

COMMONWEALTH OF PENNSYLVANIA

Ricky L. Levan : State Civil Service Commission  
: :  
v. : :  
: :  
Pennsylvania Department of : :  
Transportation : Appeal No. 31117

James Leshner  
Indispensable Party<sup>1</sup>

Ricky L. Levan Heather M. Sharp  
*Pro Se* Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Ricky L. Levan challenging his non-selection for promotion to the position of Municipal Services Supervisor (#I-2023-4497) with the Pennsylvania Department of Transportation. A hearing<sup>2</sup> was held on November 1, 2023, via video, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony, exhibits introduced at the hearing, and the Briefs submitted by appellant and the appointing authority. The issue before the Commission is whether the appointing authority did not select appellant for reasons motivated by discrimination.

---

<sup>1</sup> In recognition of the due process requirements noted in *Jefferson County Assistance Office, Department of Public Welfare v. Wolfe*, 582 A.2d 425 (Pa. Commw. Ct. 1990), the individual currently occupying the challenged position was given the opportunity to participate in the proceedings, which he accepted. Comm. Exs. C, C-1.

<sup>2</sup> The temporarily working out of class pay portion of appellant's appeal was denied a hearing. See Commission Order issued June 22, 2023.

## FINDINGS OF FACT

1. By email dated May 24, 2023, appellant was informed he was not selected for the position of Municipal Services Supervisor (hereinafter “MSS”) with the Pennsylvania Department of Transportation (hereinafter “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. D.
3. Appellant is currently employed by the appointing authority as a Municipal Services Specialist. N.T. p. 19.
4. Appellant has held the position of Municipal Services Specialist since 2004. N.T. p. 20.
5. The appointing authority created a job posting for MSS (#I-2023-44977) with an opening date of March 10, 2023, and a closing date of March 24, 2023. N.T. pp. 84-85; AA Ex. 2.

6. The appointing authority posted the MSS position internally, with a promotion without examination recruitment method. N.T. p. 89; AA Ex. 3.
7. There were no seniority rights to the MSS position. N.T. pp. 203-205.
8. Appellant, the indispensable party, and two other applicants were deemed eligible for the MSS position under the internal posting. N.T. pp. 86-89; AA Ex. 3.
9. Three applicants were interviewed for the position, including appellant and the indispensable party. The interviews were conducted over Microsoft Teams in April 2023. N.T. pp. 120-122; AA Ex. 4.
10. Senior Civil Engineer Manager Michelle Adolini, Dustin Palmer,<sup>3</sup> and Senior Civil Engineer Manager Benjamin Edward Singer served on the interview panel. N.T. pp. 118, 177.

---

<sup>3</sup> Dustin Palmer did not testify on behalf of the appointing authority. Adolini testified Palmer worked for the appointing authority as a manager within the design unit as “Right of Way Administrator.” N.T. p. 118.

11. All candidates were asked the same thirteen interview questions, which were prepared by Adolini and distributed to the other interview panelists. N.T. pp. 122-123; AA Ex. 5.
12. The interview questions asked the candidates about their ability to perform the essential job functions of the MSS position; their relevant education, training, and work experience; and their vision for their role as a supervisor. N.T. pp. 125-127; AA Ex. 5.
13. Question No. 3 asked:

Explain what you feel are the most important duties of the Municipal Services Supervisor.

AA Ex. 5.
14. In response to Question No. 3, appellant gave a brief, general response regarding liquid fuels use and the turnback program as a way of maintaining the roadways. N.T. pp. 131, 187; Ap. Exs. 7, 9, 11.
15. In response to Question No. 3, the indispensable party indicated the MSS had a broad range of duties to include their assigned county; setting up bids and answering questions; supervising other people; serving as turnback coordinator; and, attending

statewide meetings. He further indicated the supervisor must be open-minded in order to handle customer service questions. N.T. pp. 131, 187; AA Exs. 7, 9.

16. Question No. 4 asked:

Please describe your supervisory experience. Have you ever had to motivate underperforming employees to perform their job duties?

AA Ex. 5.

17. In response to Question No. 4, appellant referenced his twenty years' experience in the army during which he had instructors serving under him. Appellant indicated the union could be a learning curve. N.T. pp. 132-133; Ap. Exs. 7, 9, 11.

18. In response to Question No. 4, the indispensable party discussed specific supervisory experience with the appointing authority, to include his involvement in letting go an employee he supervised. N.T. pp. 133-134; AA Exs. 7, 11.

19. Question No. 5 asked:

If you are the successful candidate, what would be your top three priorities as the supervisor of the Municipal Services Unit?

AA Ex. 5.

20. In response to Question No. 5, appellant provided two out of three top priorities he had for the unit. He indicated he would ensure municipalities got their paperwork in on time for payments, and he would prioritize exploring multi modal grant programs. N.T. pp. 134-135, 189-191; Ap. Exs. 7, 9, 11.

21. In response to Question No. 5, the indispensable party indicated he would keep the program running with no major changes; he would reduce the paper footprint and modernize, to include digitizing files; and, he would coordinate with others in the unit for suggestions on what could be improved. N.T. pp. 134-135, 189-191; AA Exs. 7, 11.

22. Question No. 8 asked:

You will be expected to provide expert advice and guidance to local municipalities. What kind of expertise do you think you need? If you don't have that expertise, how will you gain such expertise?

AA Ex. 5.

23. In response to Question No. 8, appellant discussed available Local Technical Assistance Program (hereinafter "LTAP") training, as well as participating in an extensive training program through the appointing authority both online and in person. He further indicated he had gone to the required municipal secretary's training class. N.T. pp. 192-192; Ap. Exs. 7, 9, 11.

24. In response to Question No. 8, the indispensable party discussed how a lot of the expertise had to do with public speaking, on which he was trying to improve, as well as public relations. He further indicated he had access to legal opinions which he could reference when questions may arise. N.T. pp. 191-192; AA Exs. 7, 11.

25. Based on his responses to the interview questions and his work experience, the interview panel unanimously recommended the indispensable party for the MSS position. N.T. pp. 128-129, 182-183, 193-194.
26. Appellant was ranked second. N.T. pp. 128-129.
27. The interview panel selected the indispensable party for the MSS position over appellant because the indispensable party presented himself to be more qualified through his responses to the interview questions. N.T. pp. 136-137, 153-154, 193-195.

## DISCUSSION

The issue before the Commission is whether appellant presented sufficient evidence to establish the appointing authority did not select him for promotion to Municipal Services Supervisor (hereinafter “MSS”) for reasons motivated by discrimination. Appellant could only bring this challenge through Section 3003(7)(ii) of Act 71 of 2018<sup>4</sup> (hereinafter “Act 71”) based upon an allegation that the appointing authority’s decision was motivated by discrimination

---

<sup>4</sup> Act of June 28, 2018, P.L. 460, No. 71, § 1.



in violation of Section 2704 of Act 71. 71 Pa.C.S. §§ 2704, 3003(7)(ii). Appellant alleges he was discriminated against based on disparate treatment, retaliation, and non-merit factors, to include the interview panel consisted of individuals listed as references and a friend of the indispensable party. 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 his claim of discrimination. 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. § 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 “procedural discrimination,” which involves a violation of procedures required pursuant to Act 71 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). Here, appellant has alleged traditional discrimination. Comm Ex. B.

At the hearing, appellant testified on his own behalf. The appointing authority presented testimony from Human Resource Analyst 2 Daniel Shiffka,<sup>5</sup> Senior Civil Engineer Manager Michelle Adolini,<sup>6</sup> Senior Civil Engineer Manager Benjamin Edward Singer,<sup>7</sup> and Employee Relations Division Chief Ann Zerby.<sup>8</sup> The evidence presented by the parties is summarized below.

Appellant is currently employed by the appointing authority as a Municipal Services Specialist. *See* Finding of Fact No. 3. Appellant has held this position since 2004. *See* Finding of Fact No. 4.

In March 2023, the appointing authority created a job posting for the MSS position with an opening date of March 10, 2023. *See* Finding of Fact No. 5. Under the promotion without examination recruitment method, four candidates were deemed eligible to interview for the MSS position, to include appellant, the

---

<sup>5</sup> Shiffka works for the appointing authority as Human Resource Analyst 2. N.T. p. 73. Specifically, Shiffka works on behalf of the Office of Administration in the Talent Management Office, Bureau of Talent Acquisition, Intake Division, which provides human resources services to hiring organizations, such as the appointing authority. N.T. pp. 76-77. He has worked in the Intake Division for eighteen months, and for the Office of Administration for four years. N.T. p. 79.

<sup>6</sup> Adolini works for the appointing authority as Senior Civil Engineer Manager. N.T. p. 103. She has worked in that position for seventeen months, and for the appointing authority for eight and a half years. N.T. pp. 104-106. In her capacity as Senior Civil Engineer Manager, Adolini manages the six service units in the design section for the appointing authority, which includes her supervision of the MSS position. N.T. p. 107

<sup>7</sup> Singer works for the appointing authority as Senior Civil Engineer Manager. N.T. p. 173. He has worked for the appointing authority since 2003, and in his current position since August 2020. N.T. p. 175. In his capacity as Senior Civil Engineer Manager, Singer supervises employees for the appointing authority as head of the District's Letting Program. as well as the District's Programming and Planning Unit. N.T. pp. 175-176.

<sup>8</sup> Zerby works for the appointing authority as Employee Relations Division Chief. N.T. p. 198. She has worked in that position since August 28, 2023. N.T. p. 198. In her capacity as Employee Relations Division Chief, Zerby works in the Human Resource Delivery Center on behalf of the appointing authority N.T. p. 200.

indispensable party, Joseph M. Fegley, and Jonathan M. Reidinger. *See* Finding of Fact Nos. 6, 8. Mr. Reidinger was not interested in the position and declined an interview. N.T. p. 120. Both appellant and the indispensable party interviewed for the position on April 26, 2023. N.T. p. 58; *See* Finding of Fact No. 9.

Adolini, Palmer, and Singer served on the interview panel. *See* Finding of Fact No. 10. Adolini served as the hiring manager for the MSS position. N.T. p. 117. She was responsible for coordinating and selecting the interview panel and preparing the interview questions. *Id.* Adolini explained she selected Palmer and Singer to serve on the interview panel because they both worked as managers within the design units most closely related to the municipal service activities performed under the MSS position. N.T. pp. 117-118.

Adolini prepared the thirteen interview questions provided to the interview panel. *See* Finding of Fact No. 11. In preparing the interview questions, Adolini explained she sought to evaluate the candidates in accordance with the MSS position description.<sup>9</sup> N.T. pp. 123-124. She also developed the questions based on her past experience with interview panels. *Id.* All three candidates for the MSS position were asked those same thirteen questions. *See* Finding of Fact No. 11.

The interview questions asked the candidates about their ability to perform the essential job functions of the MSS position, their vision for their role as supervisor, as well as their relevant education, training, and work experience. *See*

---

<sup>9</sup> Adolini was also responsible for preparing the MSS position description. N.T. p. 110, AA Ex. 1. In creating the position description, she used her personal knowledge of the services the unit provides, as well as consulted with both appellant and the indispensable party, who served as Municipal Services Specialists performing the work in the design unit. N.T. p. 111. Appellant and the indispensable party confirmed the MSS position description accurately reflected the duties and functions of the MSS position. *Id.*

Finding of Fact No. 12. Based on his responses to the interview questions and his work experience, the interview panel unanimously recommended the indispensable party for the MSS position. *See* Finding of Fact No. 25. Appellant was ranked second. *See* Finding of Fact No. 26.

The interview panel selected the indispensable party for the MSS position over appellant because the indispensable party presented himself to be more qualified through his responses to the interview questions. *See* Finding of Fact No. 27. Adolini explained her decision focused on the responses to interview Questions Nos. 3, 4, and 5. N.T. pp. 130-131; *See* Finding of Fact Nos. 14-21. She explained she did not select appellant because he did not provide the third response to Question No. 5 concerning his main priorities for the unit; he was brief in his responses; and, appellant only referenced his prior work with the army and did not discuss any specific supervisory experience with the appointing authority. N.T. pp. 132-133, 138. In comparison, Adolini felt the indispensable party presented himself to be more qualified. N.T. p. 136. In his response to Question No. 4, the indispensable party described his experience with discharging an employee and how working through human resources was beneficial. N.T. pp. 133-134, 137. He further indicated he had other roles with the appointing authority, which Adolini felt made him more well-rounded. N.T. p. 137. Additionally, Adolini felt the indispensable party responded well to Question No. 5 when he indicated he would seek outside resources when necessary to help him make decisions. *Id.*

In addition to finding appellant to be less qualified than the indispensable party based on his responses to the interview questions, Adolini also based her decision on her interactions with appellant and the feedback from his municipalities. N.T. p. 138. Adolini had some experience working with both

appellant and the indispensable party on a turnback program in each of their municipalities. N.T. p. 139. In her experience, the indispensable party was easier to work with than appellant. N.T. p. 139. Adolini discussed how in March 2023, appellant had an issue working with a secretary. N.T. pp. 141-142. She felt the situation did not foster effective communication and leadership sought with a supervisory role. *Id.* In response to that incident, the indispensable party was reassigned to appellant's duties for the municipality. N.T. p. 143. Adolini expressed the situation related to the responsibility of the MSS position, as it concerned maintaining an effective working relationship with staff. N.T. pp. 144-145. Appellant does not dispute this incident occurred. N.T. pp. 143, 222-223. Neither Palmer nor Singer from the interview panel were aware of this incident. N.T. p. 146.

Singer explained he based his decision to hire the indispensable party over appellant for the MSS position solely on his responses to the interview questions. N.T. p. 193. He believed the indispensable party came across as more confident throughout the interview and was more prepared, whereas appellant gave very short answers. N.T. p. 182. In particular, the answers to Question Nos. 3, 5, and 8, stood out to Singer. N.T. p. 186; *See* Finding of Fact Nos. 14-21. He explained the indispensable party gave bigger picture answers, while appellant could have expanded more in his answers. N.T. p. 187. In some cases, appellant failed to answer the question. *Id.* Question No. 5 separated the two candidates because it showed the indispensable party looked at the big picture concerning his top priorities as supervisor, whereas appellant failed to even lay out a plan. N.T. pp. 189-191. For Question No. 8 regarding expertise, the indispensable party gave a humbling answer concerning his weakness in public speaking, further indicating he aimed to improve. N.T. pp. 192-193. In his answer, appellant stated he had been to some classes and training, and he failed to answer the customer service portion. *Id.* Singer stated the

best candidate was selected for the MSS position based on merit related factors. N.T. pp. 193-194. Based on the interview panel's unanimous decision, a final offer was extended to the indispensable party, which he accepted. N.T. pp. 95, 150-151.

Appellant asserts his non-selection was the result of traditional discrimination. Comm. Ex. B. He alleges traditional discrimination based on violation of Act 71, retaliation, disparate treatment, and non-merit factors (*i.e.*, the interview panel consisted of individuals listed as references and friend of selected candidate). *Id.*

To establish a claim of "traditional discrimination," the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate non-discriminatory explanation for the employment action. However, the appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason is merely pretext for discrimination. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. While the Commission recognizes the burden of establishing a *prima facie* case cannot be an onerous one, *Nwogwugwu, supra.*, in this matter, appellant's evidence is not enough to show his non-selection was based on retaliation, disparate treatment, or a non-merit factor.

On his non-merit factor claim, appellant argues 1) Singer was friends with the indispensable party and he failed to be objective in his determination, and 2) appellant had previously worked with Palmer, and they did not work well together. N.T. pp. 39-42. Appellant expressed he felt there was bias in the interview process based on those factors. N.T. p. 50. He did not express any problems with Adolini serving on the interview panel. N.T. p. 42.

In his case-in-chief, appellant failed to present any evidence concerning Singer's alleged friendship with the indispensable party or how that friendship affected the interview process. Additionally, appellant failed to present any evidence there was bias in the interview process based on his previous working relationship with Palmer. He admitted nobody from the appointing authority had told him Palmer chose not to select appellant based on any issues he had with him. N.T. pp. 63-66. Both appellant and the indispensable party were asked the same thirteen interview questions, which were prepared by Adolini. *See* Finding of Fact No. 11. Singer testified the interview panel came to a unanimous decision to hire the indispensable party over appellant based solely on the candidates' responses to those interview questions. N.T. p. 193.

Additionally, appellant did not present any evidence or testimony relative to his retaliation or disparate treatment claims. Instead, through the remainder of his testimony, appellant alleged the interview panel should have considered his time spent in the next lower position in order to assess his merit. This is not an appeal concerning eligibility. Ann Zerby clarified the questions on the application referring to education and experience went to help determine the candidates' eligibility to be interviewed. N.T. p. 212. Both appellant and the indispensable party were deemed eligible, and they both interviewed for the MSS

position. Appellant acknowledged he was asked about his knowledge and skill for the position during the interview, as well as questions about his prior experience, to which he had the opportunity to fully respond. N.T. pp. 59-61. Nonetheless, appellant failed to give more complete answers to the interview questions with examples of his experience. All candidates were fairly evaluated by the interview panel based on the responses they provided during the interview.

Finally, appellant alleges his seniority for the position was ignored. Zerby testified bargaining unit seniority, or length of service, does not apply to the MSS position. *See* Finding of Fact No. 7. Although the MSS job posting mistakenly referenced seniority information, none of the candidates were disadvantaged from that mistake. N.T. p. 205. The appointing authority properly followed the promotion without examination recruitment method, and all interested, eligible candidates were interviewed. *Id.* Zerby further explained even if union seniority had applied to this position, appellant would not have had bidding rights because union seniority applies to promotions within the same seniority and bargaining unit, and the MSS position is a different bargaining unit. N.T. p. 210. Thus, the mistaken seniority information on the job posting had no effect on the outcome of the interviews for the MSS position. N.T. pp. 210-211.

Following the presentation of appellant's case-in-chief, the appointing authority made a Motion to Dismiss for failure to establish a *prima facie* case. N.T. pp. 70-71. Ruling on the Motion was deferred pending review by the full Commission. N.T. pp. 71-72. Following our review, the Motion is hereby granted.



Appellant failed to present evidence establishing a *prima facie* case of traditional discrimination in his non-selection for the MSS position. He failed to establish the interview panel had bias or the indispensable party was selected for the position on any basis other than merit. Ultimately, appellant argued, “It just feels like for whatever reason, we decided to just base everything off of an interview and not look at anything else.” N.T. p. 227. All candidates were asked the same thirteen interview questions tailored to find the best candidate for the MSS position. Thus, it was appropriate for the appointing authority to make its decision based solely on the interviews. Moreover, appellant had the opportunity to fully respond to those interview questions and present himself as a more qualified candidate, but he failed to do so. Appellant failed to meet his *prima facie* case of discrimination by showing the interview panel’s decision was based on anything other than merit.

For the reasons articulated above, the Commission finds appellant has failed to present sufficient evidence of traditional discrimination. Specifically, we find appellant presented insufficient evidence to establish a *prima facie* case of traditional discrimination based on retaliation, disparate treatment, or a non-merit factor.

We further find even if appellant had established a *prima facie* case of discrimination, the appointing authority presented a legitimate non-discriminatory reason for selecting the indispensable party. The appointing authority demonstrated the indispensable party was more qualified based on his responses to the interview questions. Accordingly, we enter the following:

CONCLUSION OF LAW

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

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Ricky L. Levan challenging his non-selection for promotion to the position of Municipal Services Supervisor (#I-2023-44977) with the Pennsylvania Department of Transportation and sustains the action of the Pennsylvania Department of Transportation in not selecting Ricky L. Levan for promotion to the position of Municipal Services Supervisor (#I-2023-44977).

State Civil Service Commission

---

Maria P. Donatucci  
Chairwoman

---

Gregory M. Lane  
Commissioner

---

Pamela M. Iovino  
Commissioner

Issued: March 21, 2024