

COMMONWEALTH OF PENNSYLVANIA

William H. Lowden : State Civil Service Commission
 :
 v. :
 :
 State Correctional Institution at Fayette, :
 Department of Corrections : Appeal No. 30852

William H. Lowden : Jocelyn G. Schultz
Pro Se : Attorney for Appointing Authority

Joshua Poska
Indispensable Party¹

ADJUDICATION

This is an appeal by William H. Lowden challenging his non-selection for promotion to the position of Corrections Officer 4 with the State Correctional Institution at Fayette, Department of Corrections (hereinafter, “appointing authority”). A hearing was held on April 14, 2022, via video, before Commissioner Bryan R. Lentz.

¹ In *Jefferson County Assistance Office, Dept. of Public Welfare v. Wolfe*, 582 A.2d 425 (Pa. Cmwlth. 1990) the Commonwealth Court held that where an individual challenges his or her non-selection for promotion before the Commission, the candidate selected for promotion is an indispensable party who must be given notice and an opportunity to be heard. *Id.*, at 427. In recognition of *Jefferson County*, the individual currently occupying the challenged position, Joshua Poska, was notified of the Commission’s proceedings and of his right to participate. Comm. Ex. C. The Commission notes that Poska neither responded to the notice nor appeared on the day of the hearing. N.T. p. 9.

The Commissioners have reviewed the Notes of Testimony, exhibits introduced at the hearing, and the post-hearing Briefs submitted by the parties. The issue before the Commission is whether the appointing authority did not promote appellant to the position of Corrections Officer 4 for reasons motivated by discrimination.

FINDINGS OF FACT

1. By email dated November 3, 2021, appellant was informed he was not selected for promotion to the position of Corrections Officer 4 (hereinafter. “CO4”) with the appointing authority. Comm. Ex. A.
2. The appeal was properly raised before the Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018.
3. Appellant has been employed by the appointing authority since April 26, 2004. Ap. Ex. 1.
4. Appellant currently works for the appointing authority and has been employed as a Corrections Officer 3 since April 14, 2013. Ap. Ex. 1.

5. On October 12, 2021, the appointing authority posted a job vacancy notice for the position of CO4. N.T. p. 79; AA Ex. 1.
6. The CO4 position is a management position, and more specifically is a shift command position. N.T. p. 79-80; AA Ex 1.
7. The job posting listed “promotion without examination” (hereinafter, “PWOE”) as a recruitment method to fill the CO4 position. N.T. pp. 81; AA Ex. 1, p. 3.
8. To be eligible for PWOE, applicants had to satisfy the meritorious service and seniority requirements as defined in the job posting. N.T. p. 32, 80-81; AA Ex. 1.
9. The job posting defined meritorious service as “the absence of any discipline above the level of written reprimand during the twelve months preceding the closing date of the posting, and ... the last due overall regular or probationary performance evaluation was higher than unsatisfactory or fails to meet the standards.” AA Ex. 1, p. 4.

10. The job posting defined seniority as “a minimum of one year(s) in the next lower classes by the posting closing date.” AA Ex. 1, p. 4.
11. The Governor’s Office of Administration (hereinafter, “OA”) determined that appellant and indispensable party Joshua Poska (hereinafter, “Poska”) satisfied the meritorious service and seniority requirements for PWOE and referred them to the appointing authority for interviews. N.T. pp. 80-81; AA Ex. 4.
12. A total of sixteen candidates were referred and interviewed for the CO4 position. N.T. pp. 33, 35, 41-43; AA Ex. 4.
13. Appellant and Poska were two of the sixteen candidates who were referred and interviewed for the CO4 position. AA Ex. 4.
14. On October 27, 2021, a five-member panel conducted in-person interviews of all sixteen CO4 candidates. N.T. pp. 41-42, 82; AA Ex. 4.

15. The panel consisted of Human Resource Analyst 1 Mark Pochron, Deputy Trempus, Deputy Walker, Major Hawkinberry, and Major Michael Tkacs (hereinafter, “Tkacs”). N.T. pp. 42-43; AA Ex. 4.
16. During the interviews, the panel asked the candidates the same pre-decided questions. N.T. p. 82-83.
17. The interview questions were developed by Tkacs and then reviewed and approved internally by human resources prior to the interviews. N.T. pp. 82-83, 95.
18. Question number three asked, “What are the four reasonable suspicion indicators.” N.T. pp. 103-104.
19. There are more than four reasonable suspicion indicators, and the purpose of the question was to see the candidates’ knowledge base on the subject matter. N.T. pp. 103-104.
20. All the interviews were conducted the same way. N.T. p. 83.

21. Each panel member had a blank question sheet they used to document the candidates' answers to the questions. N.T. p. 83.
22. The panel members were not provided a score or rating sheet to evaluate the candidates' responses to the interview questions. N.T. p. 84.
23. Pochron and Tkacs did not consider age when deciding to select a candidate for promotion. N.T. pp. 49, 55, 63-64, 86-89, 99.
24. Pochron and Tkacs determined Poska's responses to the interview questions were clear, concise, confident, and demonstrated his ability to be a leader. N.T. pp. 49-51, 67, 85-86, 97-98,
25. At the conclusion of the interviews, the panel deliberated by reviewing their notes before deciding on a recommendation. N.T. pp. 85-86.
26. The panel unanimously chose Poska as their top choice, and recommended Poska for promotion to the CO4 position. N.T. p. 86.

27. On October 29, 2021, Tkacs drafted and sent a memorandum to Superintendent Armel informing him of the panel's promotion recommendations. N.T. pp. 99-102; AA Ex. 4.

28. The October 29, 2021 interview recommendation memorandum provided the following narrative of the panel's recommendation:

Lt. Poska is the panel's selection for the vacant Corrections Officer 4 position. He has been a Lieutenant for the past 5 years. Lt. Poska has a positive and calm demeanor and sets a good example to employees as a leader that will share pertinent information and one that employees can come to with questions. He is Shift Commander qualified and is the CERT Team Leader for Fayette. His responses to the panel's questions were delivered in a clear and confident manner that exemplified his knowledge of the subject matter and showed his motivation to be a leader. The panel is confident that he would be successful in the role as Captain at SCI Fayette.

AA Ex. 4.

29. Superintendent Armel made the final decision to promote Poska to the CO4 position. N.T. pp. 101-102.

30. By letter dated November 19, 2021, Poska was given notice of his promotion to the CO4 position. AA Ex. 3.

DISCUSSION

Appellant challenges his non-selection for promotion to the position of Corrections Officer 4 (hereinafter, “CO4”) with the State Correctional Institution at Fayette, Department of Corrections (hereinafter, “appointing authority”). Appellant alleges the appointing authority violated the Civil Service Act/Rules. Appellant also alleges he was discriminated against based on age.

Appellant did not testify on his own behalf, however, he did present the testimony of Major Michael Tkacs and Human Resources Analyst 1 Mark Pochron. The appointing authority also presented the testimony of Tkacs and Pochron.

The following testimony was elicited at the hearing. On October 12, 2021, the appointing authority posted a job vacancy notice for the position of CO4. N.T. p. 79; AA Ex. 1. The CO4 position is a management position, and more specifically is a shift command position. N.T. p. 79-80; AA Ex 1. The job posting listed “promotion without examination” (hereinafter, “PWOE”) as a recruitment method to fill the CO4 position. N.T. pp. 81; AA Ex. 1, p. 3. The appellant and the indispensable party Joshua Poska (hereinafter, “Poska”) applied and were interviewed for the CO4 position. AA Ex. 4. To be eligible for PWOE, applicants had to satisfy the meritorious service and seniority requirements as defined in the job posting. N.T. p. 32, 80-81; AA Ex. 1. The job posting defined meritorious

service as, “the absence of any discipline above the level of written reprimand during the 12 months preceding the closing date of the posting, and ... the last due overall regular or probationary performance evaluation was higher than unsatisfactory or fails to meet the standards.” AA Ex. 1, p. 4. The job posting defined seniority as “a minimum of one year(s) in the next lower classes by the posting closing date.” AA Ex. 1, p. 4.

The Governor’s Office of Administration (hereinafter, “OA”) determined that appellant and Poska satisfied the meritorious service and seniority requirements for PWOE and referred them to the appointing authority for interviews. N.T. pp. 80-81; AA Ex. 4. A total of sixteen candidates were referred and interviewed for the CO4 position. N.T. pp. 33, 35, 41-43; AA Ex. 4. Appellant and Poska were two of the sixteen candidates interviewed for the CO4 position. AA Ex. 4.

On October 27, 2021, a five-member panel conducted in-person interviews of all sixteen CO-4 candidates. N.T. pp. 41-42, 82; AA Ex. 4. The panel consisted of Human Resource Analyst 1 Mark Pochron (hereinafter, “Pochron”), Deputy Trempus, Deputy Walker, Major Hawkinberry, and Major Michael Tkacs (hereinafter, “Tkacs”). N.T. pp. 42-43; AA Ex. 4. During the interviews, the panel asked all the candidates the same pre-decided questions. N.T. p. 82-83. The interview questions were developed by Tkacs, and then reviewed and approved internally by human resources prior to the interviews. N.T. pp. 82-83, 95. Question number three asked, “what are the four reasonable suspicion indicators.” N.T. pp. 103-104. Tkacs testified there are more than four reasonable suspicion

indicators, and the purpose of the question was to see the candidates' knowledge base on the subject matter. N.T. pp. 103-104. Pachron testified there were no preset answers to the questions, and all the questions were open-ended. N.T. p. 84.

All the interviews were conducted the same way. N.T. p. 83. Each panel member had a blank question sheet they used to document the candidates' answers to the questions. N.T. p. 83. The panel members were not provided a score or rating sheet to evaluate the candidates' responses to the interview questions. N.T. p. 84. Pochron and Tkacs testified they did not consider the ages of the candidates when deciding which candidate to select for promotion. N.T. pp. 49, 55, 63-64, 86-89, 99. Pochron and Tkacs testified Poska's responses to the interview questions were clear, concise, confident, and demonstrated his ability to be a leader. N.T. pp. 49-51, 67, 85-86, 97-98. At the conclusion of the interviews, the panel deliberated by reviewing their notes, and decided on a recommendation. N.T. pp. 85-86. The panel unanimously chose Poska as their top choice, and recommended Poska for promotion to the CO4 position. N.T. p. 86.

On October 29, 2021, Tkacs drafted and sent a memorandum to Superintendent Armel informing him of the panel's promotion recommendations. N.T. pp. 99-102; AA Ex. 4. The October 29, 2021, interview recommendation memorandum provided the following narrative of the panel's recommendation:

Lt. Poska is the panel's selection for the vacant Corrections Officer 4 position. He has been a Lieutenant for the past 5 years. Lt. Poska has a positive and calm demeanor and sets a good example to employees as a leader that will share pertinent information and one that employees can come to with questions. He is Shift Commander qualified and is the CERT Team Leader for Fayette. His responses to the panel's questions were

delivered in a clear and confident manner that exemplified his knowledge of the subject matter and showed his motivation to be a leader. The panel is confident that he would be successful in the role as Captain at SCI Fayette.

AA Ex. 4. Superintendent Armel made the final decision to promote Poska to the CO4 position. N.T. pp. 101-102. By letter dated November 19, 2021, Poska was given notice of his promotion to the CO4 position. AA Ex. 3.

We will first address appellant's allegation of discrimination based on age. Section 2704 of Act 71 of 2018 prohibits discrimination. 71 Pa.C.S.A. § 7104. Specifically, Section 2704 of Act 71 of 2018 provides:

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

71 Pa.C.S.A. § 2704. The provisions of Section 2704 are substantially the same as the provisions in Section 905.1 of Act 286 (71 P.S. § 741.905a), and both sections of the respective acts use virtually the same language.² This includes prohibiting “traditional” discrimination which encompasses claims based upon age. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988); 71 P.S. § 2704.

² Section 905.1 provides: 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.

In claims of traditional discrimination, the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence which, if believed and otherwise unexplained, indicates it is more likely than not discrimination has occurred. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason is merely a pretext for discrimination. *Henderson* at 126 Pa. Commw. 607, 560 A.2d 859.

Appellant asserts the appointing authority has a pattern of promoting younger less experienced candidates over older and more experienced candidates. Comm. Ex. B. Appellant did not present any testimony or evidence regarding his age, the age of indispensable party Poska, or the ages of the other non-selected candidates. Both Tkacs and Pochron, who sat on the interview panel and recommended Poska for promotion to CO4, credibly testified³ they did not consider the age of the candidates. N.T. pp. 49, 55, 63-64, 86-89, 99. Specifically, Pochron testified he had only worked at the appointing authority for six months at the time of the interviews and had no idea of any of the candidates ages. N.T. pp. 87-88. Not only has appellant failed to present any evidence of age discrimination, but appellant's own witnesses testified they did not consider age when evaluating the

³ The Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *McAndrew v. State Civil Service Commission (Department of Community and Economic Development)*, 736 A.2d 26 (Pa. Commw. 1999).

candidates for promotion to the CO4 position. Accordingly, appellant has failed to present sufficient evidence to establish a *prima facie* case of discrimination based on age.⁴

We will next discuss appellant's assertions of discrimination based upon violations of the Civil Service Act and/or Rules. Act 71 of 2018 addresses "procedural" discrimination. "Procedural discrimination" involves a violation of procedures required pursuant to the Act or related Rules. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988) 71 Pa.C.S.A. § 2704. Where a procedural violation of the Act constitutes the alleged discrimination, no showing of intent is required. *Price, supra*. However, to obtain relief, the employee must show he/she was harmed because of the procedural noncompliance with the Act, or that because of the peculiar nature of the procedural impropriety, he/she could have been harmed, but there is no way to prove that for certain. *Price, supra*.

⁴ Moreover, had the burden of proof shifted, the appointing authority presented legitimate, non-discriminatory rationale for appellant's non-selection for promotion to CO4. Pochron credibly testified Poska's answers at the interview were clear and concise, and "it was obvious that Mr. Poska possessed much greater communication skills than Mr. Lowden." N.T, p. 50. Conversely, Pochron described appellant's responses as "short, not to the point, lacked confidence and even clarity. In the realm of the interview, to be frank about it, they were mediocre, at best." N.T. pp. 84-85. Similar to Pochron, Tkach credibly testified "[Poska's] answers were outstanding. They were very clearly articulated. He was very motivated to be a leader. He is a natural leader. He's our CERT team leader. That's a job in itself, where he leads an entire team of emergency response individuals." N.T. p. 67. Finally, Poska was the unanimous recommendation for promotion to CO-4 by the interview panel, and the panel's interview recommendation mirrors the assessments of Pochron and Tkach stating, "[Poska's] responses to the panel's questions were delivered in a clear and confident manner that exemplified his knowledge of the subject matter and showed his motivation to be a leader." AA Ex. 4.

Appellant makes two, separate but related technical discrimination allegations. First, appellant alleges the appointing authority's promotion decision was not based on meritorious service and seniority. Comm. Ex. B. Specifically, appellant's argument is, under the PWOE method, an appointing authority is required to promote the candidate who has more meritorious service and seniority as compared to the other candidates. Comm. Ex. B. Second, appellant alleges the appointing authority used the interview to test the candidates' knowledge. Comm. Ex. B. Specifically, appellant alleges question number three that asked each candidate "what are the four reasonable suspicion indicators" was the equivalent of a test. Comm. Ex. B.⁵

We will first address appellant's claim the appointing authority's promotion decision was not based on meritorious service and seniority because under the PWOE method an appointing authority is required to promote the candidate who has more meritorious service and seniority as compared to the other candidates. The Act authorizes the promotion of employees "without examination" in lieu of promotion from an eligible list. Specifically, Section 2301(d) of the Act provides that OA may authorize the promotion of employees, "based upon meritorious service and seniority to be accomplished by appointment without examination if the individual has completed the probationary period in the next lower position and meets the minimum requirements for the higher position." 71 Pa. C.S. § 2301(d).

⁵ Appellant raised almost identical issues before the Commission in a prior appeal, and the Commission addressed those issues in *Lowden v. SCI-Fayette, DOC*, Appeal No. 30722.

Regulation 602.4(c) implements Section 2301(d) by specifying the procedure to be followed to fill a PWOE vacancy. It provides in relevant part: “When an appointing authority desires to fill a vacant position by promotion without examination, it may follow one of” two alternative recruitment methods. 4 Pa. Code. § 602.4(c)(2). The first enumerated alternative⁶ states, “*Competitive promotion without examination*. The appointing authority shall post the vacancy, consider the eligible employees who express an interest and make the promotion decision based upon an objective review of each employee’s meritorious service and seniority.” 4 Pa. Code § 602.4(c)(2)(i). The Commission has long interpreted the terms “meritorious service” and “seniority” as used in Regulation 602.4(c)(2)(i) to represent threshold criteria a job applicant must satisfy to qualify for an interview for a PWOE vacancy.⁷ *See generally, Gordy v. State Civ. Serv. Comm'n (Dep't of Pub. Welfare)*, 2015 WL 5445015, at *2 (Pa. Cmwlth. June 11, 2015).

Conversely, appellant interprets this language used in Regulation 602.4(c)(2)(i) as requiring the appointing authority to promote job applicants who possess “more meritorious service and seniority” as compared to other applicants. Ap. Br., p. 3, at ¶ 5. Appellant’s argument lacks merit because nothing in the Act or Regulations requires an appointing authority to quantify meritorious service and

⁶ The second alternative is “Noncompetitive promotion without examination.” *See*, 4 Pa. Code § 602.4(c)(2)(ii). This recruitment method is not at issue in this appeal.

⁷ The Commission’s interpretation of Regulation 602.4(c)(2)(i) was previously codified in Commission Management Directive (MD) 580.19, titled “Promotion in the Classified Service Without Examination.” *See, Gordy*, 2015 WL 5445015, at *2 (Discussing the procedural requirements of competitive promotion without examination under MD 580.19). OA rescinded MD 580.19 following the Act’s transfer of merit system employment duties from the Commission to OA. *See*, 71 Pa. C.S. §§ 2201, 2202. OA has not since promulgated a successor directive.

seniority and then “rank” PWOE applicants for purposes of selecting an applicant for promotion. Under Regulation 602.4(c)(2)(i), a PWOE vacancy must be “post[ed]” and an appointing authority must thereafter “consider the eligible employees who express an interest” in the position. 4 Pa. Code § 602.4(c)(2)(i). The clause’s reference to the existence of “eligible employees” presupposes that the criterion used to determine the eligibility will be set forth in the job posting itself. Furthermore, because the Regulations do not prescribe *how* eligibility for a PWOE vacancy is to be determined, the eligibility standards appearing in a job posting are subject only to the requirement they be “based upon meritorious service and seniority” as required under Section 2301(d) of the Act.

Here, in the job posting for the Corrections Officer 4 position, “meritorious service” was defined to mean (1) “the absence of any discipline above the level of written reprimand” within the previous 12 months; and (2) the last annual performance evaluation received by the applicant to be rated higher than “unsatisfactory” or “fails to meet standards.” AA Ex. 1. Similarly, “seniority” was defined to require “a minimum of one year(s) in the next lower classes by the posting closing date.” AA Ex. 1, p. 4. As these eligibility standards are clearly “based upon” meritorious service and seniority, the criterion appearing in the job posting complied with Sections 2301(d) of the Act and 602.4(c)(2)(i) of the Regulations. Additionally, OA conducts an initial review of all PWOE applicants and refers to the appointing authority only those employees who satisfy the job posting’s meritorious service and seniority requirements. N.T. pp. 30-31, 62. By limiting interviews to applicants who satisfy those requirements, an appointing authority complies with its obligation under Regulation 602.4(c)(2)(i) to make a “promotion decision” based upon an objective review of meritorious service and seniority.

Lastly, the requirement that an appointing authority “make the promotion decision based upon an objective review of each employee’s meritorious service and seniority” does not mean an appointing authority must select applicants for promotion based on lengths of classified service employment and employee performance ratings. Appellant’s argument is rooted in an unnecessarily cramped view of the phrase “promotion decision” in Regulation 602.4(c)(2)(i). His argument ignores the fact OA conducts an initial review of all PWOE applicants and refers to the appointing authority only those employees who satisfy the job posting’s meritorious service and seniority requirements. N.T. p. 30-31, 62. By limiting interviews to applicants who satisfy those requirements, an appointing authority complies with its obligation under Regulation 602.4(c)(2)(i) to make a “promotion decision” based upon an objective review of meritorious service and seniority. OA referred every applicant to the appointing authority who met the eligibility requirements for meritorious service and seniority as set forth in the Corrections Officer 4 job posting. N.T. pp. 30-31, 62; AA Ex. 1. The appointing authority thereafter extended an interview to every qualifying applicant. N.T. pp. 30, 34, 36, 41, 43, 63, 71-72; AA Ex. 6. As such, the appointing authority’s decision to promote Poska over the other applicants was necessarily based on an objective review of the applicants’ meritorious service and seniority as defined in the job posting.

We will now address motions made by the parties during the hearing. Prior to the start of testimony, appellant made an oral Motion for Summary Judgment, and argued the promotion decision violated Act 71 because he has more meritorious service and seniority than Poska. N.T. pp. 23-24. After the presentation of appellant’s case in chief, the appointing authority made an oral Motion to Dismiss stating there was no *prima facie* case of discrimination. N.T. pp. 73-76. Commissioner Lentz deferred ruling on the motions pending a full review by the

Commission. N.T. pp. 23-25, 73-77. The Commission is now prepared to rule on these two motions. Here, appellant has not met his initial burden. As explained above, appellant has not presented any evidence of age discrimination, and the appointing authority's decision to promote Poska was based on an objective review of the applicants' meritorious service and seniority as defined in the job posting. Accordingly, the Commission will grant the appointing authority's Motion to Dismiss the age and meritorious service/seniority claims, and will deny appellant's Motion for Summary Judgment.

Finally, we will address appellant's second technical discrimination claim that question number three that asked each candidate "what are the four reasonable suspicion indicators" was the equivalent of a test. Some civil service positions require an applicant to take an examination as part of the recruitment process. Civil service exams are administered by OA to establish "eligible lists" – that is, "list[s] of individuals who have been found qualified by" an exam "for appointment to a position in a particular class" in the classified service. 71 Pa. C.S. § 2301; *see also*, 71 Pa. C.S. § 2301(a) (Providing that the appointment of an individual entering the classified service or promoted in the classified service "shall be from an eligible list established as the result of examinations given by [OA] to determine the relative merit of candidates.").

The Regulations define an examination as "[a] test, series of tests, or assessments used to determine the degree to which applicants or employees are qualified for appointment or promotion" in the classified service. 4 Pa. Code. § 601.3. An exam may take the form of an oral test, written test, or agility test, among others. 4 Pa. Code. § 602.7(a); *see also*, 71 Pa. C.S. § 2302(a) (Providing that an examination may be "[w]ritten or oral," a "demonstration of skill," or an "evaluation

of experience and education.”). In all cases, the Act requires exams be “practical,” to “relate to the duties and responsibilities of the position,” and to “fairly test the relative capacity” of the individuals examined. 71 Pa. C.S. § 2302(b) (capitalization omitted).

The Act separately authorizes the promotion of civil service employees outside the examination process. The Act directs that OA may “permit promotions to be accomplished” by “appointment without examination” “based upon meritorious service and seniority.” 71 Pa. C.S. § 2301(d)(3). The Regulations track this language, specifying in part: “When an appointing authority desires to fill a vacant position by promotion without examination,” it shall “post the vacancy, consider the eligible employees who express an interest and make the promotion decision based upon an objective review of each employee’s meritorious service and seniority.” 4 Pa. Code. § 602.4(c)(2)(i). Thus, unlike promotions from eligible lists, which themselves are “established as the result of examinations,” 71 Pa. C.S. § 2301(b), promotions without examination are determined “based upon meritorious service and seniority.” 71 Pa. C.S. § 2301(d)(3).⁸

Regardless of whether a promotional vacancy is filled from an eligible list or without examination, appointing authorities are permitted to interview applicants deemed eligible for the position by OA. Regulation 603.7 provides: “An appointing authority may conduct an interview or otherwise assess relative

⁸ The Act’s use of the phrase “meritorious service and seniority” and similar language found in Regulation 602.4(c) will be examined as part of appellant’s final technical discrimination claim, *infra*. For present purposes, it is sufficient to say when an appointing authority seeks to fill a vacancy by promotion without examination, an applicant’s eligibility for the position is assessed by means *other than* an examination.

suitability for appointment of a certified eligible, but the assessment must be based on position-related criteria and be conducted in accordance with” the Regulations governing promotions generally. 4 Pa. Code. § 603.7. The Commonwealth Court has explained this language “[c]learly ... authorize[s] the use of interviews to determine suitability for promotion.” *Price*, 672 A.2d at 413. While the term “interview” is not defined in the Act or Regulations, the Commission affords the term its common meaning for purposes of employment in the classified service: “[A] meeting in which someone asks you questions to see if you are suitable for a job[.]” <https://dictionary.cambridge.org/us/dictionary/english/interview> (last visited July 7, 2022); *accord*, *Zimmerman v. Harrisburg Fudd I, L.P.*, 984 A.2d 497, 501 (Pa. Super. 2009) (“Absent a definition, statutes are presumed to employ words in their popular and plain everyday sense, and popular meanings of such words must prevail.”).

In sum, the Act broadly empowers appointing authorities to conduct interviews for appointments and promotions but generally prohibits them from administering exams. These dual requirements result in the following legal rule: When an appointing authority seeks to fill a promotional vacancy and to interview those applicants deemed eligible by OA, the interview questions posed by the appointing authority (1) must be position-related; and (2) may not be tantamount to an “oral test” under the Act, since an oral test is but one form of an examination.

Determining whether an interview is the equivalent of an oral test requires a totality of the circumstance inquiry. We consider “1) the nature of the specific questions asked during the interview; 2) the context in which those questions

were asked; and 3) how the questions were utilized during the selection procedure at issue.” *Lowden v. State Correctional Institution at Fayette, Department of Corrections*, SCSC Appeal No. 30555, p. 29 (citing, *Ronald Sheposh, et al. v. Department of General Services*, SCSC Appeal Nos. 25371, 25372, 25443, and 25444, pp. 29-30). If that inquiry demonstrates that the interview questions posed by the appointing authority were designed to “re-evaluate or re-appraise” an applicant’s “underlying qualifications for the position” or his level of “technical knowledge required for the job,” then the interview is an examination. *Id.*, p. 29. Similarly, whether an appointing authority assessed interview applicants based on “position-related criteria” under Regulation 603.7 requires a comparison between the duties of the position as set forth in the job posting and the questions asked during the interview process. *See, Price*, 672 A.2d at 414.

Having reviewed the totality of the circumstances, we find question number three “what are the four reasonable suspicion indicators” qualifies as a “test” question, however, there was insufficient evidence to establish appellant was harmed by interview question three. Tkacs testified there are more than four reasonable suspicion indicators, and the purpose of the question was to see the candidates’ knowledge base on the subject matter. The purpose of question number three was clearly to re-evaluate or re-appraise the candidates’ knowledge base on that particular aspect of the CO4 job.⁹ Question three was not open ended. Question three had a set number of correct answers.

⁹ We note Tkacs also testified the panel did not want each candidate to run off fifteen indicators, and part of the purpose of the question was to limit or streamline the candidates’ responses. N.T. p. 103. This explanation does not change the fact that the question also has definitive wrong answers.

Despite question three being a test question, no evidence was presented indicating the question was material to the panel's decision to promote Poska. Pochron credibly testified he chose Poska because his answers were clear and concise, and Poska possessed much greater communication skills than appellant. N.T. p. 50. Similarly, Tkacs credibly testified "[Poska's] answers were outstanding. They were very clearly articulated. He was very motivated to be a leader. He is a natural leader. He's our CERT team leader. That's a job in itself, where he leads an entire team of emergency response individuals." N.T. p. 67. Finally, the reasons set forth in the interview recommendation memorandum for selecting Poska mirror those given by Pochron and Tkacs. AA Ex. 4. None of the testimony and evidence presented at the hearing as to why Poska was promoted either referenced question number three or was based on the candidates' answers to question three. Accordingly, we conclude appellant was not harmed by question three, and dismiss his claim of technical discrimination based on question number three being a test question.

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

CONCLUSION OF LAW

Appellant has not presented evidence establishing discrimination violative of Section 2704 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of William H. Lowden challenging his non-selection for promotion to Corrections Officer 4 employment with the State Correctional Institution at Fayette, Department of Corrections, and sustains the action of the State Correctional Institution at Fayette, Department of Corrections, in the non-selection of William H. Lowden to Corrections Officer 4 employment.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: November 22, 2022