

COMMONWEALTH OF PENNSYLVANIA

Heather L. Gergely : State Civil Service Commission
 :
 v. :
 :
 State Correctional Institution at :
 Camp Hill, Department of Corrections : Appeal No. 31058

Angela Davidson and Stephanie Misiti
Indispensable Parties¹

Heather L. Gergely
Pro Se

Page Darney
Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Heather L. Gergely challenging her non-selection for promotion to Corrections Unit Manager employment with the State Correctional Institution at Camp Hill, Department of Corrections. A hearing was held on July 26, 2023, via video, before Hearing Officer Edward Bohan.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether appellant established her non-selection for promotion was motivated by discrimination.

¹ In recognition of the due process requirements noted in *Jefferson County Assistance Office, Department of Public Welfare v. Wolfe*, 136 Pa. Commw. 115, 582 A.2d 425 (1990), the individuals currently occupying the challenged position were given the opportunity to participate in the proceedings. Comm. Exs. C, C-1, D, D-1. Angela Davidson and Stephanie Misiti were present and participated in the proceedings. Comm. Exs. C-1, D-1; N.T. pp. 99, 100, 134-135, 203, 222.

FINDINGS OF FACT

1. On January 13, 2023, appellant was notified of her non-selection for promotion to Corrections Unit Manager employment with the appointing authority. Comm. Ex. A.
2. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. E.
3. Appellant is employed as a Corrections Counselor 2 for the appointing authority's State Correctional Institution at Camp Hill (hereinafter "SCI-Camp Hill"). N.T. p. 26.
4. On October 1, 2018, appellant received a pre-disciplinary conference charging her with violations of the appointing authority's Code of Ethics. N.T. pp. 28-29; Ap. Ex. 1 (p. 1).
5. After the pre-disciplinary conference, Chief of Labor Relations Melissa Kracher recommended appellant receive a Level One Alternative Discipline in Lieu of Suspension (hereinafter "ADLS"). Ap. Ex. 1.

6. On November 28, 2018, Superintendent Laurel Harry approved Kracher's recommendation. Ap. Ex. 1 (p. 5).
7. On January 4, 2019, appellant received notice of her Level One ADLS. Ap. Ex. 1 (p. 6).
8. On January 10, 2019, appellant filed a grievance challenging her Level One ADLS. N.T. pp. 28-29; Ap. Ex. 1 (p. 6).
9. On October 29, 2019, appellant's grievance process concluded with both the appointing authority and appellant agreeing to expunge appellant's Level One ADLS from her employee performance review and from her personnel file. N.T. pp. 29, 31; Ap. Ex. 1 (p. 17).
10. Prior to the posting of the Corrections Unit Manager positions in question, the appointing authority previously had two vacant Corrections Unit Manager positions that were available to be filled in September 2022. N.T. pp. 129-130.

11. The Corrections Unit Manager positions' recruitment method was promotion without examination. N.T. pp. 118-119; AA Ex. 1.
12. Angela Davidson applied for the Corrections Unit Manager positions on August 16, 2022. N.T. p. 124; AA Ex. 5.
13. Stephanie Misiti applied for the Corrections Unit Manager positions on August 16, 2022. N.T. p. 124; AA Ex. 7.
14. Appellant applied for the September 2022 vacancy for the Corrections Unit Manager positions. N.T. pp. 150, 214.
15. Major of Unit Management Douglas Benner and Corrections Classification Treatment Manager Lori Newsome served as interview panelists for the September 2022 and October 2022 postings for the Corrections Unit Manager positions. N.T. pp. 126, 146, 211; AA Exs. 6, 8, 12.
16. Benner and Newsome interviewed appellant on September 26, 2022. N.T. pp. 150, 154-155, 214; AA Ex. 12.

17. Benner and Newsome interviewed Davidson on September 26, 2022. N.T. pp. 147-148, 165-166, 211-212, 215-217; AA Ex. 6.
18. Benner and Newsome interviewed Misiti on September 27, 2022. N.T. pp. 149, 159-160, 161-163, 213, 217-219; AA Ex. 8.
19. The appointing authority posted two new vacant Corrections Unit Manager positions. Applications were received from October 18, 2022 to November 1, 2022. N.T. pp. 121-122; AA Exs. 1, 2, 3.
20. Appellant also applied for the new Corrections Unit Manager positions on October 28, 2022. N.T. p. 125; AA Ex. 11.
21. Appellant, Davidson, and Misiti were deemed eligible for the two new Corrections Unit Manager positions. N.T. p. 123; AA Ex. 4 (p. 3).

22. In order to fill the two new vacant Corrections Unit Manager positions, the appointing authority utilized the former applicants' interviews to fill the position.² N.T. p. 130.
23. Benner and Newsome were unaware of appellant's disciplinary history. N.T. pp. 177-178, 220.
24. Benner and Newsome drafted a Selection Memorandum identifying Davidson, Misiti, and Joseph Ferranti as the top candidates for the two new Corrections Unit Manager positions.³ N.T. pp. 132; AA Ex. 13.
25. Davidson and Misiti were selected to fill the two new Corrections Unit Manager positions. N.T. p. 132.

² The appointing authority is permitted to utilize interviews for the past six months to fill the vacant positions according to the merit guidelines. N.T. p. 130.

³ Since there were only two Corrections Unit Manager positions available, Davidson and Misiti were promoted to the Corrections Unit Manager positions. Ferranti was not promoted. N.T. pp. 132-133.

DISCUSSION

The issue in the present appeal is whether appellant established her non-selection for promotion to Corrections Unit Manager employment with the appointing authority was motivated by discrimination. Specifically, appellant alleges the appointing authority's determination to not select her was motivated by retaliation. Comm. Ex. B.

In an appeal alleging discrimination, the burden of presenting evidence in support of all allegations of discrimination lies with the appellant. *Nosko v. Somerset State Hospital*, 139 Pa. Commw. 367, 370-371, 590 A.2d. 844, 846 (1991). Accordingly, the sole question for determination by this Commission is whether appellant has presented evidence sufficient to establish her claim of discrimination. 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 non-merit factors.

71 Pa.C.S.A § 2704.⁴ The prohibition set forth in this section encompasses two general types of discrimination. First, “traditional discrimination” encompasses claims of discrimination based on race, gender, religion, disability, political, partisan

⁴ 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. Section 905.1 provides:

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

1 P.S. § 741.905a.

or labor union affiliation, or other non-merit factors; and second, “technical 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), citing *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988). In the instant matter, this appeal involves a claim of traditional discrimination.

In analyzing claims of discrimination under Section 2704 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 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 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).

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 that the proffered merit reason for the personnel action is merely pretextual. *Henderson*, 126 Pa. Commw. at 614-615.

In support of her claim, appellant testified on her own behalf. In response, the appointing authority presented the testimony of Field Human Resource Officer Jennifer Bott,⁵ Major of Unit Management Douglas Benner,⁶ and Corrections Classification Treatment Manager Lori Newsome.⁷

Appellant argued the appointing authority retaliated against her because she received discipline in November 2018 and successfully had the discipline removed through the grievance procedure in October 2019. Specifically, in June 2018, a disciplinary investigation began when an inmate was having relations with a corrections officer. Before the inmate in question was transferring out, appellant received an order to report to the security office to make a statement and fill out a questionnaire regarding the inmate. N.T. pp. 27-28. Later, on October 1, 2018, appellant received a pre-disciplinary conference charging her with violations of the appointing authority's Code of Ethics. N.T. pp. 28-29; Ap. Ex. 1. On October 31, 2018, Chief of the Labor Relations Division Melissa Kracher recommended appellant receive a Level One Alternative Discipline in Lieu of Suspension (hereinafter "ADLS"). Ap. Ex. 1. On November 28, 2018,

⁵ Bott is employed by the Office of Administration (hereinafter "OA") as a Field Human Resource Officer. N.T. p. 116. As a Field Human Resource Officer, Bott's responsibilities include managing and overseeing the Human Resource functions for SCI-Camp Hill and the Elizabethtown Training Academy. N.T. p. 116. Additionally, Bott is responsible for conducting interviews and obtaining information needed to send to OA's Bureau of Talent Acquisition or Central Office. N.T. p. 116. Bott is a custodian of personnel records for the appointing authority. N.T. p. 117.

⁶ Benner is employed by the appointing authority as a Major of Unit Management assigned to SCI-Camp Hill. N.T. p. 143. Benner's responsibilities include overseeing SCI-Camp Hill's housing units and supervising Corrections Unit Managers, Counselors, and Corrections Officers assigned to the housing units. N.T. p. 145. Benner has worked for the appointing authority for over twenty-three years. N.T. p. 145.

⁷ Newsome is employed by the appointing authority as a Corrections Classification Treatment Manager (hereinafter "CCTM"). N.T. p. 209. Newsome's responsibilities include overseeing operations and programing of specialized units, such as the Youthful Offender Program, the Management Control Unit, the Residential Treatment Unit, and the Special Observation and Assessment Unit. N.T. p. 210. Prior to becoming a CCTM, Newsome was employed as a Corrections Unit Manager. N.T. p. 210. Newsome's employment with the appointing authority has been within SCI-Camp Hill. N.T. p. 211.

Superintendent Laurel Harry approved Kracher's recommendation. Ap. Ex. 1 (p. 5). On January 4, 2019, appellant received notice of her Level One ADLS. Ap. Ex. 1 (p. 6).

Upon receiving her Level One ADLS, appellant filed a grievance on January 10, 2019. N.T. pp. 28-29; Ap. Ex. 1 (p. 6). At the conclusion of the grievance procedure, appellant and the appointing authority agreed on October 29, 2019, to expunge appellant's Level One ADLS from her employee performance review and from her personnel file. N.T. pp. 29, 31; Ap. Ex. 1 (p. 17).

Although the grievance occurred on January 10, 2019, appellant contended her non-selection from the Corrections Unit Manager position was in retaliation for her successful grievance. N.T. p. 36. In support of her assertion, appellant recalled participating in an interview for the September 2022 Corrections Unit Manager positions on September 26, 2022. N.T. pp. 97-98; AA Ex. 12. After the interviews were completed and she was not selected, appellant requested and reviewed the interview notes and results for the Corrections Unit Manager positions.⁸ N.T. pp. 38-39. Upon review, appellant argued the appointing authority continued to retaliate against her for her successful grievance by overlooking her experience and selecting candidates who provided incorrect interview responses. N.T. pp. 47, 54-55, 56; AA Exs. 6, 8, 10, 12.

⁸ The Commission notes appellant did not appeal her non-selection to the September 2022 Corrections Unit Manager positions.

Appellant noted she formerly acted as a Corrections Unit Manager for eighteen months between 2012 and 2014. N.T. p. 41. Based on her performance as an acting Corrections Unit Manager, appellant received commendation letters from Major of Unit Management John Homer on December 24, 2013. N.T. p. 42; Ap. Ex. 2. Also, appellant contended her EPRs during her time as an acting Corrections Unit Manager reflected her outstanding work performance. N.T. p. 42; Ap. Exs. 3, 4. Appellant believed with her former experience as a Corrections Unit Manager, her commendation letters, her former EPRs, and her removed discipline, she would be promoted. Nevertheless, appellant argued she was overlooked for promotion. N.T. p. 45.

Having carefully reviewed the record, the Commission now turns to whether appellant produced sufficient evidence to establish a *prima facie* case of retaliation. A retaliation claim is a specific subcategory of the broader category of non-merit factor discrimination. In a retaliation case, appellant may establish a *prima facie* case by proving 1) she engaged in a protected activity; 2) the appointing authority was aware of the protected activity; 3) that subsequent to participation in the protected activity, appellant was subjected to an adverse employment action by the appointing authority; and 4) that there is a causal connection between participation in the protected activity and the adverse employment action. *Robert Wholey Co., Inc. v. Pennsylvania Human Rel. Comm'n.*, 606 A2d 982, 983 (Pa. Commw. 1992) citing *Brown Transport Corp. v. Pennsylvania Human Rel. Comm'n.*, 578 A.2d 555 (Pa. Commw. 1990). When participation in a protected activity and the occurrence of an adverse employment action occurs within close proximity in time, causation is inferred. *Id.* at 984.

There is no dispute appellant's grievance filed on January 10, 2019 of her Level One ADLS qualified as a protected activity. Further, there is no dispute that some people at the appointing authority were aware of the protected activity, especially given the October 29, 2019 agreement between the appellant and the appointing authority. Similarly, after filing her grievance, appellant was subjected to an adverse employment action in the form of her non-selection for promotion to the Corrections Unit Manager position on January 13, 2023. However, the appellant failed to produce evidence establishing a causal connection between the January 10, 2019 grievance and her non-selection on January 13, 2023. Appellant did not present how Benner, Newsome, or Bott had any knowledge of her former Level One ADLS or her use of the grievance procedure. Indeed, appellant did not show how her non-selection for promotion was because of her grievance. Although the appellant's burden of establishing a *prima facie* case cannot be onerous, the disparity of time between these two events equating to over four years cannot be construed to be within a close proximity in time for a causal connection to exist. *Robert Wholey Co., Inc., supra*. Therefore, the appellant has failed to establish a *prima facie* case of discrimination and the appeal is properly to be dismissed.⁹ Accordingly, we enter the following:

⁹ The Commission further acknowledges the appointing authority presented legitimate non-discriminatory reasons supporting appellant's non-selection for promotion to the Corrections Unit Manager position. *Henderson, supra*. Specifically, Field Human Resource Officer Bott, Major Benner and CCTM Newsome credibly testified they were unaware of appellant's disciplinary history and that she was not blacklisted from promotion. N.T. pp. 117-118, 133-134, 220. Furthermore, Benner and Newsome confirmed that appellant's former experience as an acting Corrections Unit Manager did not detrimentally impact her interview performance. N.T. pp. 177-178, 220. 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*, 95 Pa. Commw. 475, 478, 505 A.2d 339, 341 (1986). Additionally, Benner and Newsome provided credible explanations on how Davidson's and Misiti's interview performance was more in-depth and succinct than appellant's interview responses. N.T. pp. 154-155, 159-160, 161-163, 166, 169-170, 217-219; AA Exs. 6, 8, 12. After the presentation of the appointing authority's case, appellant did not present how their proffered reasons were pretextual. *Henderson, supra*.

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 Heather L. Gergely challenging her non-selection for promotion to Corrections Unit Manager with the State Correctional Institution at Camp Hill, Department of Corrections, and sustains the action of the State Correctional Institution at Camp Hill, Department of Corrections in the non-selection of Heather L. Gergely to Corrections Unit Manager.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Pamela M. Iovino
Commissioner

Mailed: November 16, 2023