

COMMONWEALTH OF PENNSYLVANIA

Lisa M. Neiter : State Civil Service Commission  
 :  
 v. :  
 :  
 Office of Administration, Executive :  
 Offices : Appeal No. 31021

John B. Dougherty : Jonathan W. Kunkel  
 Attorney for Appellant : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Lisa M. Neiter challenging her Level-Two Alternative Discipline in Lieu of a three-day suspension (hereinafter “ADLS”) and reassignment from regular Human Resource Analyst 3 (Labor Relations) employment with the Office of Administration, Executive Offices (hereinafter “OA”). Hearings were held on March 1, 2023 and April 27, 2023, via video, before Chairwoman Maria P. Donatucci.

The Commissioners have reviewed the Notes of Testimony and the exhibits introduced at the hearing. The issues before the Commission are whether OA has established good cause for appellant’s suspension<sup>1</sup> and whether appellant has established the suspension and reassignment were the result of discrimination.

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<sup>1</sup> Under the Level-Two ADLS, there was no effect on appellant’s pay, seniority, or other benefits. The Level-Two ADLS carries the same weight as if appellant served a three-day suspension. Comm. Ex. A. Consequently, the present appeal will be considered by the Commission as an appeal of a three-day suspension.

## FINDINGS OF FACT

1. By letter dated September 23, 2022, appellant was issued a Level-Two Alternative Discipline in Lieu of Suspension (hereinafter “ADLS”) with final warning which was equivalent to a three-day suspension from her position as a regular status Human Resource Analyst 3 (Labor Relations) (hereinafter “HR Analyst 3”) with the Office of Administration’s (hereinafter “OA”) Public Safety Human Resource Delivery Center (hereinafter “Public Safety Delivery Center”), Division of Employee Relations. Comm. Ex. A.
2. By letter dated September 23, 2022, appellant was reassigned to the Employee Relations Section, supporting the Pennsylvania State Police (hereinafter “PSP”) in OA’s Public Safety Delivery Center, Division of Employee Relations. Comm. Ex. A.

3. By letter dated September 23, 2022, appellant was charged with falsification as follows:

Specifically, on May 2, 2022, you reported a complaint to your EEO office on behalf of a co-worker. The information you reported was knowingly false.

Comm. Ex. A.

4. The appeal was properly raised before this Commission.
5. The three-day suspension (ADLS) portion of the appeal was heard under Sections 3003(7)(i) and (ii) of Act 71 of 2018. Comm. Exs. C, F.
6. The reassignment portion of the appeal was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Exs. C, F.
7. Appellant was employed as an HR Analyst 3 with OA's Public Safety Delivery Center, Employee Relations Division. N.T. pp. 357, 359-360.
8. Appellant has worked for the Commonwealth for twenty-three years. N.T. p. 359.

9. As a HR Analyst 3 with the Employee Relations Division, appellant served as a Special Labor Relations Analyst. N.T. p. 360.
10. As a HR Analyst 3 with the Employee Relations Division, appellant's duties included investigating disciplinary matters, conducting pre-disciplinary conferences, addressing union grievances, and providing guidance to supervisors and managers related to policy and contract interpretations. N.T. p. 360.
11. On May 2, 2022, appellant and Clerical Assistant 3 Stephany Nicholson were the only employees in the office. N.T. p. 372.
12. On May 2, 2022, appellant had lunch with Nicholson. N.T. pp. 74, 100, 372.
13. During lunch on May 2, 2022, Nicholson told appellant that Chief of the DOC Labor Relations Division Robert Shettlewood sometimes does not respond to her emails in writing and instead comes to her desk. N.T. p. 373; AA Ex. 5 (p. 15).<sup>2</sup>

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<sup>2</sup> The Commission is not opining on whether the sexual harassment occurred. The Commission's Findings of Fact Nos. 13-15 and 18 reflect what appellant believes Nicholson told her during their lunch conversation on May 2, 2022.

14. Nicholson told appellant that while Shettlewood is at her desk, he looks at her chest and attempts to look down her shirt. N.T. p. 373; AA Ex. 5 (p. 15).
15. Nicholson told appellant that once when she was standing in Shettlewood's office, he looked at her chest and crotch area. N.T. p. 373.
16. After listening to Nicholson's experiences, appellant shared that Shettlewood made comments about her body and rubbed his foot along her leg during meetings. N.T. pp. 78, 108-109, 374.
17. Appellant advised Nicholson she could report Shettlewood's behavior to the Equal Employment Opportunity Office (hereinafter "EEO") if she felt uncomfortable. N.T. pp. 374, 398.
18. The May 2, 2022 lunch conversation ended with Nicholson informing appellant that a former co-worker had referred to Shettlewood as a "ladies' man" and she did not know what that meant at the time. N.T. p. 374.
19. Shettlewood was Nicholson's direct supervisor. N.T. pp. 75-76.

20. Shettlewood did not directly supervise appellant. N.T. p. 420.
21. After the May 2, 2022 lunch conversation, appellant spoke to HR Analyst 3 Michelle Merovich about what Nicholson told her. N.T. pp. 351, 376.
22. Merovich had similar experiences with Shettlewood. N.T. p. 351.
23. Merovich suggested appellant ask EEO Chief of Investigation and Training John Harris for guidance on what she should do. N.T. pp. 351-352.
24. After speaking with Merovich, appellant reviewed the sexual harassment policy and then spoke with Harris about what Nicholson told her at lunch. N.T. pp. 29, 376, 381.
25. No investigation was conducted by EEO because Nicholson indicated she did not have anything to report on Shettlewood and the lunch conversation was a misunderstanding. N.T. p. 190; AA Ex. 3 (p. 1).

26. On May 9, 2022, Nicholson informed Shettlewood and HR Program Manager Bryan Oles of her lunch conversation with appellant. N.T. pp. 92, 141; AA Ex. 5 (p. 14).
27. HR Analyst 5 Richard Murray, who works for OA's Health and Human Services Delivery Center, was assigned to conduct a disciplinary investigation related to appellant's EEO inquiry. N.T. pp. 200-204.
28. Murray's investigation was limited to interviewing EEO Chief of Investigation Harris, EEO Director Epoca, HR Program Manager Oles, alleged offender Shettlewood, Nicholson, and appellant. N.T. pp. 205-206; AA Ex. 5 (p. 1).
29. No evidence was found in the investigation that appellant was attempting to generate sexual harassment complaints against Shettlewood. Comm. Ex. D.
30. Murray summarized his findings in a report dated June 6, 2022. N.T. pp. 215, 235; AA Ex. 5.

31. By letter dated August 29, 2022, appellant was notified a pre-disciplinary conference (hereinafter “PDC”) was scheduled for that same day to discuss the charge of falsification based on her May 2, 2022 inquiry to EEO. AA Ex. 6.
32. On August 29, 2022, appellant’s PDC was held. N.T. pp. 248, 271.
33. Appellant did not have any prior discipline. N.T. p. 363.
34. On her last Employee Performance Review (hereinafter “EPR”) prior to the September 23, 2023 Level-Two ADLS and reassignment, appellant received an overall rating of “commendable.” N.T. p. 305; Ap. Ex. 2 (p. 4).
35. There are five possible EPR ratings: “outstanding;” “commendable;” “satisfactory;” “needs improvement;” and “unsatisfactory.” Ap. Ex. 2.



36. “Commendable” is the second highest rating on an EPR. Ap. Ex. 2.
37. Management Directive 505.30 Amended (Prohibition of Sexual Harassment in Commonwealth Work Settings) prohibits visual sexual harassment in the form of sexually oriented gestures. Ap. Ex. 5 (p. 2).
38. Management Directive 505.30 Amended imparts on all employees a responsibility to ensure the workplace is free from all forms of sexual harassment. Ap. Ex. 5 (p. 1).
39. Section 7(a)(7) of Management Directive 410.10 Amended (Guidelines for Investigating and Resolving Internal Discrimination Complaints) provides:
- All employees are responsible for ensuring the prohibition of workplace discrimination, and therefore, are encouraged to report such acts.
- Ap. Ex. 20 (p. 7).

40. Section 3 of Executive Order 2021-04 (Prohibition of Sexual Harassment) provides:

Any Commonwealth employee who engages in or knowingly permits or condones sexual harassment during the course of conducting their Commonwealth duties shall be subject to disciplinary action, up to and including dismissal.

Ap. Ex. 6 (p. 2).

41. DOC's Sexual Harassment Policy and Procedures Manual prohibits sexual harassment and holds all employees accountable for creating and maintaining a workplace free from sexual harassment. Ap. Ex. 4 (p. 1).
42. The provisions of DOC's Sexual Harassment Policy and Procedures Manual applied to appellant. N.T. pp. 315-316
43. The employee's responsibility to ensure a sexual harassment free workplace is taught during employee trainings. N.T. pp. 41-44.

44. Failure to comply with Management Directive 505.30 Amended, Executive Order 2021-04, and DOC's Sexual Harassment Policy may result in disciplinary action, including removal. Ap. Exs. 4 (pp. 1-2), 5 (p. 2), 6 (p. 2).
45. Management Directives 505.30 and 410.10 Amended, Executive Order 2021-04, and DOC's Sexual Harassment Policy prohibit retaliation in any form. Ap. Exs. 4 (p. 2), 5 (p. 2), 6 (p. 2), 20 (p. 3).
46. From September 23, 2020 through September 2022, the Bureau of Equal Employment Investigations, Department of Corrections received 186 complaints of sexual harassment and discrimination. Comm. Ex. D.
47. Out of the 186 complaints, 143 complaints were determined to be unsubstantiated. Comm. Ex. D.
48. None of the 143 unsubstantiated complaints resulted in discipline for the filing employee. Comm. Ex. D.
49. None of the 143 unsubstantiated complaints resulted in the transfer of the filing employee. Comm. Ex. D.

50. The Bureau of Equal Employment Investigations is within OA's Equal Opportunity Office. Comm. Ex. D.

### DISCUSSION

In the present appeal, appellant is challenging the following disciplinary actions: 1) the Level-Two Alternative Discipline in Lieu of Suspension (hereinafter "ADLS") with final warning issued to her for falsification of a sexual harassment complaint; and 2) the decision to reassign her to another office which was also based on the falsification charge. Comm. Ex. A. Appellant brought these challenges through Sections 3003(7)(i) and 3003(7)(ii) of Act 71 of 2018.<sup>3</sup> 71 Pa.C.S.A. §§ 3003(7)(i), (ii). Thus, the issues before the Commission are: 1) whether the Office of Administration, Executive Offices (hereinafter "OA") established good cause for the Level-Two ADLS with final warning; 2) whether appellant established the Level-Two ADLS with final warning and/or reassignment were the result of discrimination. Specifically, appellant asserts the Level-Two ADLS with final warning and reassignment were the result of discrimination based on retaliation and disparate treatment. Comm. Ex. B.

In an appeal challenging the suspension of a regular status employee, the appointing authority bears the burden of establishing good cause for the personnel action. *White v. Commonwealth, Department of Corrections*, 110 Pa. Commw. 496, 532 A.2d 950 (1986); 71 Pa.C.S.A. §§ 2603(c), 3003(7)(i). Good

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<sup>3</sup> Act of June 28, 2018, P.L. 460, No. 71, § 1.

cause must be based upon meritorious criteria and be related to one's competency and ability to execute job duties properly. *White*, 110 Pa. Commw. at 498, 532 A.2d at 951.

Concerning the discrimination claim, appellant bears the burden of establishing the Level-Two ADLS with final warning and reassignment were due to discrimination. *See Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989). In analyzing claims of discrimination under section 2704 of Act 71, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred.<sup>4</sup> 71 Pa.C.S.A. § 2704; *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Once a *prima facie* case of discrimination has been established the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for the personnel action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate the proffered merit reason for the

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<sup>4</sup> Section 2704 of 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.A. § 2704. The prohibition set forth in this section encompasses two general types of discrimination—“traditional discrimination,” which encompasses claims of discrimination based on labor union affiliation, race, sex, national origin or other non-merit factors; and “technical discrimination,” which involves a violation of procedures required pursuant to the Act or related Rules. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. Ct. 1996), citing *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988).

personnel action is merely pretext. *Id.* at 614-615. In particular, an employee claiming disparate treatment must demonstrate that he or she was treated differently than others similarly situated. *Nwogwugwu*, at 141 Pa. Commw. 40, 594 A.2d 851 (1991).

Here, appellant alleges traditional discrimination based on retaliation and disparate treatment. Comm. Ex. B. Specifically, appellant alleges she was disciplined and reassigned because she reported alleged sexual harassment. Comm. Ex. B. Additionally, appellant asserts she was treated differently than other similarly situated employees who reported discriminatory conduct.

In support of its charges and in rebuttal of appellant's discrimination claims, OA presented the testimony of EEO Chief of Investigation and Training John Harris,<sup>5</sup> Corrections Mail Inspector Supervisor Stephany Nicholson,<sup>6</sup> HR Program Manager Bryan Oles,<sup>7</sup> HR Analyst 5 Richard Murray,<sup>8</sup> HR Analyst 3 Emily

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<sup>5</sup> Harris is employed by the Office of Administration's (hereinafter "OA") Equal Employment Opportunity Office as the Chief of Investigation and Training (hereinafter "EEO Chief of Investigation and Training"). N.T. pp. 27, 35. In that capacity, he is responsible for investigating discrimination complaints arising from the Department of Corrections (hereinafter "DOC"). N.T. p. 28. Harris is also responsible for making and providing EEO-related trainings to various departments and DOC employees. N.T. p. 36.

<sup>6</sup> Nicholson is currently employed as a Corrections Mail Inspector Supervisor at SCI Camp Hill. N.T. pp. 72, 128. Nicholson assumed this position in November of 2022. N.T. pp. 73, 128. At the time of the events relevant to the present appeal, Nicholson was employed by OA as a Clerical Assistant 3 within the DOC Labor Relations Division of the Public Safety Delivery Center. N.T. pp. 74, 137. Her direct supervisor was the Chief of the DOC Labor Relations Division, Robert Shettlewood. N.T. p. 137.

<sup>7</sup> Oles is employed by OA as the HR Program Manager for the Public Safety Delivery Center, which includes the DOC Labor Relations Division. N.T. p. 135. Oles has held this position since January 2018. N.T. pp. 135-136. At the time of the event relevant to the present matter, he was the second-level supervisor to Nicholson and appellant and direct supervisor for Shettlewood. N.T. pp. 137, 148-149.

<sup>8</sup> Murray is employed by OA as a HR Analyst 5 with the Health and Human Services Delivery Center. N.T. pp. 200-202. His working title is Chief of the Employee Relations and Safety Division. N.T. p. 202. Murray's primary responsibilities encompass labor relations and other employment matters arising out of the Department of Military and Veterans Affairs (hereinafter "DMVA"). N.T. p. 202. Murray was asked by his supervisor to investigate the present matter because the Delivery Center he works for is separate and apart from appellant's Delivery Center. N.T. pp. 147, 287, 203-204.

Shapard,<sup>9</sup> and HR Delivery Center Manager Ty Stanton.<sup>10</sup> Appellant testified on her own behalf and presented the testimony of Director of the Bureau of DOC Equal Employment Opportunity Investigations (hereinafter “EEO Director”) Tiffany Epoca<sup>11</sup> and HR Analyst 3 Michelle Merovich.<sup>12</sup> The evidence provided by the parties has been reviewed by the Commission and is summarized below.

### *Summary of the Evidence*

The events relevant to the present appeal arose from a lunch conversation appellant had with a new co-worker on May 2, 2022. That day, the only employees in the office were appellant and her new co-worker, Stephany Nicholson, who at the time was a Clerical Assistant 3. N.T. pp. 74, 100, 372. Appellant recalled she went to lunch late because she was waiting for an email. N.T. p. 372. Appellant apologized to Nicholson for the delay which she explained was because of the email. N.T. p. 372. In response, Nicholson asked appellant if Chief of the DOC Labor Relations Division Robert Shettlewood responds to her

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<sup>9</sup> Shapard is employed by OA as a HR Analyst 3 with the General Government Delivery Center (hereinafter “GGDC”) and has held this position for approximately one year. N.T. pp. 241-243. The GGDC provides services to seventeen agencies under the Governor’s jurisdiction, to include OA. N.T. p. 243. Therefore, Shapard was responsible for conducting appellant’s pre-disciplinary conference in the present matter. N.T. p. 243.

<sup>10</sup> Stanton is employed by OA as the HR Delivery Center Manager for the Public Safety Delivery Center. N.T. p. 281. Stanton was involved in determining the level of discipline issued to appellant. N.T. pp. 291-292.

<sup>11</sup> Epoca has held the position of EEO Director since December 2020. N.T. pp. 175-176. As the EEO Director, Epoca directly supervises EEO Chief of Investigation and Training Harris. N.T. p. 177.

<sup>12</sup> Merovich is employed by OA as an HR Analyst 3 with the Public Safety Organization Management Unit. N.T. p. 348. Merovich has worked for the Commonwealth for twenty-nine years and held her present position for about twelve years. N.T. p. 349. At the time of the events related to the present matter, Merovich worked in the same office as appellant and had so for approximately eight years. N.T. p. 350.

emails. N.T. p. 372. At the time, Shettlewood was Nicholson's direct supervisor and responsible for her training since she was a new employee.<sup>13</sup> N.T. pp. 76, 100-101, 137, 420. Shettlewood did not directly supervise appellant. N.T. pp. 420-421.

Appellant explained to Nicholson that she does not often send Shettlewood emails that require responses, but when she does, he responds. N.T. pp. 373, 396-397. Nicholson then told appellant that Shettlewood sometimes does not respond to her emails in writing and instead comes to her desk. N.T. p. 373. Nicholson told appellant that while Shettlewood is at her desk, he looks at her chest and attempts to look down her shirt. N.T. p. 373. Appellant recalled Nicholson pulled at her shirt and said, "I don't think I wear shirts that are too low." N.T. pp. 373, 397. Appellant told Nicholson her shirts are fine. N.T. pp. 373, 397. Nicholson then disclosed that once when she was standing in Shettlewood's office, he looked "here," motioning toward her chest and crotch area. N.T. p. 373. Nicholson also told appellant that Shettlewood does not look at her face when he talks to her. N.T. p. 373.

After listening to Nicholson, appellant shared that she had experienced similar behavior from Shettlewood. N.T. p. 374. Appellant also explained to Nicholson that if she feels uncomfortable, she can report it to the Equal Employment Opportunity Office (hereinafter "EEO") because Shettlewood is in their chain of command. N.T. pp. 374, 398. The conversation then ended with Nicholson informing appellant that a former co-worker had referred to Shettlewood as a

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<sup>13</sup> Nicholson started in the Clerical Assistant 3 position in April 2022. N.T. pp. 76, 100.



“ladies’ man” and she did not know what that meant at the time. N.T. p. 374. After the conversation about Shettlewood ended, appellant and Nicholson continued with an ordinary lunch conversation. N.T. p. 374.

Appellant testified she believed what Nicholson was telling her about Shettlewood based on her own experiences. N.T. p. 375. Appellant stated she was also aware of others who experienced similar treatment. N.T. p. 375.

On the way back to her desk after lunch, appellant saw that HR Analyst 3 Michelle Merovich was in her cubicle. N.T. pp. 354, 376. Appellant stopped to talk to Merovich about what Nicholson told her. N.T. pp. 351, 376. Appellant explained she wanted to make sure her own experiences were not coloring her view of what Nicholson disclosed. N.T. p. 376.

Appellant recounted for Merovich what Nicholson had told her, that being that Shettlewood makes her feel uncomfortable and stares at her chest and crotch while addressing her. N.T. p. 351. Merovich testified she believed what appellant told her because she had experienced similar behavior. N.T. p. 351. Merovich also recalled appellant asked her if she should report it to EEO. N.T. p. 351. Merovich suggested appellant ask EEO Chief of Investigation and Training John Harris for guidance on what she should do. N.T. pp. 351-352. Appellant agreed. N.T. pp. 352, 376.

After speaking with Merovich, appellant returned to her desk and reviewed the policy. N.T. p. 376. She then went to talk to Harris about what, if anything, needed to be done. N.T. p. 376. Appellant explained the policy required her to say something and she was concerned she may be disciplined if it was discovered she knew and failed to report it. N.T. pp. 377, 400.

Upon meeting with Harris, appellant informed him of the lunch conversation she had with Nicholson.<sup>14</sup> N.T. pp. 29, 381. Appellant also told Harris she was not sure what needed to be done but she was letting him know. N.T. p. 48. Harris advised appellant she did not need to do anything and indicated he would need to inform EEO Director Tiffany Epoca. N.T. pp. 30, 48, 381, 400.

After speaking with appellant, Harris emailed Epoca. N.T. pp. 30-31, 182; AA Ex. 1. This is standard procedure for allegations brought to Harris' attention. N.T. pp. 31-32. Epoca is then responsible for determining whether to open a complaint and conduct an investigation.<sup>15</sup> N.T. p. 32.

That same day, May 2, 2022, Epoca emailed Nicholson and asked to talk to her about what appellant reported. N.T. pp. 80, 178, 182; AA Ex. 3 (p. 2). Nicholson responded that she did not have anything to report on Shettlewood; she understands there is some history between Shettlewood and appellant; and she thinks her conversation with appellant was a misunderstanding. N.T. pp. 84-85; AA Ex. 3

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<sup>14</sup> During his testimony, Harris recalled in detail what appellant told him. N.T. pp. 29, 49-52. Harris' testimony is consistent with appellant's hearing testimony recounting her lunch conversation with Nicholson. N.T. pp. 29, 49-52.

<sup>15</sup> Pursuant to section 7(b)(1) of Management Directive 410.10 Amended (Guidelines for Investigating and Resolving Internal Discrimination Complaints), discrimination complaints are to be promptly investigated. Ap. Ex. 20 (p. 7). Nothing in this Management Directive gives a particular person authority to dispense with such investigations. N.T. p. 64; Ap. Ex. 20.

(p. 1). Epoca thanked Nicholson for the clarification and encouraged her to reach out if anything occurs. AA Ex. 3 (p. 1). No investigation was opened. N.T. pp. 52, 183.

Epoca did not have any conversations with appellant or Shettlewood. N.T. p. 183. Nor is there any evidence she spoke to anyone else who may have observed Shettlewood's behavior toward Nicholson. Epoca explained the matter was not investigated because the information provided by appellant was not considered a complaint. N.T. p. 189. Epoca deemed the information appellant provided to be an inquiry about a possible sexual harassment allegation. N.T. p. 190. Epoca further explained there was no allegation because Nicholson denied anything happened; therefore, the inquiry was closed. N.T. p. 190.

About a week later, on May 9, 2022, Nicholson spoke with Shettlewood about appellant. AA Ex. 5. Nicholson explained she wanted to distance herself from appellant and let Shettlewood know she was trying not to associate with appellant. N.T. pp. 91-92. Nicholson began by asking Shettlewood for clarification on her job duties related to JNET, which is a duty she shared with appellant.<sup>16</sup> N.T. pp. 75, 87, 91, 127. Nicholson did not mention the lunch conversation until Shettlewood asked for clarification. N.T. p. 92. Thereafter, Shettlewood went to his direct supervisor, HR Program Manager Bryan Oles. N.T. p. 141.

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<sup>16</sup> JNET is an online system that provides criminal conviction information. N.T. p. 369. As a Clerical Assistant 3, Nicholson was responsible for reviewing JNET notifications of employee arrests and citations and notifying the institutions where the employees worked. N.T. p. 75. Appellant was assigned to be Nicholson's "backup." N.T. p. 87. In or around April 2022, appellant and Nicholson were simultaneously being trained on this system. N.T. p. 369.

Shettlewood informed Oles that he learned from Nicholson that appellant submitted an EEO complaint against him. N.T. p. 141. Oles told Shettlewood he would look into the matter and directed Shettlewood to return to his office. N.T. p. 141. Oles then reached out to Nicholson and asked if she had time to speak with him. N.T. pp. 141-142. That same afternoon, they spoke about Nicholson's lunch conversation with appellant. N.T. pp. 95-96, 142-145. Nicholson's version of the lunch conversation differed from appellant's account and she claimed appellant was trying to influence her to make a complaint.<sup>17</sup> N.T. pp. 143-144; AA Ex. 5 (p. 11). Based on this, Oles was concerned appellant made a false report and did not want it to cause problems within their team. N.T. pp. 145-146.

Oles reached out to EEO Director Epoca, who informed him there was nothing for EEO to investigate based on Nicholson's response. N.T. pp. 142, 146-147, 152. Wanting to pursue the matter further, Oles reached out to his supervisor, HR Delivery Center Manager Ty Stanton. N.T. pp. 147, 287. Oles and Stanton discussed the matter and it was decided they would request assistance in conducting the investigation from a different Delivery Center. N.T. pp. 147, 288. HR Analyst 5 Richard Murray, who works for the Health and Human Services Delivery Center, was assigned to conduct the investigation. N.T. pp. 200-204.

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<sup>17</sup> The version of events Nicholson gave Oles differs from the statement she gave Murray and her testimony. N.T. pp. 76-79, 143-144; AA Exs. 4, 5 (pp. 11, 13). For example, during her testimony, Nicholson claimed appellant randomly brought up Shettlewood, whereas she told Oles the conversation arose out of her comment about her co-worker calling Shettlewood a "ladies' man." N.T. pp. 76-77; AA Exs. 4, 5 (p. 11). With that said, we note Nicholson acknowledged using the examples appellant reported to EEO, but claimed she said Shettlewood never did these things. N.T. p. 110; AA Ex. 4 (p. 1). Additionally, we note appellant's accounts of the lunch conversation have been consistent. N.T. pp. 29, 212, 372-374, 397-398; AA Ex. 5 (pp. 5, 15)

Murray's investigation was limited to interviewing EEO Chief of Investigation Harris,<sup>18</sup> EEO Director Epoca, HR Program Manager Oles, alleged offender Shettlewood, Nicholson,<sup>19</sup> and appellant. N.T. pp. 205-206; AA Ex. 5 (p. 1). No coworkers were interviewed to determine what, if anything, they saw or heard related to the alleged sexual harassment. AA Ex. 5 (p. 1).

After completing his investigation, Murray concluded appellant knowingly made a false report because she previously filed a complaint about Shettlewood. N.T. pp. 216-217, 230-232. Murray reasoned this gave appellant motive to lie and he speculated appellant did so because she wanted to get Shettlewood into trouble. N.T. p. 217. Murray further reasoned nothing inappropriate happened to Nicholson because Nicholson denied it, was a new employee, and did not want any drama. N.T. pp. 216-217. Murray believed if something had happened to Nicholson, she would have reported it. N.T. pp. 216-217.

Murray summarized his findings in a report dated June 6, 2022. N.T. pp. 215, 235; AA Ex. 5. An advance copy of the report was provided to HR Delivery Center Manager Stanton and HR Program Manager Oles.<sup>20</sup> N.T. pp. 232-233, 289.

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<sup>18</sup> Harris was asked by Epoca on May 9, 2022, to write a witness statement summarizing what appellant reported to him. N.T. p. 33. Epoca directed Harris to send the witness statement to her and HR Program Manager Oles, which he did. N.T. pp. 33-34; AA Ex. 2. This appears to be the witness statement Murray included in his investigative report. AA Ex. 5 (p. 4).

<sup>19</sup> Prior to Murray initiating his investigation, Oles asked Nicholson to complete a witness statement, which she did. N.T. pp. 96-97; AA Ex. 4. Nicholson subsequently made additions to her original statement to clarify what she claimed she did not say. N.T. pp. 98-99, 210-211, 233.

<sup>20</sup> Stanton explained Oles attended the meeting with Murray because he is a senior manager. N.T. p. 301. Stanton did not view this as a conflict because he did not deem Oles to be a material witness. N.T. p. 301.

A few days or a week thereafter, Murray met with Stanton and Oles via video. N.T. pp. 235, 289, 301. This concluded Murray's involvement in the disciplinary action. N.T. pp. 217-218.

Following the above meeting, Stanton discussed the matter with his supervisor, Deputy Secretary for Administration Reid Walsh, who was transitioning from that role, and her replacement, Jay Gasdaska. N.T. pp. 289-290. It was decided a pre-disciplinary conference (hereinafter "PDC") should be conducted. N.T. p. 290.

On or about August 22, 2022, Stanton emailed Murray's report and the witness statements to HR Analyst 3 Emily Shapard and requested that she conduct a PDC with appellant.<sup>21</sup> N.T. pp. 242, 246. Shapard was selected to conduct the PDC because she works for the General Government Delivery Center (hereinafter "GGDC"), which is a separate Delivery Center that services OA. N.T. p. 290. Since appellant and her supervisors are employees of OA, this Delivery Center is technically their HR Office. N.T. p. 290.

After reviewing the documents provided by Stanton, Shapard framed the charge and drafted the PDC Notice. N.T. pp. 246-248, 259. The PDC Notice informed appellant of the charge, that being falsification, and the date of the PDC. AA Ex. 6; Ap. Ex. 15. The PDC took place as scheduled on August 29, 2022. N.T. pp. 248, 271; AA Ex. 6. Present at the PDC were appellant, Shapard, and Gertrude Brunot, who is a retired colleague of Shapard. N.T. p. 248.

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<sup>21</sup> It is unclear why more than a month passed before Shapard was contacted about conducting a PDC.

During the PDC, appellant was provided an opportunity to respond to the falsification charge. N.T. pp. 249-250. Appellant denied the charge and asserted the PDC was retaliatory. N.T. p. 250. Appellant also discussed her history with Shettlewood to include a complaint she made in or around 2016 for similar conduct. N.T. pp. 250-251. Appellant explained this information was contextual and noted the behavior was continuing. N.T. p. 404.

Following the PDC, Brunot compiled the PDC minutes which detailed appellant's responses. N.T. pp. 251-252; AA Ex. 7. Appellant was also provided an opportunity to submit additional information, which she did. N.T. pp. 253-255. Specifically, appellant provided a witness statement and copy of an EEO complaint she made in January 2022. N.T. pp. 254. Shapard determined both complaints were investigated appropriately and closed. N.T. p. 255.

Subsequently, Shapard met, via video, with HR Delivery Center Manager Stanton and Deputy Secretary for Administration Gasdaska to discuss the information obtained from the PDC and her recommendation as to what, if any, discipline was warranted. N.T. pp. 255-256, 290-291, 299. Shapard recommended a Level-Two ADLS be issued to appellant due to the severity of the offense. N.T. pp. 256. Shapard explained appellant holds a position which requires the highest level of integrity and accountability which is why a Level-Two ADLS was recommended. N.T. p. 257.

After the meeting with Shapard, a separate discussion was held between Stanton, Gasdaska, and Ann Korb, who is the Manager for the GGDC. N.T. pp. 291, 313. During this discussion it was decided a Level-Two ADLS with final warning would be issued to appellant and she would be reassigned to another office. N.T. pp. 291-292.

Stanton believed reassignment was warranted because it was not in the best interest of the unit to permit appellant to work in the same unit with Shettlewood. N.T. pp. 314, 317. Stanton also believed reassignment was warranted because appellant worked in the Labor Relations Division which is responsible for conducting investigations and PDCs; determining whether rule violations occurred; and representing agencies and OA at various meetings. N.T. p. 292. Stanton reasoned these duties require honesty and integrity which appellant failed to maintain when she made an allegation against Shettlewood, who was her Division Chief. N.T. pp. 292, 313-314.

While Stanton stressed the seriousness of the infraction, he noted appellant had performed well in her duties which is why it was decided she would be reassigned to another Labor Relations Office. N.T. p. 297. Appellant's commendable Employee Performance Review (hereinafter "EPR") was also considered as mitigating factor when issuing the Level-Two ADLS.<sup>22</sup> N.T. p. 309.

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<sup>22</sup> On her last EPR prior to the present discipline, appellant received an overall rating of "commendable." N.T. p. 305; Ap. Ex. 2 (p. 4). In the category of work results, which rates the employee's customer service and timeliness as an individual and team, appellant was rated "outstanding." N.T. pp. 305, 361; Ap. Ex. 2 (p. 2). Appellant was rated "commendable" in the following categories which address her communication and conflict resolution skills, as well as her willingness to function as a team player: communications; interpersonal relations; and work habits. N.T. pp. 306-308, 361-362; Ap. Ex. 2 (pp. 2-3).



Appellant was given two options for reassignment. N.T. p. 293. The first option was the Labor Relations Office at the Pennsylvania State Police (hereinafter “PSP office”), which is part of the Public Safety Delivery Center where she currently worked. N.T. pp. 168, 293, 316, 384. The second option was the Regional Office that provides HR support to SCI-Frackville and SCI-Mahanoy. N.T. pp. 293, 316, 384. At either location, appellant would be serving as the Labor Relations Coordinator. N.T. p. 384. Stanton informed appellant if she failed to choose, the default would be the PSP office. N.T. p. 293. However, regardless of what appellant chose, she would be losing her ability to telework. N.T. p. 385.

Appellant asked for some time to consider the two options, which she was given. N.T. pp. 295, 385. Appellant chose reassignment to the PSP office because it was about twenty minutes from her home. N.T. pp. 295, 385. The other option would be an hour commute one-way. N.T. p. 385. Since appellant would be losing her ability to telework, the option with less travel was the logical choice. N.T. pp. 385-386.

Shortly after appellant was reassigned to the PSP office, her position was changed to Safety Coordinator. N.T. p. 318. Appellant was transferred to the PSP office on September 26, 2022 and assumed the new role of Safety Coordinator in December 2022. N.T. pp. 387-388. Appellant noted she did not have any prior experience as a Safety Coordinator. N.T. p. 388. Appellant testified HR Program Manager Oles was responsible for this change in her duties. N.T. p. 388.

On October 24, 2022, appellant filed an EEO complaint for retaliation based on the disciplinary action and reassignment. N.T. p. 388; Ap. Ex. 17. By email dated October 28, 2022, EEO Director Epoca informed appellant that her complaint would not be investigated. N.T. p. 391; Ap. Ex. 18.

### *Good Cause for the Suspension*

The Commission must first determine if there was good cause for the Level-Two ADLS with final warning under section 3003(7)(i) of Act 71. Good cause must relate to an employee's competence and ability to perform her job duties, *Department of Corrections v. Ehnnot*, 110 Pa. Commw. 608, 532 A.2d 1262 (1987), or must result from conduct that hampers or frustrates the execution of the employee's duties. *McCain v. Department of Education*, 71 Pa. Commw. 165, 454 A.2d 667 (1983). Having carefully reviewed the evidence, we find OA has failed to establish the charge against appellant and has therefore failed to establish good cause for the Level-Two ADLS with final warning. In support of our conclusion, we find credible the testimony and evidence provided by appellant.<sup>23</sup>

Appellant was charged with falsification for knowingly reporting a false sexual harassment complaint. The disciplinary investigation focused on the lunch conversation between appellant and Nicholson. No co-workers were interviewed to determine, what if anything, they saw or heard related to the alleged sexual harassment. *See* Finding of Fact 28. While the quality of the investigation is concerning, it is not dispositive of whether falsification occurred. The issue is whether the evidence presented established appellant knowingly made a false report.

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<sup>23</sup> 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).

We find there is no credible evidence to support the underlying charge, that being that appellant knowingly reported something that was false. At most, this was a conversation of which two people had different impressions. A misperception is not equivalent to a knowingly false statement. Whether the report was knowingly false hinges on whether appellant believed what she was reporting was false at the time she reported it. We find appellant believed, at the time she made the report and even now, that the information she provided was true and correct. Specifically, we find appellant credibly testified she believed Clerical Assistant 3 Nicholson told her Shettlewood looks at her chest, attempted to look down her shirt, and once looked at her crotch area. *See Findings of Fact 15-16.*

Furthermore, we find there is no credible evidence suggesting appellant believed otherwise. Appellant's explanations as to what occurred during the lunch conversation have been consistent. There is no evidence appellant tried to influence or force an investigation into the sexual harassment she reported, nor did she ask for a particular result. Also, there is no evidence appellant attempted to generate complaints against the alleged harasser, Shettlewood. *See Finding of Fact 29.* Appellant simply reported what she believed she heard as required by her training, the Management Directives, and other policies. *See Findings of Fact 38-44.* We further note other employees who reported unsubstantiated conduct were not disciplined for falsification. *See Findings of Fact 47-48.*

Additionally, we are not persuaded by Nicholson's belief that she was being used as a pawn for appellant to "get back at [Shettlewood] for something." N.T. p. 86. As previously indicated, there is no evidence appellant meddled in the investigatory process or attempted to generate other complaints against Shettlewood. Nonetheless, Nicholson asserts the following behavior by appellant supports her

belief: 1) appellant stopped at her desk and asked if she had anything going on after EEO Director Epoca sent the email on May 2, 2023; 2) appellant asked to assume JNET duties a few days a week; 3) appellant gave her a gift for Administrative Professionals Day; and 4) appellant offered to buy her lunch. N.T. pp. 87, 88, 95, 120-121. We find there is no credible evidence to support Nicholson's belief that she was being used as a pawn or groomed.

First, we note there is no evidence appellant's broad general question to Nicholson (*i.e.*, Did she have anything going on?) was anything more than a friendly conversation starter. There is no indication appellant knew EEO Director Epoca had emailed Nicholson. Also, there is no dispute appellant and Nicholson frequently conversed and occasionally ate lunch together, along with other employees. N.T. pp. 76, 89, 369-370. Thus, such a question, without more, is insufficient to establish a hidden agenda.

Furthermore, we find there is no evidence appellant tried to influence or force an investigation into the sexual harassment she reported. Appellant merely reported what she believed she heard to EEO Chief of Investigation and Training Harris as required under the Management Directives and other policies and asked what she should do. N.T. p. 381. Harris told her there was nothing she needed to do and her involvement ended there. N.T. pp. 381-382, 400; AA Ex. 5 (p. 15).

Likewise, we find appellant's request to assume JNET duties a few days a week has no connection to the sexual harassment report. In or around April or May 2022, appellant began training on JNET with Nicholson. N.T. p. 369; AA Ex. 5 (p. 16). JNET is an online system that provides criminal conviction information. N.T. p. 369. Through JNET, HR personnel are notified when employees receive

non-traffic criminal citations of any type. N.T. p. 369. As a Clerical Assistant 3 with the Employee Relations Division, Nicholson was primarily responsible for reviewing JNET notifications and appellant was her “backup.” N.T. pp. 75, 87, 120; AA Ex. 5 (p. 16). There appears to have been some miscommunication between appellant and Nicholson’s direct supervisors as to how the duties would be divided. N.T. pp. 91, 127; AA Ex. 5 (p. 16).<sup>24</sup> There is no evidence appellant did anything inappropriate with regard to her JNET duties, nor was she charged as such.

Additionally, we find there is no evidence of nefarious intent related to the gift appellant gave Nicholson for Administrative Professionals Day. N.T. p. 95. Appellant credibly testified she usually gave gifts to the administrative professionals on Administrative Professionals Day. N.T. p. 371. In 2022, Administrative Professionals Day was on Wednesday, April 27<sup>th</sup>. N.T. p. 371. The following Monday, appellant brought in gifts for Nicholson and another clerical employee because she did not go shopping until the weekend. N.T. p. 371; AA. Ex. 5 (p. 16). Appellant left the gifts on their desks. N.T. p. 371. Indeed, Nicholson acknowledged she was not the only person who received a gift from appellant on Administrative Professionals Day. N.T. p. 95. Furthermore, there is no evidence appellant spoke to the other administrative professional or anyone else about how Shettlewood treats them. *See* Finding of Fact 29. Thus, we find there is no evidence appellant attempted to use the gift to “groom” Nicholson.

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<sup>24</sup> Appellant’s direct supervisor was Jim Hall. N.T. p. 420. Shettlewood was Nicholson’s direct supervisor. N.T. pp. 75-76.

Lastly, we find there is nothing nefarious about appellant's offer to buy Nicholson lunch. Nicholson acknowledged she believed appellant asked to take her to lunch merely because she was a new employee. N.T. p. 95. Additionally, we find appellant credibly testified she offered to buy everyone lunch which was something she occasionally did. N.T. p. 370. Appellant explained she went to a restaurant by the workplace, picked up lunch, and brought it back to the office for everyone who wanted lunch. N.T. pp. 370-371. HR Program Manager Oles corroborated appellant's testimony and noted appellant recently bought pizza for the HR staff at the PSP office where she had been reassigned. N.T. p. 155. Accordingly, we find there is no credible evidence appellant attempted to groom Nicholson or use her as a pawn. We further find, for the reasons previously articulated, the report appellant made to Harris was a good faith effort to comply with the Management Directives and other policies. Accordingly, we find there is insufficient evidence to establish the charge of falsification. As such, OA did not have good cause to issue the Level-Two ADLS with final warning.

### ***Discrimination Claims***

In addition to challenging the substance of the discipline, appellant asserted the Level-Two ADLS and her reassignment to the PSP office were retaliatory and the result of disparate treatment. With regard to these discrimination claims brought under Section 3003(7)(ii) of Act 71, the initial burden has been placed upon appellant to establish a *prima facie* case in support of her allegations—*i.e.*, she is required to introduce evidence that, if believed and otherwise left unexplained, would indicate that more likely than not discrimination has occurred. *Henderson*, 126 Pa. Commw. at 614, 560 A.2d at 863. Provided appellant establishes a *prima facie* case of discrimination, the burden shifts to the appointing

authority to present a legitimate non-discriminatory explanation for the employment action. However, appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason, if one is given, is merely pretext for discrimination. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. We find appellant has met her burden and established discrimination occurred.

There is no dispute appellant engaged in a protected activity—participating in the complaint process by reporting possible sexual harassment. *See* Findings of Facts 37-45. Provided appellant acted on a reasonable belief that something in the workplace was discriminatory, she is protected from retaliation. For the reasons articulated in the previous section of this adjudication, we find appellant’s action (*i.e.*, reporting the matter to Harris) was based on a reasonable belief that Clerical Assistant 3 Nicholson was experiencing visual sexual harassment. *See* Findings of Fact 14-15, 37. Specifically, we find appellant credibly testified she believed Nicholson told her Shettlewood looks at her chest, attempted to look down her shirt, and once looked at her crotch area. *See* Findings of Fact 14-15.

We further find appellant’s belief that this was occurring was reasonable based on her past experience. Whether Nicholson subsequently denied the sexual harassment is irrelevant to whether appellant reasonably believed Nicholson’s initial account during their lunch conversation, which she did. Therefore, we find appellant established a *prima facie* case of discrimination.

While we recognize engaging in protected EEO activity does not shield an employee from all discipline, the discipline cannot be motivated by retaliatory or discriminatory reasons. Here, OA has failed to establish a legitimate non-discriminatory reason for the Level-Two ADLS or the reassignment. There is no dispute the actions taken by OA are directly related to the protected activity. Comm. Ex. A. Specifically, OA issued the Level-Two ADLS and reassigned appellant because she reported possible sexual harassment. Comm. Ex. A. This is not a legitimate non-discriminatory reason, particularly given our finding that appellant believed she truthfully reported what she heard.

Additionally, we note employers should not respond to EEO activity in a manner that would discourage someone from complaining about future discrimination. We are concerned that appellant was the only employee disciplined and reassigned for reporting an unsubstantiated complaint. *See Findings of Fact 46-49.* Such action is disparate treatment for which no legitimate non-discriminatory reason was presented. Therefore, we find appellant established discrimination based on retaliation and disparate treatment. Accordingly, we enter the following:

### CONCLUSIONS OF LAW

1. The appointing authority failed to present evidence sufficient to establish good cause for suspension under Section 2603(c) of Act 71 of 2018.



2. 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 Lisa M. Neiter challenging her three-day Alternative Discipline in Lieu of Suspension and Reassignment from regular Human Resource Analyst 3 (Labor Relations) employment with the Office of Administration, Executive Offices and overrules the action of the Office of Administration, Executive Offices in the three-day Alternative Discipline in Lieu of Suspension and Reassignment of Lisa M. Neiter from regular Human Resource Analyst 3 (Labor Relations) employment. We order the Office of Administration, Executive Offices shall do the following:

1. The three-day Alternative Discipline in Lieu of Suspension with final warning shall be expunged from appellant's record;
2. Within thirty (30) calendar days, appellant shall be returned to the position, duties, work location, and telework eligible status that she held immediately prior to her reassignment, which was effective September 26, 2022;
3. Within thirty (30) calendar days, appellant shall be reimbursed such wages and emoluments which would have been received, but for her improper reassignment, less wages earned and

benefits received under the Public Laws of Pennsylvania as established by a sworn statement to be submitted by appellant; and

4. Within thirty (30) calendar days of the mailed date of this opinion, the Office of Administration, Executive Offices shall submit written notice of compliance with this Order to the Executive Director of the State Civil Service Commission.

State Civil Service Commission

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Maria P. Donatucci  
Chairwoman

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Gregory M. Lane  
Commissioner

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Pamela M. Iovino  
Commissioner

Mailed: September 21, 2023