

COMMONWEALTH OF PENNSYLVANIA

Carol A. Cool : State Civil Service Commission
 :
 v. :
 :
 Allegheny County Department of :
 Human Services : Appeal No. 30865

Carol A. Cool : Jake S. Lifson
Pro Se : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Carol A. Cool challenging her removal from regular County Social Services Aide 2 (Local Government) employment with the Allegheny County Department of Human Services. A hearing was held on May 20, 2022, via video, before Commissioner Bryan R. Lentz.¹

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing.² The issue before the Commission is whether the appointing authority established just cause for appellant’s removal and whether appellant’s removal was motivated by discrimination.

¹ Bryan R. Lentz’s service as Commissioner ended December 16, 2022, before this adjudication was issued.

² At the conclusion of the hearing, the parties elected to close the record by filing Briefs. N.T. pp. 100-101. A Briefing schedule was issued; however, neither party filed Briefs according to the Briefing schedule.

FINDINGS OF FACT

1. On December 2, 2021, appellant received notice of her removal from regular County Social Services Aide 2 (Local Government) employment with the appointing authority, effective December 2, 2021. Comm. Ex. A; N.T. p. 88; AA Ex. 1.

2. The December 2, 2021 notice provided the following reasons in support of appellant's removal:

The Department has carefully considered this matter. In light of the health risks posed by COVID-19 to our employees and members of the public with whom our employees interact and Allegheny County's COVID-19 vaccination requirement, you have disqualified yourself from employment by failing to comply with that requirement. As a result of this disqualification, the Department has decided to terminate your employment with Allegheny County for failing to comply with its COVID-19 vaccination requirement, effective as of the date of this letter.

Comm. Ex. A; AA Ex. 1.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(i) and under Section 3003(7)(ii) Comm. Ex. C.
4. Appellant was employed by the appointing authority as a County Social Services Aide 2 (Local Government). Comm. Ex. A.
5. Appellant worked with the appointing authority for over thirty years. N.T. p. 94.
6. In response to the COVID-19 pandemic, the appointing authority required its employees, including appellant, to wear masks at all times while in the workplace and undergo weekly COVID-19 testing. N.T. pp. 38-39.
7. During the rise of the Delta variant of the COVID-19 virus, the appointing authority instituted a requirement of its employees to be fully vaccinated against the COVID-19 virus by December 1, 2021. N.T. p. 45.

8. On October 7, 2021, appellant signed, acknowledged, and agreed she received the appointing authority's letter notifying her of the COVID-19 vaccination requirement. N.T. p. 85; AA Ex. 2.
9. The appointing authority's letter notifying employees of the COVID-19 vaccination requirement did not include the appointing authority's COVID-19 vaccination requirement policy. AA Ex. 2.
10. Throughout the COVID-19 pandemic, appellant continually wore a mask and subjected herself to COVID-19 testing while working as a County Social Services Aide 2 (Local Government). N.T. p. 97.
11. On December 1, 2021, appellant was unvaccinated against the COVID-19 virus. N.T. pp. 50-51, 82.

DISCUSSION

The issues in the present appeal are whether the appointing authority established just cause to remove appellant from County Social Services Aide 2 (Local Government) employment and whether appellant's removal was motivated by discrimination. Specifically, the appointing authority charged appellant with failing to comply with the appointing authority's COVID-19 vaccination requirement. Comm. Ex. A. In response, appellant alleged the appointing authority improperly denied her religious exemption and violated Act 71 of 2018 and Rules when the appointing authority incorrectly indicated she did not respond to the charges at the Loudermill hearing³. Comm. Ex. B.

In an appeal challenging the removal of a regular status employee, the appointing authority bears the burden of proving just cause for the removal and must prove the substance of the charges underlying the removal. *Long v. Commonwealth of Pennsylvania Liquor Control Board*, 112 Pa. Commw. 572, 535 A.2d 1233 (1988). Factors supporting the just cause removal of a civil service employee must be related to the employee's job performance and touch in some logical manner upon the employee's competency and ability to perform her job duties. *Woods v. State Civil Service Commission*, 590 Pa. Commw. 337, 912 A.2d 803 (2006).

³ While appellant alleged the appointing authority denied her religious exemption, appellant admitted she did not submit a religious exemption request to the appointing authority. N.T. pp. 94-95, 98. Furthermore, appellant acknowledged her recorded statements during her Loudermill hearing were accurate. N.T. pp. 95, 97, 98. Because appellant acknowledged she did not submit a religious exemption request and agreed to the appointing authority's accuracy of her statements during the Loudermill hearing, the sole issue before the Commission is whether the appointing authority established just cause for appellant's removal.

In support of the charges, the appointing authority presented the testimony of Deputy Director James Regan,⁴ Dr. Kristen Jean Mertz,⁵ and Assistant Deputy Director Rebecca Palatino.⁶ In response and in support of her discrimination claims, appellant testified on her own behalf.

Deputy Director Regan explained how the appointing authority decided to implement a COVID-19 vaccine requirement for its employees. From July 2021 through August 2021, Regan reviewed the Center for Disease Control's (hereinafter "CDC") guidelines and Allegheny County's surge of COVID-19 Delta variant cases, infections, and hospitalizations. N.T. pp. 30, 32; AA Exs. 17, 19. Based on the CDC Health Advisory and CDC announcements, Regan discovered COVID-19 Delta variant cases were spreading. To stop the spread of the virus, the CDC recommended vaccination against COVID-19. N.T. pp. 33, 33-35, 37-38; AA Exs. 17, 19. Consequently, Regan testified the appointing authority decided to require its employees to be fully vaccinated against the COVID-19 virus by December 1, 2021. N.T. p. 45.

⁴ James Regan is employed by the appointing authority as a Deputy Director for the Allegheny County Department of Human Resources. N.T. p. 27.

⁵ Dr. Kristen Jean Mertz is a Medical Epidemiologist with a medical degree and a Master's in Public Health. N.T. p. 61. The parties agreed Dr. Mertz is an expert in the field of medicine and qualified to give medical opinions as they relate to COVID-19 and public health care. N.T. pp. 55-56.

⁶ Rebecca Palatino is employed by the appointing authority as the Assistant Deputy Director for Children, Youth and Families. N.T. p. 80.

Before requiring its employees to be fully vaccinated against the COVID-19 virus, the appointing authority implemented an incentive of one-hundred dollars for employees to receive the COVID-19 vaccine. N.T. p. 35. The appointing authority also provided employees paid time during their workday to receive the COVID-19 vaccine. N.T. p. 36. If an employee was sick with the COVID-19 virus and submitted proof of vaccination, the appointing authority allowed eighty hours of paid leave for reasons related to COVID-19. N.T. pp. 36, 46-47; AA Ex. 10 (p. 1-2).

Additionally, unvaccinated employees were required to wear masks at all times in the workplace and undergo weekly COVID-19 testing. N.T. pp. 38-39. If an employee tested positive for the COVID-19 virus, the employee would be given a PCR test and sent home.⁷ N.T. pp. 39, 42. Despite the masking and testing requirements and the appointing authority's incentive, Regan explained there were approximately twenty-five percent of the appointing authority's workforce, including appellant, that remained unvaccinated. N.T. p. 45.

Regan explained how the appointing authority informed its unvaccinated employees about the appointing authority's vaccination requirement policy. If the appointing authority did not receive proof of vaccination, the appointing authority sent its unvaccinated employees a letter describing the vaccination requirement policy. Specifically, the vaccination requirement letter provided the following:

On or before December 1, 2021, all Allegheny County employees under the Executive branch must have received their second dose of a two-dose COVID-19 vaccine, with

⁷ PCR test was not defined during the course of the hearing.

exceptions only as required by law. Employees who fail to submit proof of completed vaccination by December 1, 2021 (without an approved accommodation) will be subject to termination of employment.

N.T. pp. 46-47; AA Ex. 10 (p. 1). In addition to sending a vaccine requirement notice letter, the appointing authority enclosed a supplemental document explaining the COVID-19 vaccine. N.T. p. 49; AA Exs. 3, 10. On October 7, 2021, appellant signed, acknowledged, and agreed she received the appointing authority's letter notifying her of the COVID-19 vaccination requirement. N.T. p. 85; AA Ex. 2. The appointing authority's vaccination policy was not attached to the letter. AA Ex. 2.

In support of the appointing authority's COVID-19 vaccination requirement policy, the appointing authority presented the medical opinion of Dr. Mertz. Dr. Mertz explained the dominant strain of the COVID-19 virus in September 2021 was the Delta variant. The Delta variant was more transmissible than the previous COVID-19 variants that led to more severe hospitalizations and even death. N.T. p. 63, 65. Dr. Mertz noted the Delta variant persisted throughout the fall and into December 2021. N.T. p. 65.

Dr. Mertz agreed with the CDC's assertion that vaccination is considered a very effective strategy to prevent contracting the COVID-19 virus, including the Delta variant. N.T. p. 66; AA Ex. 17. Dr. Mertz explained vaccinated individuals are less likely to contract the COVID-19 virus and if they become infected, they would be infectious for a shorter period of time. N.T. p. 67.

In her opinion, Dr. Mertz believed the appointing authority acted reasonably in requiring its employees to be fully vaccinated against the COVID-19 virus to prevent the spread of the virus. N.T. pp. 70-71. Dr. Mertz asserted while weekly testing would assist in identifying those who were infected with the COVID-19 virus, it did not account for the remaining six days of the week. N.T. p. 69. Dr. Mertz contended since appellant was unvaccinated against the COVID-19 virus while transporting children to various locations, she would be not only susceptible to the virus, but also likely to transmit the virus to her passengers. N.T. p. 71. ,

On December 1, 2021, appellant remained unvaccinated against the COVID-19 virus. As a result, appellant received a Loudermill hearing because of her failure to comply with the vaccine requirement policy. N.T. pp. 50-51, 82. Assistant Deputy Director Palatino conducted appellant's Loudermill hearing and noted appellant's explanations for why she did not become vaccinated against the COVID-19 virus.⁸ Appellant provided the following:

I had COVID and believe in many reports that I have an immunity toward COVID, perhaps better than the vaccine. My body, My choice – I don't get other vaccines, flu or otherwise, I should not be forced to get this vaccine. I appreciate the county's concern, regarding it being a public health risk and I have followed all the guidelines they have set in place, with wearing a face mask when I interact with the public, and I been getting tested once a week. I also appreciate the county's concern for my health, but it is for me to worry about. I believe in Jesus Christ and he is really the boss, and when it is my time to

⁸ Palatino acknowledged she was not involved in evaluating whether appellant's statements amounted to a religious exemption or accommodation request. N.T. p. 89.

go he will ultimately decide. I consider myself a healthy adult who has been working transporting many, many children and families for over 17 years and rarely got sick, so again it should be my decision whether to get the vaccine or not.

N.T. pp. 84, 86-87; AA Ex. 4. After appellant's Loudermill hearing, Palatino provided appellant's responses to the appointing authority's Human Resources Department. N.T. p. 87.

Regan reviewed the results of appellant's Loudermill hearing. Regan explained it was determined appellant did not present a reason for her to be exempt from taking the vaccine. N.T. p. 51. Subsequently, on December 2, 2021, appellant was removed from regular County Social Services Aide 2 (Local Government) employment. Comm. Ex. A; N.T. p. 88; AA Ex. 1.

In response, appellant does not dispute the appointing authority's COVID-19 vaccine requirement policy or her noncompliance to the policy. N.T. p. 93. Although appellant remained unvaccinated against the COVID-19 virus, she continued to undergo weekly COVID-19 testing and wore a mask while transporting homeless individuals throughout the pandemic. N.T. p. 97. Appellant explained she did not believe the appointing authority would remove employees for failing to be vaccinated against the COVID-19 virus. N.T. pp. 94-95, 98. Appellant further emphasized her thirty years of experience with the appointing authority. N.T. p. 94.

Upon review of the record, the Commission finds the appointing authority proved the substance of the charges against appellant. We find Regan and Palatino credible⁹ that appellant did not comply with the appointing authority's COVID-19 vaccination requirement policy.¹⁰ Regan explained employees were required to be fully vaccinated against the COVID-19 virus by or before December 1, 2021. Appellant was aware of the appointing authority's COVID-19 vaccination policy and chose to remain unvaccinated against the virus.

Nevertheless, the Commission finds the appointing authority failed to prove just cause for appellant's removal. As articulated above, when an appellant challenges her removal from her regular status position, the appointing authority bears the burden of proving just cause for the removal *and* must prove the substance of the charges underlying the removal. *Long, supra* (emphasis added). Just cause must be related to appellant's job performance and touch upon appellant's competency and ability to perform her job duties. *Woods*, 912 A.2d at 813 (Pa. 2006). The cause for appellant's removal should be personal to appellant and such as to render her unfit for her County Social Services Aide 2 (Local Government) position. *Id.* at 808. Thus, the appointing authority had the burden of proving whether appellant failed to execute her duties or has acted in such a way that hampers

⁹ 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).

¹⁰ Although the appointing authority's vaccine mandate was referenced in appellant's removal letter, a copy was not entered into evidence. Nor is the policy accessible to employees and/or the public through the appointing authority's website. Accordingly, we cannot take official notice of the policy. *See Falasco v. Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole*, 104 Pa. Commw. 321, 326 n.6, 521 A.2d 991, 994 n.6 (1987) (holding an administrative agency may take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person).

or frustrates the execution of her duties as a County Social Services Aide 2 by failing to be vaccinated against the COVID-19 virus by December 1, 2021. *See Thompson v. State Civil Service Commission*, 863 A.2d 180, 184 (Pa. Commw. 2004).

Appellant was employed as a County Social Services Aide 2. Besides Dr. Mertz's opinion of appellant driving children and appellant's testimony of her driving homeless individuals, the appointing authority has not presented testimony or evidence regarding appellant's job duties or responsibilities. There is no evidence providing an explanation of how she interacts with the public or how she transports the public to their destinations. There is no evidence describing how many members of the public appellant interacts within the vehicle she drives. There is no evidence presented whether appellant had any disciplinary history.

Moreover, appellant has been employed by the appointing authority for over thirty years. Even though appellant remained unvaccinated against the vaccine, she successfully and effectively worked as a County Social Services Aide 2 while being masked and subjected herself to weekly COVID-19 testing throughout the COVID-19 pandemic, including the introduction of the Delta variant. As a result, we are left to conclude that appellant's vaccination status had no bearing upon her competency or ability to properly execute her duties and responsibilities as a County Service Aide 2. *Woods, supra*.

Under Section § 3003 (8)(ii) of Act 71, where an individual prevails in an appeal, "the commission shall make an order as the commission deems appropriate to assure the rights accorded the individuals under this part." 71 Pa.

C.S.A. § 3003(8(ii)). Upon review of the record, as a whole, we are convinced appellant's removal is not supported by just cause. Therefore, we are ordering the appointing authority to reinstate appellant to regular County Social Services Aide 2 (Local Government) employment. Accordingly, we enter the following:

CONCLUSION OF LAW

The appointing authority has failed to present evidence establishing just cause for removal under Section 2607 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, sustains the appeal of Carol A. Cool challenging her removal from regular County Social Services Aide 2 (Local Government) employment with the Allegheny County Department of Human Services and overrules the action of the Allegheny County Department of Human Services in the removal of Carol A. Cool from regular County Social Services Aide 2 (Local Government) employment. We order the Allegheny County Department of Human Services to expunge the removal from the official personnel file and reinstate Carol A. Cool to regular County Social Services Aide 2 (Local Government) employment within thirty (30) calendar days. We further award appellant reimbursement of such wages and emoluments as she would have earned had she worked as a County Social Services Aide 2 (Local Government) from December 2, 2021, less wages earned, and benefits received under the Public

Laws of Pennsylvania as established by a sworn statement to be submitted by appellant to the appointing authority. We further order that within thirty (30) calendar days of the mailed date of this order, the appointing authority 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

Pamela M. Iovino
Commissioner

Mailed: February 16, 2023