

COMMONWEALTH OF PENNSYLVANIA

Shannon D. Bean : State Civil Service Commission
 :
 v. :
 :
 Office of Administration, Executive :
 Offices : Appeal No. 30916

Shannon D. Bean Johnathan W. Kunkel
Pro Se Attorney for Office of Administration

ADJUDICATION

This is an appeal by Shannon D. Bean challenging the determination by the Office of Administration, Executive Offices that she was not eligible for Corrections General Industries Factory Foreman 1 (CS-20220398-98345). A hearing was held August 11, 2022, via video, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and Exhibits introduced at the hearing, as well as the Briefs submitted by the parties.¹ The issue before the Commission is whether the determination that appellant is not eligible for the Corrections General Industries Factory Foreman 1 (CS-20220398-98345) position was the result of discrimination.

¹ Appellant attached five documents labeled Exhibits 1, 3, 4, 5, and 6 to her Brief that were not entered into the record during the hearing. As these documents were not provided to the appointing authority there was no opportunity to object to their submission or contents or cross examine any testimony presented regarding their contents. Therefore, they are not properly submitted to the Commission for review and will not be considered.

FINDINGS OF FACT

1. By email dated February 16, 2022, appellant was notified she did not meet the minimum experience and training requirements for the external posting for Corrections General Industries Factory Foreman 1 (CS-20220398-98345). N.T. pp. 111-112; OA Ex. 12.
2. By email dated February 23, 2022, appellant was notified she did not meet the minimum experience and training requirements for the internal posting for Corrections General Industries Factory Foreman 1 (CS-20220398-98345). N.T. p. 89; Comm. Ex. A.
3. The appeal was properly raised before the Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018.
4. In 2008, appellant began employment with the Department of Corrections. Since 2018, appellant has been employed by the Department of Corrections as a Corrections Employment Vocational Assistant (hereinafter “CEVA”), which is covered by the Service Employees International Union. N.T. pp. 19-20, 24.

5. The Corrections General Industries Factory Foreman 1 position is covered by the Pennsylvania State Corrections Officers Association. N.T. pp. 52; OA Ex. 4.

6. To be eligible for the position of Corrections General Industries Factory Foreman 1, an applicant must satisfy the Minimum Experience and Training Requirements (hereinafter “METs”). OA Exs. 1, 9.

7. The METs for Corrections General Industries Factory Foreman 1 are:

Three years of experience in varied machine or production operations, such as production planning and/or quality control in a manufacturing environment and graduation from high school;

Or

Three years [of] experience as a Corrections Officer, including one year involving the methods and techniques used in varied machine or production operations, such as production planning and/or quality control in a manufacturing environment;

Or

An equivalent combination of experience and training.

OA Exs. 1, 9.

8. As a CEVA, appellant's job duties include supervising, interviewing, and staffing of inmates. She is responsible for assigning inmates work, as well as technical/vocational training of inmates, interviewing newly admitted inmates, providing employment services to inmates, providing advice and guidance to inmates regarding the selection of training to develop job skills, and matching inmates to available jobs. N.T. pp. 24, 30, 45, 48-50; OA Ex. 3.
9. Appellant's CEVA Position Description does not include the care, custody, and control of inmates. N.T. p. 45; OA Ex. 3.
10. Appellant has never been employed as a Corrections Officer and does not follow the same chain of command as Corrections Officers. N.T. pp. 24-25, 88; OA Exs. 2, 10.
11. On February 2, 2022, appellant applied for the internal posting for the Corrections General Industries Factory Foreman 1 (CS-20220398-98345) position. N.T. p. 24; OA Exs. 2, 8.

12. Subsequently, appellant noticed the Corrections General Industries Factory Foreman 1 (CS-20220398-98345) position was also posted for external applications. N.T. pp. 24, 104; OA Ex. 9.
13. On February 7, 2022, appellant emailed Human Resource Analyst 2 James Torres² to inquire whether she should also apply to the external posting; he advised her to do so. N.T. pp. 24, 92-93; OA Ex. 8.
14. Appellant applied through the external posting for the Corrections General Industries Factory Foreman 1 (CS-20220398-98345) position. N.T. pp. 25, 105; OA Ex. 10.
15. Neither of appellant's applications indicate she has ever served as a Corrections Officer, a position covered by the Pennsylvania State Corrections Officers Association union. N.T. pp. 26-27, 51; OA Exs. 2, 6, 10.

² At the time of the position posting, Torres was a Human Resource Analyst 2. At the time of his testimony, Torres was a Human Resource Intake Analyst. N.T. pp. 63, 67.

16. Both applications show that from January 1992 to December 1997 appellant was a co-owner of a car wash facility. OA Exs. 2, 10.
17. On February 18, 2022, after receiving notification she was not eligible under the external posting, appellant requested reconsideration. N.T. pp. 130-131; OA Ex. 13.
18. On May 24, 2022, appellant was notified she remained ineligible for the Corrections General Industries Factory Foreman 1 (CS-20220398-98345) position. N.T. pp. 133-134; OA Ex. 14.

DISCUSSION

At issue before the Commission is whether the Office of Administration's (hereinafter "OA") determination that appellant was ineligible for Corrections General Industries Factory Foreman 1 (CS-20220398-98345) was based upon any discriminatory factor. Appellant asserts she meets the minimum experience and training requirements (hereinafter "METs") for the Corrections General Industries Factory Foreman position.

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 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 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 of 2018, the Commission has authority to convene hearings when an individual aggrieved by an alleged violation of Section 2704 files a timely appeal.

The provisions of Section 2704 are substantially the same as the provisions in Section 905.1 of Act 286 (71 P.S. § 741.905a), and both sections of the respective acts use virtually the same language.³ 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

³ 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.

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).

Appellant testified on her own behalf. The OA presented the testimony of Human Resource Analyst 2 James Torres, Human Resource Analyst 4 Jason Brown, and Human Resource Analyst 3 Deborah Krammes.

The parties do not dispute the following facts. The METs for the Corrections General Industries Factory Foreman 1 position are:

Three years of experience in varied machine or production operations, such as production planning and/or quality control in a manufacturing environment and graduation from high school;

Or

Three years [of] experience as a Corrections Officer, including one year involving the methods and techniques used in varied machine or production operations, such as production planning and/or quality control in a manufacturing environment;

Or

An equivalent combination of experience and training.

OA Exs. 1, 9. On February 2, 2022, appellant submitted her application for the internal Corrections General Industries Factory Foreman 1 (CS-20220398-98345) position. N.T. p. 24; OA Exs. 2, 8. After noticing the position was also posted

externally and inquiring with Human Resource Analyst 2 James Torres, appellant submitted her application for the external posting. N.T. pp. 24-25, 92-93, 104-105; OA Exs. 8, 9, 10.

First, appellant argues OA committed a procedural error when it failed to provide her with a timely response to her reconsideration request. 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. Ct. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988); 71 P.S. § 2704. Where a procedural violation of the Act constitutes the alleged discrimination, no showing of intent is required. *Price, supra*. However, to obtain relief, the employee must show she was harmed because of the procedural noncompliance with the Act, or that because of the peculiar nature of the procedural impropriety, she could have been harmed, but there is no way to prove that for certain. *Price, supra*.

As of February 2022, when appellant applied for the reconsideration request, the relevant regulation, 4 Pa Code 602.19, Reconsideration of examination score or eligibility determination, stated the following:

An applicant may request the Office of Administration reconsider the applicant's examination score, or an eligibility determination finding that the applicant lacks the minimum qualifications or selective criteria required for employment in a job classification or position, by submitting a written request for reconsideration to the Office of Administration within 5 business days of the date that the notice of examination score or eligibility

determination was sent to the applicant by the Office of Administration. The written request for reconsideration shall state the grounds for the request, specifically explaining why the applicant's examination score is incorrect based on the examination answers provided by the applicant, or why the applicant's eligibility determination was incorrect based on the information provided by the applicant on their application. The Office of Administration will re-review the applicant's examination or application and provide the applicant with a further explanation or revised result.⁴

By email dated February 16, 2022, appellant was notified of her ineligibility from the external posting. N.T. pp. 25, 111-112; OA Ex. 12. Within the notification is the statement that she may submit a reconsideration request within five business days. OA Ex. 12. On February 18, 2022, within the proper time frame, appellant filed a reconsideration request. N.T. pp. 25, 130-131; OA Ex. 13. Appellant received a response to her reconsideration on May 24, 2022. N.T. pp. 25, 133, OA Ex. 14.

⁴ Upon taking effect on March 28, 2019, Act 71 of 2018 modified the responsibilities and duties of the Commission and established within the Commonwealth of Pennsylvania, Governor's Office of Administration (hereinafter "OA") duties and responsibilities for civil service employment in Pennsylvania. In accordance with 2203(b) of Act 71, OA promulgated temporary regulations, which were referred to as the Merit System Employment Regulations (hereinafter "MSER"). On February 22, 2021, portions of the MSER were amended, including the section relevant to reconsideration of eligibility determinations. On March 12, 2022, OA rescinded the MSER, which were published at 4 Pa. Code Chapters 601-607. The MSER 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 MSER which were in effect at the time of the initial eligibility regarding appellant's eligibility for Correctional General Industries Factory Foreman 1 and her filing of the reconsideration request.

On behalf of the OA, Human Resource Analyst 3 Krammes acknowledged it was an oversight when she did not issue a response to appellant's reconsideration request in a timely manner. N.T. p. 133. However, Krammes further explained appellant did not meet the METs for the position. Specifically, Krammes reviewed the Evaluation Guide and appellant's external application and determined the initial determination of ineligibility was correct. N.T. p. 132; OA Ex. 11. She further clarified appellant did not meet the first option of the METs because her co-ownership of the car wash did not constitute working in a manufacturing environment as described in the Evaluation Guide. N.T. pp. 135-138; OA Ex. 11. Further, appellant did not meet the second option of the METs because she did not have three years as a Corrections Officer exercising the care, custody, and control of inmates or the required work in a manufacturing environment. N.T. pp. 138-139. Finally, Krammes testified appellant did not meet the equivalency provision of the METs because she did not have the required college training or courses. N.T. p. 140.

Upon review of the record, the Commission finds appellant did establish she did not receive a response to her reconsideration request until the job posting was closed. However, appellant did not demonstrate any harm because the reconsideration result still determined she was ineligible and, therefore, unable to interview for the position.⁵ *Price, supra*.

⁵ It is noted the Office of Administration must issue timely reconsideration responses as a delay could result in a hiring agency being compelled to repost a vacancy.

Appellant also argues the OA made a mistake of fact in determining she is ineligible for Corrections General Industries Factory Foreman 1, position CS-20220398-98345. In a mistake of fact case, an appellant is required to establish that the decision at issue 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 (removal of Corrections Officer Trainee based upon 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.

Appellant asserts she meets the METs. Appellant claims she meets the first option of the METs because she was a co-owner of a car wash and, therefore, has at least three years of experience in varied machine or production operations. N.T. p. 25. However, appellant provides no indication she was in a manufacturing environment, as specified on the METs, during her co-ownership. OA Exs. 1, 9.

Appellant also asserts she meets the second option of the METs because her current Corrections Employment Vocational Assistant (hereinafter "CEVA") position is equivalent to a Corrections Officer position. To this argument, appellant asserts both her CEVA job duties and the Corrections Officer duties require care,

custody, and control of inmates. N.T. pp. 25, 31-32, 49. However, she acknowledged her CEVA position description does not specifically state she is responsible for the care, custody, and control of inmates while the Corrections Officer position description specifically states the employee is responsible for the care, custody, and control of inmates. N.T. pp. 45; OA Exs. 3, 6. Appellant also acknowledges she does not follow the same chain of command as a Corrections Officer and is not covered by the same union. (See Findings of Fact 4, 10, 15.) Moreover, appellant did not present any indication that her CEVA position includes one year involving the methods and techniques used in varied machine or production operations as specified in the MET. OA Exs. 1, 9.

After the presentation of appellant's case in chief, the OA made a motion to dismiss for failure to establish a *prima facie* case of discrimination based upon a mistake of fact. N.T. p. 57. An appellant must initially present 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, supra; Nwogwugwu, supra*. We have been advised, “[g]iven the critical role of circumstantial evidence in discrimination proceedings, the *prima facie* case cannot be an onerous one.” *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. In this instance, appellant has not met her initial burden because she did not present evidence establishing her co-ownership of the car wash was in a manufacturing environment. She also acknowledged her CEVA position description does not include “care, custody, and control” of inmates which is written in the position description for a Corrections Officer. She further acknowledges her CEVA

position follows a different chain of command and she is in a different union. Therefore, appellant has not established a *prima facie* case of discrimination based upon a mistake of fact.⁶

In summation, appellant has not established procedural discrimination because she has not demonstrated any harm resulting from the OA's error. Further, appellant has not established the OA erred in finding her ineligible for the Corrections General Industries Factory Foreman 1 (CS-20220398-98345) position. Accordingly, we enter the following:

⁶ Had the burden of proof shifted, the OA presented legitimate, nondiscriminatory reasons for determining appellant is not eligible for the Corrections General Industries Factory Foreman 1 position. *Henderson, supra; Nwogwugwu, supra*. Specifically, Human Resource Analyst 2 Torres credibly explained appellant does not meet the METs because her current CEVA position is a paraprofessional position that does not involve the care, custody, and control of inmates equivalent to the Corrections Officer position. N.T. pp. 85-86. Human Resource Analyst 4 Brown provided additional credible testimony explaining appellant does not meet the METs because, in addition to the lack of Corrections Officer experience, appellant's experience as co-owner of a car wash was providing a service, not delivering or manufacturing a product. N.T. pp. 109-1113. Finally, Human Resource Analyst 3 Krammes provided additional credible statements regarding appellant's ineligibility for the Corrections General Industries Factory Foreman 1 position. Specifically, she explained appellant's experience as a co-owner of the car wash did not qualify as working within a manufacturing environment. N.T. pp. 136-138. 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. Ct. 1999). Thus, the appointing authority has presented legitimate, nondiscriminatory reasons for determining appellant did not meet the METs. *Henderson, supra*. Appellant has not presented any evidence of pretext. *Id.*

CONCLUSION OF LAW

Appellant has failed to present evidence establishing discrimination violative of Section 2704 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Shannon D. Bean challenging the Office of Administration, Executive Offices' determination that she was not eligible for Corrections General Industries Factory Foreman 1 (CS-20220398-98345) and sustains the action of the Office of Administration, Executive Offices in the ineligibility determination of Shannon D. Bean for Corrections General Industries Factory Foreman 1 (CS-20220398-98345).

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Pamela M. Iovino
Commissioner

Mailed: February 16, 2023