, the courts have held these provisions address both “traditional” and “procedural” discrimination. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 462 (Pa. Commw. Ct. 1988). “Traditional discrimination” encompasses claims of discrimination based on race, sex, national origin, or other non-merit factors. Discrimination based upon a non-merit factor includes claims of mistake of fact discrimination. *See State Correctional Institution at Albion v. Bechtold*, 670 A.2d 224 (Pa. Commw. Ct. 1996).

¹ Section 905.1 provides:

905.1 Prohibition of Discrimination—No officer or employe[e] of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

71 P.S. § 741.905a.

In support of her appeal, appellant testified on her own behalf. OA presented the testimony of Human Resource Analyst 2 Andrea Bentzel² and Judge Manager David Cicola.³ The evidence presented by the parties is summarized below.

Summary of the Evidence

Appellant is presently employed as an Appeals Referee with the Department of Labor and Industry's Unemployment Compensation Board of Review (hereinafter "UC Board of Review"). N.T. pp. 31-32. Appellant has held this position for thirteen years. N.T. p. 32. Prior to serving as an Appeals Referee for the UC Board of Review, appellant obtained her Juris Doctor degree in 2004. N.T. p. 34. This led to appellant obtaining employment as Assistant Counsel for the UC Board of Review. N.T. p. 34. Appellant served as Assistant Counsel for approximately three years, until she was hired as an Appeals Referee in 2007. N.T. pp. 35-36.

² Bentzel is employed as a Human Resource Analyst 2 with OA's Bureau of Talent Acquisition. N.T. pp. 157-158. In that capacity, Bentzel is responsible for evaluating job applications to ensure the applicants meet the minimum experience and training requirements for the position. N.T. p. 159. Bentzel was responsible for evaluating appellant's application for the position presently at issue, as well as an application appellant submitted in 2013 for the same position. N.T. pp. 102, 167; Ap. Ex. 8; OA Ex. 4.

³ Cicola is employed as a Judge Manager by the Department of Labor and Industry's Workers' Compensation Office of Adjudication. N.T. p. 225. Cicola has held this position since February 2008. N.T. p. 226. As a Judge Manager, Cicola supervises twenty-one Workers' Compensation Judges and two interview hearing officers. N.T. p. 227. In addition to his supervisory duties, Cicola presides over and mediates disputed Workers' Compensation claims. N.T. p. 227. Prior to holding the position of Judge Manager, Cicola served in several other positions with the Department of Labor and Industry. N.T. p. 228. Also, during the course of his career, Cicola served as a subject matter expert for the Commission and OA in the creation of Evaluation Guides, to include the Evaluation Guide which was used in the present matter. N.T. p. 230; OA Ex. 3.

On or around December 2020, appellant came across the job posting for the Workers' Compensation Judge position at issue in the present matter. N.T. p. 36; OA Ex. 1. Appellant applied for the position on or about December 22, 2020. N.T. p. 88; OA Ex. 4. On December 31, 2020, appellant received an email indicating she was not eligible for the position because she did not have the required experience. N.T. pp. 89-90; OA Ex. 5. No explanation was provided in this email as to why appellant's experience was lacking. OA Ex. 5.

On January 2, 2021, appellant filed a challenge to the December 31, 2020 ineligibility decision. N.T. p. 91; OA Ex. 6. In challenging the decision, appellant reiterated she has thirteen years of experience as a hearing officer for the UC Board of Review which she argued satisfies the five years of equivalent experience requirement set forth in the job posting. N.T. p. 92; OA Ex. 6. Appellant did not submit any additional information upon filing the challenge nor was she contacted by anyone about the challenge. N.T. pp. 91-92, 94.

On March 4, 2021, appellant received a response to her January 2, 2021 challenge. N.T. pp. 92-93; Comm. Ex. A. The March 4, 2021 response informed appellant she did not qualify under the equivalency because she did not show any experience in a related area of law. Comm. Ex. A. The response further informed appellant:

Examples of qualifying experience considered would be presiding over judicial or quasi-judicial proceedings as a judge, magistrate or hearing officer, acting as a legal representative in judicial or quasi-judicial proceedings or experience as a law clerk or opinion writer. Related areas

of law include social security, personal injury cases.^[4] Your application does not show any experience in a related area of law; therefore, you do not qualify under the equivalency.

Comm. Ex. A.

Contrary to the above conclusion, appellant testified she has approximately sixteen years of combined experience as a hearing officer, legal representative, and opinion writer for the UC Board of Review, which she detailed on her application for the position. N.T. pp. 34-36; OA Ex. 4. Appellant further asserted this experience is in a related area of law, specifically Unemployment Compensation Law and procedures. N.T. p. 64. Appellant argues this experience satisfies the METs for the position.

The METs as set forth on the job posting required applicants to have “[f]ive years of Workers’ Compensation practice before administrative agencies, or equivalent experience.”⁵ N.T. p. 163; OA Ex. 1 (p. 2). Appellant acknowledges she never practiced in the area of Workers’ Compensation. N.T. pp. 40, 83. However, she argues her thirteen years of experience as an Appeals Referee for the UC Board of Review is equivalent experience.

⁴ No other areas of law were listed in the March 4, 2021 response. Comm Ex. A. However, the Evaluation Guide, which was used by OA to assess appellant’s application, suggests other areas of law may qualify provided the area of law imparts upon the applicant “a basic understanding of medical terms and findings, treatment methods and probable results, and particularly, the relationship between physical or psychological impairment and a person’s ability to work.” OA Ex. 3 (p. 2)(emphasis omitted).

⁵ Human Resource Analyst 2 Andrea Bentzel testified this requirement is also set forth in the job specification, which she defined as a document created and agreed upon by OA and the agency. N.T. pp. 160, 163-164; OA Ex. 2 (p. 2). We note the job specification for the Workers Compensation Judge position at issue in the present appeal was last updated on November 25, 2006, which was prior to OA taking over the responsibilities of merit system employment. OA Ex. 2 (p. 1). Effective December 13, 2018, the Commission entered into an Interagency Agreement with OA to undertake the duties and responsibilities of merit system employment that would become OA’s responsibility once Act 71 fully took effect on March 28, 2019.

The term equivalent experience is not defined in the job posting. OA Ex. 1. The definition of this term is only found in the Evaluation Guide for the position. N.T. pp. 40-41, 181-182; OA Ex. 3. Generally, Evaluation Guides are created by OA's Test Development Unit with the assistance of subject matter experts, such as supervisors or long-term employees who have expertise regarding the position.⁶ N.T. pp. 164-165. They are used as interpretive guides to assist evaluators in understanding the type of experience which qualifies for a particular position. N.T. pp. 160, 164. Evaluation Guides are not publicized, nor are they provided to applicants. N.T. pp. 179, 216. Appellant indicated she only saw the Evaluation Guide at issue in the present appeal during the course of preparing for her civil service hearing. N.T. p. 43.

Pursuant to the Evaluation Guide for the position of Workers Compensation Judge, "equivalent experience" is defined as "at least five years of experience practicing before administrative agencies or courts of record (e.g., Commonwealth Court) which involved related areas of law."⁷ N.T. p. 43; OA Ex. 3 (p. 1). The Evaluation Guide further defines related areas of law as those areas which provide candidates with a basic understanding of: 1) medical terms and findings;

⁶ Bentzel indicated the Evaluation Guide relied upon by OA in the present matter was created by the Commission when the Commission was responsible for civil service employment in Pennsylvania. N.T. p. 216. We note this Evaluation Guide is dated June 22, 2016, which is prior to the transfer of civil service employment to OA. N.T. p. 178; OA Ex. 3 (p. 1). With that said, Judge Manager David Cicola speculated he may have assisted OA in developing a later Evaluation Guide, but he was uncertain. N.T. pp. 246-249. No credible evidence was presented in support of Cicola's unsubstantiated belief.

⁷ Pursuant to the Evaluation Guide, only experience gained after graduation from an approved school of law is considered acceptable. OA Ex. 3 (p. 1). The mistake of fact claim asserted by appellant is limited to her post-law school experience. As such, this requirement is not in dispute.

2) treatment methods and probable results; and 3) the relationship between physical and psychological impairment and a person's ability to work. N.T. pp. 113, 139, 165; OA Ex. 3 (p. 2).

Human Resource Analyst 2 Andrea Bentzel, who was responsible for reviewing appellant's application, testified applicants must demonstrate they have a basic understanding of all three criteria listed above. N.T. pp. 166-167. Acceptable qualifying experience related to each criterion was further explained by Judge Manager David Cicola, who assisted in creating the Evaluation Guide for the position at issue in the present appeal. N.T. pp. 230-239.

Cicola explained medical evidence is critical in cases over which Workers' Compensation Judges preside. N.T. p. 232. Regarding the first criteria (medical terms and findings), Cicola noted Workers' Compensation Judges review medical records, diagnostic reports, narrative reports from physicians and other healthcare providers, and medical testimony from experts to answer various questions which are raised in Workers' Compensation petitions. N.T. pp. 232-233. Cicola stated these questions include: 1) Was there an injury; 2) What was the diagnosis of the injury; 3) Was the diagnosis causally related to a work event; 4) If not, was there an aggravation of a pre-existing condition; 5) To what degree is the individual disabled from a work-related condition; 6) If the individual is able to do some work, is that type of work available; and 7) Has the disability lessened or completely resolved? N.T. pp. 232-233. Additionally, Cicola noted it is important for an applicant to have familiarity with medical evidence and medical testimony because Workers' Compensation Judges need to make credibility determinations with respect to medical witnesses. N.T. p. 234.

Next, Cicola explained the second criteria (treatment methods and probable results) arises in cases where pre-approval requests or challenges have been filed regarding a particular treatment, as well as cases where the employer seeks to stop benefits because the employee refused reasonable treatment. N.T. p. 235. Cicola stated in these types of cases, the Workers' Compensation Judge reviews utilization review reports and expert medical testimony to assess the propriety of the treatment, which necessitates an understanding of the treatment methods and probable results. N.T. pp. 235-236.

Lastly, Cicola explained the third criteria (the relationship between physical and psychological impairment and a person's ability to work) relates to the applicant's ability to understand and analyze medical records and conflicting medical testimony, determine credibility, and write reasoned decisions. N.T. p. 237. Cicola stated when writing reasoned decision, Workers' Compensation Judges are required to explain why a particular witness is found to be credible, which is typically done through an assessment of deposition testimony from expert witnesses and the medical records presented by the parties. N.T. pp. 237-239. For example, Cicola stated a witness may be found not credible because the witness did not have an accurate history of the events or because the witness did not review certain diagnostic test results. N.T. p. 238.

The additional information Cicola provided is not contained in the Evaluation Guide or job posting for the position at issue. OA Exs. 1, 3. Regardless, appellant argues the information she provided on her application established she had

five years of experience in a related area of law as that term is defined in the Evaluation Guide. N.T. p. 82; OA Ex. 4. Appellant testified her experience is in Unemployment Compensation Law,⁸ which she asserts has “a great deal of overlap” with Workers’ Compensation. N.T. pp. 64, 76-77.

Appellant explained Unemployment Compensation Appeals Referees, like Workers’ Compensation Judges, address a person’s ability to work and the relationship between the employer and employee. N.T. pp. 76-78. Specifically, in each case over which appellant presides, she must determine whether a claimant who is seeking unemployment compensation is able and available for suitable work as required by Section 401(d)(1) of the Unemployment Compensation Law, 43 P.S. § 801(d)(1).⁹ N.T. p. 69. Appellant stated in making this determination, she is often required to review medical documentation, which necessitates a basic understanding of the evidence, including the relationship between physical and psychological impairment to the person’s ability to work. N.T. pp. 68, 78, 143.

Appellant testified when a claimant initially files for unemployment benefits, they are presumed to be able and available for suitable work, which means they are physically, psychologically, and legally able to do some kind of work that attaches them to the existing labor market. N.T. p. 69. However, if the claimant is disabled or a doctor indicates they are unable to work, the claimant would not qualify

⁸ The Unemployment Compensation Law is codified at 43 P.S. § 751 *et. seq.*

⁹ Appellant acknowledged she did not explain specific sections of the Unemployment Law on her application. N.T. p. 130.

for unemployment compensation benefits. N.T. p. 69. This includes situations where a claimant is psychologically disabled or in a rehab facility and unable to leave the facility. N.T. p. 70. Appellant stated when determining whether a claimant's physical or psychological impairment limits their availability for work, she often needs to review medical documentation, doctor's notes, and records from hospitals, urgent care facilities, rehabilitation hospitals, and substance abuse facilities. N.T. p. 71. Appellant testified these are common issues raised before and/or during the hearings over which she presides. N.T. pp. 69-70.

Another issue addressed by appellant during the hearings over which she presides is whether a claimant, who leaves their job, has a "qualifying separation," as required under Sections 402(b) and (e) of the Unemployment Compensation Law, 43 P.S. §§ 802(b) and (e). N.T. pp. 71-72. Appellant explained if the reason the claimant left the job is connected to a physical or psychological impairment, the claimant may not have a "qualifying separation" because they may not be available for suitable work. N.T. pp. 71-72. To further explain this concept, appellant provided the example of a pregnant certified nursing assistant (hereinafter "CNA") with a lifting restriction. N.T. pp. 72-76.

Appellant stated to determine whether the pregnant CNA is able to perform her job duties, she would need to review documentation from the CNA's doctor. N.T. pp. 72-74. Upon reviewing that information, appellant would then make the following determinations: 1) whether the doctor's information is credible; 2) whether the CNA is unable to perform one of the functions of her job (e.g., lifting more than fifteen pounds); 3) whether the CNA is still able to work; and 4) whether the employer has work available based on the limitation. N.T. pp. 73-74. Appellant pointed out this calculus would most likely change after the CNA gives birth because

doctors typically prohibit patients from working the first couple of weeks after birth. N.T. pp. 74-75. Thus, appellant explained the fluid nature of the CNA's ability to work necessitates that she review updated medical documentation as the CNA's pregnancy progresses. N.T. pp. 75-76. Appellant stated if the doctor subsequently determines the CNA can no longer work based on her physical state, she may no longer be eligible for unemployment. N.T. pp. 75-76. Appellant noted she conducts similar analyses regarding Workers' Compensation injuries and addictions. N.T. pp. 79-80.

Appellant testified she detailed her experience reviewing medical documentation on her application by noting she reviews such documentation as part of her current position and when she previously served as Assistant Counsel. N.T. pp. 120-122; OA Ex. 4 (pp. 1-2). With that said, appellant acknowledged when detailing her work experience on the application she did not use the terms "medical treatment methods" or "probable results," nor did she use the phrase "developed an understanding of the relationship between physical or psychological impairment and an individual's ability to work." N.T. pp. 119, 121-123; OA Ex. 4 (pp. 1-2).

In response to the testimony presented by appellant, Human Resource Analyst 2 Bentzel explained the procedure she follows when evaluating applications, along with the reasons appellant was found ineligible. Bentzel stated to determine whether an applicant is eligible for a position, she conducts a review of the job posting, job specification, and Evaluation Guide in conjunction with the application. N.T. p. 161. Bentzel indicated she used this same procedure when evaluating the applications for the Workers Compensation Judge position at issue in the present matter. N.T. p. 167.

Bentzel explained there were two options by which applicants could be found eligible for the Workers Compensation Judge position. N.T. p. 168; OA Exs. 1 (p. 2), 2 (p. 2), 3. The first option required applicants to have five years of Workers' Compensation practice before administrative agencies. N.T. p. 168; OA Exs. 1 (p. 2), 2 (p. 2). Alternatively, applicants who had five years of qualifying experience in a related area of law could be found eligible. N.T. p. 168; OA Exs. 1 (p. 2), 2 (p. 2), 3 (p. 1). Upon reviewing appellant's application, Bentzel concluded appellant was not eligible under either option. N.T. p. 168; OA Ex. 4.

There is no dispute appellant did not qualify under the first option. N.T. pp. 40, 168. Regarding the second option, Bentzel stated appellant did not show she had five years of qualifying experience in a related area of law on her application. N.T. p. 168. Bentzel intimated to establish qualifying experience in a related area of law, applicants needed to explain on their application how they met the criteria listed in the Evaluation Guide. N.T. pp. 165-166, 172-173, 203-204. Bentzel noted merely listing the terms used in the Evaluation Guide was insufficient to satisfy this requirement. N.T. p. 166. Rather, applicants were required to detail their experience in a way that Bentzel was able to understand it. N.T. p. 166. Bentzel stated she cannot assume anything because she is required to treat all applicants the same. N.T. p. 166.

However, Bentzel noted if an applicant is not clear on their application, she may refer to the applicant's responses to the supplemental questions. N.T. p. 168. Bentzel stated the answers to the supplemental questions are used to assist

the evaluator on an as needed basis. N.T. p. 209. Additionally, she noted the information provided in response to the supplemental questions must also be included in the application section.¹⁰ N.T. pp. 209, 214.

Bentzel concluded appellant was ineligible for the position because she did not list any experience on her application showing she had a basic understanding of the relationship between physical and psychological impairment, which is one of the three criteria listed on the Evaluation Guide. N.T. pp. 170, 177; OA Ex. 3 (p. 2). There is no dispute appellant indicated in the application section that she reviews medical documents in her current position as an Appeals Referee and her prior position as Assistant Counsel. OA Ex. 4 (pp. 1-2). There is also no dispute appellant has sixteen years of combined experience in these two positions. N.T. pp. 35-36; OA Ex. 4 (pp. 1-2). It is also undisputed appellant practices in the area of Unemployment Compensation Law. OA Ex. 4. However, Bentzel concluded appellant's explanations were insufficient to satisfy the METs. N.T. pp. 210-211.

Bentzel stated appellant's experience presiding in a quasi-judicial manner does not make her eligible unless it is in a related area of law. N.T. p. 177. Bentzel did not provide any testimony regarding what if any weight she gave the type of law appellant practiced. Bentzel merely noted appellant failed to indicate on her application that she makes decisions regarding whether claimants are able and

¹⁰ The application submitted by appellant is comprised of three sections—the application, supplemental questions, and work behavior questions. N.T. p. 169; OA Ex. 4. The application section is where appellant detailed her education, work experience, certificates and licenses, skills, references, and responses to agency-wide questions. N.T. p. 169; OA Ex. 4 (pp. 1-4).

available to work, which is a statutory component of Unemployment Compensation Law. N.T. p. 177. Bentzel also stated appellant needed to explain the term “medical documents” more clearly on her application. N.T. pp. 210-211. Bentzel did not specify what more was needed.

In support of her assessment, Bentzel pointed to appellant’s answers to Supplemental Question Nos. 5 and 6. N.T. pp. 168-170; OA Ex. 4 (p. 5). Supplemental Question No. 5 asked applicants:

How many years of full-time experience practicing before administrative agencies or courts of record (e.g., Commonwealth Court) which involved related areas of law which involved the relationship between physical or psychological impairment and a person’s ability to work (e.g., social security disability, personal injury, etc.) do you possess?

- 5 years or more
- 4 years but less than 5 years
- 3 years but less than 2 years [sic]
- 2 years but less than 3 years
- 1 years but less than 2 years
- Less than 1 year
- None

OA Ex. 1 (p. 3), 4 (p. 5). Supplemental Question No. 6 provided applicants with an opportunity to expand upon their answer to Supplemental Question No. 5. OA Ex. 1 (p. 4), 4 (p. 5). To that end, Supplemental Question No. 6 instructed applicants:

CS-MET2 If you are claiming experience in the above question, please list the employer(s) where you gained this experience in the text box below. The employer(s) and a description of the experience must also be included in the appropriate sections of your application if you would like the experience to be considered in the eligibility decision. If you claimed you do not have experience, type N/A in the text box below.

OA Ex. 1 (p. 4), 4 (p. 5). While Bentzel acknowledged neither of these questions covered appellant's thirteen years of experience as a hearing officer, she asserts appellant's responses are insufficient to establish the required experience. N.T. pp. 183-184.

There is no dispute appellant selected "3 years but less than 2 years" in response to Supplemental Question No. 5.¹¹ N.T. p. 124; OA Ex. 4 (p. 5). There is also no dispute appellant provided the following explanation in response to Supplemental Question No. 6:

EMPLOYER: Commonwealth of Pennsylvania,
Unemployment Compensation Board of Review

DESCRIPTION OF EXPERIENCE: Draft Board Decisions/Orders and subsequent defense of them before Commonwealth Court including drafting pleadings, motions and briefs on matters of unemployment compensation law, which often involve the relationship between physical/psychological impairment and a person's ability to or availability for work.

OA Ex. 4 (p. 5).

Bentzel asserted the above responses were insufficient to satisfy the METs for the following reasons: 1) appellant had less than five years of experience; 2) appellant did not use the phrase "relationship between physical and psychological

¹¹ Appellant testified she selected the pre-populated answer which most closely reflected her years of experience as Assistant Counsel for the UC Board of Review. N.T. pp. 127-128, 141-142; OA Ex. 4 (p. 5). Appellant stated she did not include her experience as an Appeals Referee because in that role, she does not "practice before" the agency or the courts, rather she "presides" over such matters. N.T. pp. 126, 141-142. With that said, appellant noted the choice she selected, "three, but less than two years," did not make sense. N.T. pp. 140-141. Bentzel explained there was a typo in this pre-populated response. N.T. p. 162. The answer appellant selected should have read "three but less than four years." N.T. p. 162.

impairment and a person's ability to work" in the application section; and 3) appellant failed to explain how this phrase related to her job. N.T. pp. 170, 172-173; OA Ex. 4. Bentzel noted Supplemental Question No. 6 warns applicants that any information they provide in response to this question must also be included in their application. N.T. p. 172; OA Ex. 4 (p. 5). Bentzel stated she cannot assume anything. N.T. p. 173. Bentzel explained her review is limited to the information provided on the application. N.T. p. 173. However, Bentzel was unable to articulate what more she needed for the explanation to be sufficient. N.T. p. 184.

Regarding the questions that followed, Bentzel testified she did not review them when evaluating appellant's application. N.T. pp. 176, 208. Bentzel stated Question Nos. 7 through 15 are Work Behavior Questions, which are part of the exam. N.T. pp. 176-177. Bentzel explained these questions are only reviewed after the candidate has been made eligible. N.T. p. 206. Bentzel also noted the Work Behavior Questions are not reviewed due to the number of applications OA receives. N.T. p. 207. Bentzel noted she reviews over 1000 applications per month and approximately ten to fifteen challenges are processed per month. N.T. pp. 174, 191, 198, 207. With that said, Bentzel testified appellant's response to the Work Behavior Questions, had they been reviewed, were insufficient to satisfy the METs. N.T. p. 176.

In response to Work Behavior Question Nos. 12 and 13, appellant indicated she reviews medical documents and medical texts.¹² OA Ex. 4 (p. 6). Bentzel testified this statement is insufficient to demonstrate experience in a related area of law because it does not show "the treatment method and probable results [or]

¹² Appellant testified the term "medical texts" encompasses evaluation guides, texts such as Grey's Anatomy, doctor's pamphlets and notes, as well as printouts from an emergency room. N.T. p. 145.

the relationship between physical and psychological impairment.” N.T. p. 176. Bentzel did not comment on the other duties appellant detailed in response to the Work Behavior Questions, which included her experience presiding over hearings, preparing written decisions, and researching applicable case law, including Workers Compensation Law, when issuing decisions. OA Ex. 4 (pp. 6-7). Bentzel also did not provide any testimony regarding her assessment of the qualifying duties appellant detailed in her application.

In addition to experience practicing in a related area of law, the Evaluation Guide requires applicants to have five years of experience in one or a combination of the following: 1) presiding over judicial or quasi-judicial proceedings as a judge, magistrate, or hearing officer; 2) acting as a legal representative in judicial or quasi-judicial proceedings; or 3) experience as a law clerk or opinion writer. OA Ex. 3 (p. 2). Examples of qualifying duties associated with each type of work are set forth in the Evaluation Guide. OA Ex. 3 (p. 2). Appellant testified she performed the required type of work in her roles as Appeals Referee and Assistant Counsel for the UC Board of Review. N.T. pp. 44-55, 57-59, 61-62; OA Exs. 3 (p. 2), 4 (pp. 1-2). Appellant detailed this experience on her application, in her responses to the Supplemental and Work Behavior Questions, and during the hearing on the present matter. N.T. pp. 44-55, 57-59, 61-62; OA Ex. 4.

Appellant testified, as an Appeals Referee, she performed the following qualifying duties: 1) identifying the issues; 2) exchanging and/or limiting exhibits; 3) limiting the number of witnesses, as well as addressing offers of proof regarding

witness testimony and sequestration requests; 4) issuing subpoenas; 5) explaining hearing procedures; 6) controlling the course of the hearing; 7) listening to and analyzing testimony and evidence; 8) examining witnesses; 9) ruling on objections, motions, and the admissibility of evidence; 10) researching laws, rules, and precedent decisions; and 11) preparing written decisions. N.T. pp. 44-55; OA Ex. 4 (pp. 1, 6-7). Appellant added the decisions she prepares include findings of fact, the statement of the issues, her legal reasoning, and the legal order. N.T. p. 53; OA Ex. 4 (pp. 1, 6-7). Appellant noted these decisions are issued within a few days to a few weeks after the hearing, depending on the complexity of the case. N.T. p. 53. Appellant also noted she occasionally addresses pre-hearing evidentiary matters and issues various types of orders, to include dismissal orders, orders to vacate prior decisions, and orders to reopen a hearing to obtain additional information. N.T. pp. 49, 53-54; OA Ex. 4 (p. 6).

The above listed duties satisfy all but one of the examples of acceptable judicial/quasi-judicial work set forth in the Evaluation Guide. OA Ex. 3 (p. 2). The only duty listed in the Evaluation Guide that appellant does not perform is conducting formal pre-hearing conferences. N.T. p. 44. However, appellant testified she occasionally addresses exhibits issues, as well as other issues, at the outset of the hearing akin to what occurs at a pre-hearing conference. N.T. p. 45. Appellant stated such issues may also be addressed during the hearing. N.T. p. 45.

In addition to her qualifying experience as an Appeals Referee, appellant recounted the duties she performed as Assistant Counsel for the UC Board of Review from 2004 to 2007. N.T. pp. 57-59; OA Ex. 4 (pp. 2, 5). As Assistant

Counsel, appellant defended the UC Board of Review before Commonwealth Court. N.T. pp. 35, 58-59; OA Ex. 4 (pp. 2, 5). To that end, appellant noted she performed the following qualifying duties listed in the Evaluation Guide: 1) gathering facts and evidence to formulate a defense; 2) developing strategy and arguments in preparation for the presentation of cases; and 3) preparing and filing legal briefs. N.T. pp. 34-35, 58-59; OA Exs. 3 (p. 2), 4 (pp. 2, 5). Also, if oral argument was required before Commonwealth Court, appellant assisted the Deputy Chief Counsel who was responsible for handling such matters. N.T. pp. 58-59. Pursuant to the Evaluation Guide, experience assisting other attorneys is considered acceptable qualifying experience. OA Ex. 3 (p. 2).

Lastly, appellant noted she had qualifying experience as an opinion writer. N.T. pp. 35, 61; OA Ex. 3 (p. 2). On her application, appellant indicated she wrote opinions in both positions she has held with the UC Board of Review. OA Ex. 4 (pp. 1-2, 5, 7). As an opinion writer, appellant analyzed the testimony and evidence presented at the hearing and researched the applicable laws, rules, and Commonwealth Court precedent. N.T. p. 61; OA Ex. 4 (pp. 1-2, 5, 7). Appellant also drafted memorandum of law and conversed with the members of the UC Board of Review when there were contentious legal issues related to the drafting of opinions. N.T. p. 62 OA Ex. 4 (pp. 1-2, 5, 7). Pursuant to the Evaluation Guide, experience drafting opinions for hearing bodies such as a board of review is considered qualifying experience. OA Ex. 3 (p. 2). Therefore, based on the above, appellant asserts she has the type of work experience required by the Evaluation Guide.

Furthermore, appellant noted she was previously found eligible for the same position in 2013. N.T. pp. 95, 101. While appellant's 2013 application was submitted to the State Civil Service Commission, not OA, it is undisputed most of the circumstances surrounding the submission were the same.¹³ N.T. p. 134; Ap. Ex. 9. The same Human Resource Analyst, who evaluated the application at issue in the present matter, evaluated appellant's 2013 application. N.T. pp. 102, 189-190; Ap. Exs. 8. Also, the job qualifications and the requirement that applicants have five years of Workers' Compensation or equivalent experience were the same.¹⁴ N.T. pp. 145, 246; OA Ex. 2. Additionally, appellant's work experience and duties were relatively the same, minus the number of years she served as an Appeals Referee. N.T. pp. 98-99, 102. Appellant now has approximately seven additional years of experience in the Appeals Referee position. N.T. pp. 98-99, 102.

Likewise, similar to the present application, appellant's 2013 application was initially rejected. N.T. p. 99. In 2013, appellant challenged the initial determination and was subsequently contacted by Human Resource Analyst 2 Bentzel for additional information. By email dated June 7, 2013, Bentzel asked appellant to explain what she did to determine whether "clients" were able to work. N.T. p. 100; Ap. Ex. 8 (p. 3). By email dated June 10, 2013, appellant clarified she does not represent clients. N.T. p. 101; Ap. Ex. 8 (p. 2). Appellant explained her

¹³ At the time appellant submitted the 2013 application, the Commission was responsible for civil service employment in Pennsylvania. However, we note effective June 28, 2018, Section 4(1)(ii) of Act 71 transferred from the Commission to OA, *inter alia*, lists, books, records, documents, all supplies, materials, equipment, and computer hardware and software used in connection with the merit system. 71 Pa.C.S. § 3301(a). This included appellant's 2013 application and any related documentation, which was in the Commission's possession.

¹⁴ The job specification for the position of Workers Compensation Judge, which contains the job qualifications and METs for the position, was last updated November 11, 2006. OA Ex. 2 (p. 1).

job is akin to that of a judge and she is responsible for determining whether claimants are able and available to work, which includes the review of medical documentation. Ap. Ex. 8 (p. 2). In response, Bentzel asked appellant to quantify the percentage of time it takes for her to make these determinations. Ap. Ex. 8 (p. 1). Appellant informed Bentzel approximately seventy-five percent of her job is determining whether claimants are able and available for work.¹⁵ N.T. pp. 195-196; Ap. Ex. 8 (p. 1). Upon providing this additional information, appellant was deemed qualified for the position.¹⁶ N.T. pp. 101, 103.

Conversely, in the present matter, Bentzel found appellant to be ineligible. Bentzel testified she did not recall appellant's 2013 application when she reviewed appellant's 2020 application. N.T. p. 212. Bentzel also noted she is no longer permitted to receive or consider additional information after the application is filed. N.T. pp. 196-197. At the end of the 2020 application, there is an acknowledgment section which informs applicants the submission of incomplete information could disqualify them from consideration for employment. N.T. p. 116; OA Ex. 4 (p. 7). This section also informs applicants that only their most recent application will be considered. N.T. p. 118; OA Ex. 4 (p. 7). The acknowledgment for the 2013 application appears to be less restrictive in that it contemplates

¹⁵ At the hearing on the present matter, appellant testified she has presided over four to seven hearings a day, five days a week for the last thirteen years. N.T. p. 55. In doing so, she has conducted hundreds of hearings. N.T. p. 55. Appellant also noted she has conducted hearings during the Great Recession, Hurricane Sandy in 2012, and the COVID-19 pandemic which required her to apply many different federal programs, as well as extensions of unemployment compensation. N.T. pp. 55-56.

¹⁶ At the time of the 2013 evaluation, appellant was also required to take a civil service test, which she did. N.T. p. 103. Upon taking that test, appellant was deemed to be a candidate for the position. N.T. pp. 103-104. However, she was not selected for the job. N.T. p. 103. Appellant noted presently applicants are no longer required to take a knowledge-based test. N.T. pp. 104-105.\

applicants may be required to provide supplemental information or documentation, along with the application. N.T. p. 134; Ap. Ex. 9 (p. 4). Regardless, Bentzel asserts appellant should have known to include the additional information she submitted in 2013 on her 2020 application.¹⁷ N.T. p. 215.

Bentzel stated she did not deviate from the applicable policies or rules when evaluating appellant's application. N.T. p. 174. Bentzel testified upon finding appellant ineligible for the position, she sent her an ineligibility notice, which appellant challenged. N.T. pp. 174-175. Bentzel explained the challenge process does not permit applicants to provide any additional information. N.T. p. 175. Rather, the same information is reviewed. N.T. p. 175.

Motions

During the pendency of the present matter, OA made several motions. In its post-hearing brief, OA renewed its October 21, 2021 Pre-hearing Motion¹⁸ challenging the sufficiency of the discrimination allegations raised in appellant's appeal form. OA Bf., p. 4. Additionally, OA made a Motion to Dismiss for failure to establish a *prima facie* case at the hearing. N.T. p. 150; OA Bf., p. 4. Ruling on this Motion was deferred pending review by the full Commission. N.T. p. 151. For the reasons set forth below, we deny OA's Motions.

¹⁷ We note the 2013 and 2020 applications were submitted on different forms which ask different questions. Ap. Ex. 9; OA Ex. 4. Indeed, appellant acknowledged she did not provide the same level of detail on her 2020 application as she did in her June 10, 2013 email to Bentzel because she was not asked. N.T. p. 131.

¹⁸ By Order dated October 27, 2021, the Commission denied OA's Pre-hearing Motion.

Sufficiency of Allegations in Appellant's Appeal Form

OA asserted the present appeal should be denied because appellant failed to raise sufficient allegations of discrimination in her appeal form. OA Bf., p. 4. Under Section 105.12(c) of the Commission's Rules, appeals alleging discrimination which do not include specific facts relating to discrimination may be dismissed. 4 Pa. Code § 105.12(c). Specific facts, which should appear on the appeal form, include:

- (1) The acts complained of.
- (2) How the treatment differs from treatment of others similarly situated.
- (3) When the acts occurred.
- (4) When and how the appellant first became aware of the alleged discrimination.

4 Pa. Code § 105.12(c)(1)-(4). With that said, the second element listed above does not apply in a mistake of fact cases because, in such cases, the appellant is not required to prove the appointing authority's decision was motivated by discrimination, just that it was based upon mistaken factual information. *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).

In the present matter, the explanation provided by appellant on her appeal form established she was raising a claim of non-merit factor discrimination in the form of a mistake of fact. In support of her claim, appellant asserted OA's

ineligibility determination was based upon a mistake created by OA's erroneous interpretation of the facts of her relevant experience. Comm. Ex. B. Specifically, appellant asserted she had five years of equivalent experience as required under the METs and had previously been found eligible for the position. Comm. Ex. B. Appellant noted she has thirteen years of experience presiding over quasi-judicial proceedings as a hearing officer for the UC Board of Review, which includes experience as an opinion writer. Comm Ex. B. Appellant further indicated Unemployment Compensation and Workers' Compensation are related areas of law with a substantial overlap in legal principles and administrative procedures. Comm. Ex. B.

Based on the above information as set forth on appellant's appeal form, we find appellant met the criteria under Section 105.12(c) of the Commission's Rules. Furthermore, any incidental gaps in appellant's narrative may be readily filled in with standard questioning at the hearing. *See Filice v. Department of Labor and Industry*, 155 Pa. Commw. 347, 351-352, 625 A.2d 148, 150 (1993) (holding the requirements set forth in Section 105.12(c) were met because any gaps in appellant's account could be filled in readily with standard questioning at a hearing). Accordingly, OA's Motion to Dismiss is denied on the grounds that the allegation raised in the appeal form is insufficient.

Traditional Discrimination – Mistake of Fact

OA asserted the present appeal should be denied because appellant failed to sufficiently establish a claim of discrimination. OA Bf., p. 4. Following our review, we find appellant has met her burden of establishing traditional discrimination in the form of a mistake of fact. Accordingly, the appointing authority's Motion to Dismiss is hereby denied for the reasons set forth below.

To establish a claim of mistake of fact, appellant must show OA'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 anti-discrimination provision of Act 71.

Here, the sole matter in dispute is whether OA relied on a mistake of fact when it determined appellant's experience was insufficient to satisfy the equivalency criteria for Workers' Compensation Judge employment. The March 4,

2021 email from OA finding appellant ineligible informed appellant she failed to satisfy the equivalency criteria in that she failed to establish she had five years of experience in a related area of law. *See* Findings of Fact 2, 8. There is no dispute appellant served thirteen years as a hearing officer. *See* Finding of Fact 32. There is also no dispute such experience would be considered qualifying experience provided it is in a related area of law.¹⁹ *See* Findings of Fact 2, 20, 22, 24, 26, 32, 33, 38. Thus, the only issue before us is whether a mistake of fact occurred when OA determined appellant's experience was not in a related area of law.

The Evaluation Guide for the Workers Compensation Judge position defines "related areas of law" as "those which provide candidates with a basic understanding of medical terms and findings, treatment methods and probable results, and particularly, the relationship between physical and psychological impairment and a person's ability to work e.g., social security disability, personal injury cases, etc."²⁰ *See* Finding of Fact 21. On her application, appellant indicated she is a hearing officer for the UC Board of Review. *See* Finding of Fact 32. Thus, there is no dispute appellant practices Unemployment Compensation Law. OA Bf., p. 6.

¹⁹ We note appellant also indicated on her application that she served approximately three years as a legal representative for the UC Board of Review. *See* Findings of Fact 37-38. This experience would also be considered qualifying experience provided Unemployment Compensation Law is a related area of law. *See* Findings of Fact 22, 25, 26, 39, 40. With that said, since appellant's experience as a hearing officer is more than sufficient to satisfy the five-year equivalency requirement, we will forego a full review of her experience as a legal representative.

²⁰ We note the March 4, 2021 email from OA finding appellant ineligible appears to limit the term "related areas of law" to social security disability and personal injury cases. *See* Finding of Fact 2. However, the definition in the Evaluation Guide as set forth above is more expansive. *See* Finding of Fact 21.

Pursuant to the statutory provisions of the Unemployment Compensation Law, appellant is responsible for determining whether a claimant who is seeking unemployment compensation is “able and available for suitable work.” *See* Finding of Fact 34. Appellant is also statutorily required to determine whether a claimant, who leaves their job, has a “qualifying separation.” *See* Finding of Fact 36. To that end, appellant must determine whether claimants are physically, psychologically, and legally able to do some kind of work that attaches them to the existing labor market. *See* Finding of Fact 35. In making such determinations, appellant frequently reviews medical documentation, doctor’s notes, and records from hospitals, urgent care facilities, rehabilitation hospitals, and substance abuse facilities, as well as matters related to Workers Compensation injuries. *See* Finding of Fact 37. Thus, common sense dictates appellant must have a basic understanding of medical terms and findings, treatment methods and probable results, and the relationship between physical and psychological impairment and a person’s ability to work. Otherwise, she would be unable to fulfill her duties under the statute.

We further note appellant was found eligible for the same position in 2013.²¹ *See* Finding of Fact 64. While appellant’s 2013 application was submitted to the Commission and the 2020 application was submitted to OA, we find: 1) the

²¹ OA asserts the Commission improperly ordered the production of documents related to appellant’s 2013 application at the hearing on the present matter because no subpoena was issued and the request was not in writing. OA Bf., pp. 15-16. Contrary to OA’s assertion, Section 3102(b) of Act 71 and Section 105.14a of the Commission’s Rules do not preclude the Commission from ordering the production of documents at a hearing. Rather, Section 3102(b) of Act 71 merely bestows upon the Commission subpoena powers and Section 105.14a of the Commission’s Rules sets forth the procedure for requesting subpoenas. Furthermore, we note Section 35.127 of the General Rules of Administrative Practice and Procedure provides that hearing officers may call for further evidence upon an issue and/or require evidence to be presented by a party at the hearing. 1 Pa. Code § 35.128.

same METs applied; 2) Human Resource Analyst 2 Bentzel reviewed both applications; 3) the same job specification applied; and 4) appellant's work experience and duties were the same. *See* Findings of Fact 41, 64-70. The only differences were: 1) appellant now has seven more years of experience as a hearing officer; 2) appellant's 2013 and 2020 applications were submitted on different application forms; and 3) in 2013, Bentzel requested additional information from appellant regarding her duties. OA Ex. 4; Ap. Ex. 8. We find these differences are distinctions without a difference for purposes of determining whether a mistake of fact occurred.

Whether Unemployment Compensation Law is a "related area of law" is not determined by appellant's years of experience, the format of the application, or appellant's additional explanations. The statutory nature of the type of law is what controls. Based on the statutory provisions discussed above, Unemployment Compensation Law clearly satisfies the criteria set forth in the Evaluation Guide. OA neglected to consider these basic statutory tenets when making its determination. No explanation for this omission was provided other than OA's claim that its review is limited to the information provided on the application. OA Bf., pp. 5-7, 11-12. OA cites to Section 602.1(b)(1) of the Merit System Employment Regulations²² in support of its action. OA Bf., pp. 5-7, 11-12.

²² On March 12, 2022, the Office of Administration rescinded the Merit System Employment Regulations, which were published at 4 Pa. Code Chapters 601-607. The Merit System Employment Regulations were replaced by temporary regulations set forth in 4 Pa. Code Chapters 601a-607a. The new temporary regulations are referred to as the Rules of Classified Service Employment. For purposes of this adjudication, the Commission will focus on the applicable sections of the Merit System Employment Regulations which were in effect at the time of the March 4, 2021 ineligibility determination.

Section 601.2(b)(1) of the Merit System Employment Regulations provides:

An applicant shall include on their application all information relevant for determining whether the applicant possesses the minimum qualifications for employment in the relevant job classification and, where applicable, the selective criteria required for appointment or promotion to the specific position to which the applicant applied.

4 Pa. Code § 602.1(b)(1)(expired March 12, 2022). While we acknowledge this Regulation requires applicants to include all relevant information on their application, we note the selection criteria upon which OA's decision was based was not provided to the applicants. *See Findings of Fact 16-19*. It is one thing to expect applicants to conform with the expectations set forth in the Regulations, job posting, or application form. However, it is quite another to require applicants to divine OA's interpretation of what unrequested information should be included.

Section 602.1(b)(3) of the Merit System Employment Regulations identifies the job specification as the primary basis and source of authority for the evaluation of the METs. 4 Pa. Code § 602.1(b)(3)(expired March 12, 2022). Pursuant to the job specification, applicants are required to have "five years of Workers' Compensation practice before administrative agencies, or equivalent experience" to satisfy the METs. *See Findings of Fact 11-12*. The same criteria is also noted on the job posting to which the application form is attached. *See Findings of Fact 11-12*. No additional explanations or criteria are provided in documents which are publicly available to applicants. *See Findings of Fact 11-12, 16-19*. Thus,

we find there is nothing which would otherwise put appellant on notice that she was required to explain: 1) the basic statutory tenets of Unemployment Compensation Law; 2) how she reviews medical records; and/or 3) the extent of her understanding of treatment methods or probable results with respect to the relationship between physical and psychological impairment and a person's ability to work. *See Findings of Fact 9-14.*

Furthermore, we are not persuaded by OA's suggestion applicants should be able to piece together the required criteria from the Supplemental Questions. OA Bf., p. 11. The Supplemental Questions do not inform applicants they are required to provide a detailed explanation of the type of law they practice. OA Ex. (pp. 3-4). Nor do they provide an exhaustive list of the required criteria set forth in the Evaluation Guide. OA Ex. 1 (pp. 3-4). For example, there is no mention of the requirement that applicants must have a basic understanding of medical terms and findings or treatment methods and probable results. OA Ex. 1 (pp. 3-4). Additionally, experience regarding the relationship between physical and psychological impairment and a person's ability to work is only mentioned in Supplemental Question No. 5 as it relates to the applicant's experience practicing before administrative agencies or the courts (i.e., experience as a legal representative). *See Finding of Fact 50.* Thus, we find it is unreasonable to expect an applicant to determine what information is required by reviewing the Supplemental Questions. We further note the Work Behavior Questions do not provide any additional clarity. OA Ex. 1 (pp. 4-7). Accordingly, we find OA's suggested approach is an unreasonable application of Section 602.1(b)(1). *See*

Northwestern Youth Services, Inc. v. Com., Dept. of Public Welfare, 620 Pa. 140, 156-158, 66 A.3d 301, 310-312 (2013)(holding guidance documents, such as manuals, interpretive memoranda, and staff instructions, may be disregarded where the interpretation is unwise or violative of legislative intent).

OA's approach is also counter to the legislative intent of Act 71. Act 71 was enacted with the goal of modernizing the merit employment system to better meet the needs of the appointing authorities and those seeking employment with the Commonwealth. Pennsylvania Senate Legislative Journal, 2018 Session, No. 26 (June 5, 2018), at 537. The purpose of Act 71 was "to create and sustain a modern merit system of employment within the Commonwealth workforce that promotes the hiring, retention and promotion of highly qualified individuals, ensuring that government services are efficiently and effectively delivered to the public." 71 Pa.C.S. § 2102; *see also* 4 Pa. Code. 601.2(a)(expired March 12, 2022). To that end, systems for the evaluation of candidates must avoid procedures which result in erroneous determinations that arise from mistake of fact.

Here, OA failed to acknowledge the clear and apparent nature of Unemployment Compensation Law as set forth in the statute, resulting in an erroneous determination based on a mistake of fact. We further note our determination that a mistake of fact occurred is supported by the information appellant provided on her 2020 application. *See* Findings of Fact 31-33, 38. Specifically, there is no dispute appellant included the following information on her application: 1) she practices Unemployment Compensation Law; 2) she reviews medical documentation; 3) she presides over administrative hearings for the UC Board of Review; 4) she writes opinions for the UC Board of Review; and 5) she has performed these duties for thirteen years. *See* Findings of Fact 31-33, 38; OA

Bf., p. 6. Thus, this information was available and known to OA at the time it made the eligibility determination. Indeed, Human Resource Analyst 2 Bentzel, who reviewed the application at issue in this matter, previously found appellant eligible for Workers' Compensation Judge employment in 2013 under the same criteria. *See* Findings of Fact 41, 64, 66, 68. Thus, we find any claims by Human Resource Analyst 2 Bentzel that she did not understand Unemployment Compensation Law was a related area law to be disingenuous based on her review and approval of appellant's 2013 application.²³ *See* Findings of Fact 41, 66.

We are also concerned with Bentzel's inability to explain what more appellant was required to provide on her 2020 application for it to be sufficient. N.T. p. 184. Based on Bentzel's explanation of the process, it appears OA has taken a formulaic approach to the review of employment applications due to the number of applications it receives. *See* Findings of Fact 42-47. In support of this approach, OA argues the acknowledgement section of the application put appellant on notice that she was to supply all information related to her qualifications on the application. OA Bf., p. 7. We are not persuaded by this argument. Moreover, we find OA's approach is contrary to the legislative intent of Act 71 as articulated above and creates an unfair surprise to applicants because the formula being applied is not readily available to all.²⁴

²³ 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).

²⁴ We also find it particularly concerning that at the time of the hearing on this appeal, any additional information submitted by a candidate as part of the challenge process is no longer being considered by OA. *See* Findings of Fact 62-63; 4 Pa. Code § 602.19 (expired March 12, 2022). This does not provide for a meaningful review and, as a result, denies applicants due process. As observed in the present matter, appellant was disadvantaged by undisclosed criteria. This lack of transparency was further compounded by the fact that appellant could not provide any additional information when challenging the determination. In 2013, there was an interactive process by which appellant was able to explain legal concepts related to her experience, which were not readily understood by the evaluator. Ap. Ex. 8. No such discussion was permitted when appellant challenged the determination in the present matter. *See* Findings of Fact 62-63. Thus, we find the present challenge process is wholly inadequate.

In the present matter, applicants were not fully notified of the criteria against which their applications were being judged. *See* Findings of Fact 16-19. Specifically, the selection criteria set forth in the Evaluation Guide, upon which OA relied in finding appellant ineligible, were not provided to the applicants. *See* Findings of Fact 16-19. Applicants were only informed they need to have “five years of Workers’ Compensation practice before administrative agencies, or equivalent experience.” *See* Findings of Fact 11-12.

Applicants were not informed they need to provide a detailed explanation of the statutory constructs of the law they practice. Nor were applicants informed they must explain how and for what purposes they review medical documentation or their experience related to their understanding of medical terms and findings, treatment methods and probable results, and the relationship between physical and psychological impairment and a person’s ability to work. *See* Findings of Fact 16-21. Nonetheless, OA expected applicants to discern and satisfy these unpublicized criteria for which they had no notice. This created an unreasonable burden on applicants and frustrated the goal of Act 71 in promoting the hiring, retention, and promotion of highly qualified individuals. 71 Pa.C.S. § 2102; *see also* 4 Pa. Code. 601.2(a)(expired March 12, 2022). Additionally, it resulted in an erroneous determination arising from a mistake of fact.

We cannot hold applicants to unreasonable standards or ones for which they have no notice. *See Northwestern Youth Services, Inc., supra*. Here, appellant provided the information requested. *See* Findings of Fact 27-40. We find this information was sufficient to satisfy the METs as set forth on the job specification,

which is the primary authority for the METs. *See* 4 Pa. Code § 602.1(b)(3)(expired March 12, 2022). We further find a mistake of fact occurred when OA failed to consider appellant's experience in Unemployment Compensation Law, the nature of which is statutorily defined. Accordingly, we enter the following:²⁵

CONCLUSIONS OF LAW

Appellant has presented 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, sustains the appeal of Catherine A. Rothaug challenging the Office of Administration, Executive Office's determination that she was not eligible for Workers' Compensation Judge employment, and overrules the Office of Administration, Executive Office's determination that Catherine A. Rothaug was not eligible for Workers' Compensation Judge employment. We hereby order the Office of Administration to include Catherine A. Rothaug in the final round of interviews for the next available Workers' Compensation Judge position in any region where she is willing to participate. Catherine A. Rothaug shall provide notice of the

²⁵ Under Section 3003(8) of Act 71, where an appellant prevails in an appeal, the Commission has the express authority to fashion a remedy and issue an appropriate order to assure rights accorded to an individual under Act 71 are protected. 71 Pa.C.S. § 3003(8)(ii).

region(s) where she is willing to participate to the Office of Administration, Executive Offices and the Executive Director of the State Civil Service Commission within fourteen (14) days of the mailed date of this opinion. We further order that within thirty (30) calendar days of receipt of Catherine A. Rothaug's notification, the Office of Administration, shall submit written notice of compliance with this Order to the Executive Director of the State Civil Service Commission.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: May 20, 2022