

COMMONWEALTH OF PENNSYLVANIA

Jennifer E. Nestor : State Civil Service Commission
 :
 v. :
 :
 Office of Administration, Executive :
 Offices : Appeal No. 31142

Jennifer E. Nestor : Andrew B. Kerr
Pro Se : Anthony R. Holbert
 : Attorneys for Office of Administration

ADJUDICATION

This is an appeal by Jennifer E. Nestor challenging the Office of Administration, Executive Office’s determination that she is not eligible for Employment Security Manager 2 (CS-2023-53606-06122) employment. A hearing was held December 20, 2023, via video, before Chairwoman Maria P. Donatucci.

The Commissioners have reviewed the Notes of Testimony and Exhibits introduced at the hearing. The issue before the Commission is whether the Office of Administration, Executive Office’s determination that appellant was not eligible for Employment Security Manager 2 (CS-2023-53606-06122) was the result of any discriminatory factor.

FINDINGS OF FACT

1. By email dated June 27, 2023, appellant was informed the Office of Administration, Executive Office's review of her Reconsideration Request determined she remained ineligible for the Employment Security Manager 2 (CS-2023-53606-06122) position. Comm. Ex. A; Ap. Ex. 8; OA Ex. 8.
2. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. B.
3. From June 1, 2023 through June 14, 2023, the Office of Administration posted the Employment Security Manager 2 (CS-2023-53606-06122) position. N.T. pp. 22, 70; Ap. Ex. 1; OA Ex. 4.
4. On June 13, 2023, appellant filed her timely application as an external candidate. N.T. pp. 24, 26-27, 37-38, 71-72; Ap. Ex. 2; OA Ex. 5.
5. At the time of her application, she was employed as a Workforce Development Analyst 2 with PA CareerLink, Westmoreland for approximately four and one half years. N.T. p. 18.

6. The Minimum Experience and Training Requirements (hereinafter “METs”) for the Employment Security Management position are:
- A. One year of experience as an Employment Security Manager 1, or Employment Security Program Manager; **or**
 - B. Four years of technical experience in unemployment compensation or public employment service work including one year in a supervisory capacity; and a bachelor’s degree; **or**
 - C. Four years of managerial, administrative, or consultative work involving planning and coordinating the work of others including three years in a public employment service agency or a closely related program within or outside government service; and a bachelor’s degree; **or**
 - D. Any equivalent combination of experience and training that included three years in a public employment service agency or a closely related program within or outside government service, including or supplemented by one year of supervisory experience.

Ap. Ex. 1; OA Exs. 3, 4, 9 (emphasis in original).

7. Appellant has never been employed as either an Employment Security Manager 1 or Employment Security Program Manager. N.T. pp. 43-44.
8. Appellant does not have four years of technical experience in unemployment compensation or public employment service work that includes one year in a supervisor capacity. N.T. pp. 38, 44.
9. Appellant has a bachelor's degree and three years in a public employment service agency. N.T. pp. 26-27, 90; Ap. Exs. 1, 2, 5.
10. Appellant does not have four years of managerial administrative or consultant work involving the planning or coordinating the work of others. N.T. pp. 93-94.
11. Appellant does not have one year of supervisory experience. N.T. pp. 46-47, 85.
12. By email dated June 14, 2023, the OA found her ineligible because she did not have the required experience. N.T. pp. 38, 73; Ap. Ex. 5; OA Ex. 6.

13. On June 15, 2023, appellant filed a timely Reconsideration Request asserting she qualified for the position under the third MET. N.T. pp. 39-40; Ap. Exs. 6, 7; OA Ex. 7.

DISCUSSION

At issue before the Commission is whether the Office of Administration, Executive Office's determination that appellant was ineligible for Employment Security Manager 2 (CS-2023-53606-06122) was the result of discrimination based upon either disparate treatment or a mistake of fact. Comm. Ex. B.

In an appeal alleging discrimination, appellant bears the burden of establishing the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989) *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990). Section 2704 of Act 71 of 2018 provides:

An officer or employee of the Commonwealth may not discriminate against an individual in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of race, gender, religion, disability or political, partisan or labor union affiliation or other nonmerit factors.

71 Pa.C.S. § 2704. As expressly provided for in this section, the Commission has jurisdiction over claims of discrimination involving numerous actions that occur in the merit system, including recruitment. 71 Pa.C.S. § 2704. Under Section

3003(7)(ii), the Commission has authority to convene hearings when an individual aggrieved by an alleged violation of Section 2704 files a timely appeal. 71 Pa.C.S. § 3003(7)(ii).

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.¹ In applying this language, the courts have held these provisions address both “traditional” and “procedural” discrimination. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 462 (Pa. Commw. Ct. 1988). “Traditional discrimination” encompasses claims of discrimination based on race, sex, national origin or other non-merit factors. Discrimination based upon a non-merit factor includes claims of mistake of fact discrimination. *See State Correctional Institution at Albion v. Bechtold*, 670 A.2d 224 (Pa. Commw. Ct. 1996). In the current appeal, appellant raises a claims of traditional discrimination, specifically disparate treatment and mistake of fact.

Appellant testified on her own behalf. The Office of Administration presented the testimony of Human Resource Analyst 4 Estella Jenkins.

¹ Section 905.1 provides:

905.1 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.

71 P.S. Section 741.905a.

The parties agree the Minimum Experience and Training requirements (hereinafter “METs”) for the Employment Security Manager 2 position state:

- A. One year of experience as an Employment Security Manager 1, or Employment Security Program Manager; **or**
- B. Four years of technical experience in unemployment compensation or public employment service work including one year in a supervisory capacity; and a bachelor’s degree; **or**
- C. Four years of managerial, administrative, or consultative work involving planning and coordinating the work of others including three years in a public employment service agency or a closely related program within or outside government service; and a bachelor’s degree; **or**
- D. Any equivalent combination of experience and training that included three years in a public employment service agency or a closely related program within or outside government service, including or supplemented by one year of supervisory experience.

Ap. Ex. 1; OA Exs. 3, 4, 9 (emphasis in original).

We begin with appellant’s claim of disparate treatment. An employee claiming disparate treatment must demonstrate she was treated differently than others similarly situated. *Nwogwugwu*, 141 Pa. Commw. at 40, 594 A.2d at 851. In

this instance, appellant has not presented any evidence of any similarly situated applicant. Thus, upon review of the record, the Commission finds appellant has not established a *prima facie* case of discrimination based upon disparate treatment.²

We next discuss appellant's argument asserting the determination of her ineligibility was based upon an erroneous interpretation of her work experience. Comm. Ex. B. She acknowledges she does not meet the qualifications required for MET's 1, 2, or 4. *See* Findings of Fact 11, 12, 15. Thus, the issue is whether appellant's work experience meets the criteria set forth in the third MET.

In a mistake of fact case, an appellant is required to establish the decision at issue was based upon an erroneous interpretation of the facts. *See State Correctional Institution at Graterford, Department of Corrections v. Goodridge*, 87 Pa. Commw. 527, 487 A.2d 1036 (1985); *and State Correctional Institution at Albion v. Bechtold*, 670 A.2d 224 (Pa. Commw. Ct. 1996). Where a decision is based upon an erroneous interpretation of the facts, the decision is based on a non-merit factor. *Bechtold*, 670 A.2d at 226 (removal of Corrections Officer Trainee

² Had the burden of proof shifted to the Office of Administration, Jenkins credibly testified all applications, including appellant's, undergo the identical evaluation process to determine an applicant's eligibility. N.T. pp. 54-62; OA Exs. 1,2. All applications are evaluated based upon the information provided by the applicant in their application; evaluators are not expected to know information about the applicant's job duties that are not provided in the application. N.T. pp. 108-110. She further credibly testified all timely Reconsideration Requests undergo the identical process to reevaluate an applicant's eligibility. N.T. pp. 62-64, 86. Thus, had the burden of proof shifted, the appointing authority presented sufficient evidence of a legitimate, nondiscriminatory reason for the manner in which appellant's initial application and subsequent Reconsideration Request were reviewed. Appellant has not presented any evidence or testimony to show the appointing authority's reasons for their review processes were merely pretext. *Henderson, supra*. The Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *McAndrew v. State Civil Service Commission (Department of Community and Economic Development)*, 736 A.2d 26 (Pa. Commw. Ct. 1999).

based upon mistaken factual assumption was based upon a non-merit factor, and therefore constitutes discrimination). In a mistake of fact case, appellant is not required to prove the appointing authority's decision was motivated by discrimination, just that it was based upon mistaken factual information. *Goodridge*, 87 Pa. Commw. 527, 487 A.2d 1036; *Bechtold*, 670 A.2d 224. As noted previously, non-merit factor discrimination is expressly prohibited by the anti-discrimination provision of Act 71.

According to appellant, she meets the requirements of the third MET. First, she has at least three years in a public employment service agency as required by the third MET. N.T. p. 90; Ap. Ex. 1; OA Exs. 3, 4, 9. Second appellant has a bachelor's degree. N.T. pp. 26-27; Ap. Exs. 1, 4; OA Exs. 3, 4, 9. Third, appellant asserts her current job duties meet the requirement of "four years of managerial, administrative, or consultative work involving the planning and coordinating the work of others..." Ap. Ex. 1; OA Exs. 3, 4, 9. She explained her job duties include distributing federal grant money to local Workforce Development Boards and monitoring their submitted plans to ensure they fall within the grant requirements. N.T. pp. 29-31. She evaluates and monitors the work carried out by the local Workforce Development Boards to ensure it meets the programmatic, fiscal, and administrative requirements of the grant. N.T. p. 32. Appellant writes monitoring reports, and develops fiscal, programmatic, and administrative tools to assist in their compliance with the terms of the grant. N.T. pp. 33-34. If any local Workforce Development Board is not in compliance with grant requirements, she provides recommendations and technical assistance to regain compliance. N.T. p. 33. Thus, according to appellant, she meets the requirements of the third MET.

In response, Human Resource Analyst 4 Jenkins credibly testified the Evaluation Guide provides that the “planning and coordinating” required by the MET must be on an individual basis, not a program level. N.T. pp. 83-84; OA Ex. 9. Here, appellant’s application does not demonstrate any experience in planning or coordinating the work of others. N.T. pp. 79, 93-94; Ap. Ex. 2; OA Ex. 5. Instead, appellant’s application shows that she plans programmatic work, providing information and consultation regarding the implementation of the program to agencies and entities. N.T. pp. 79-80; Ap. Ex. 2; OA Ex. 5. However, she does not provide or coordinate any employee’s work or plan any other person’s work. N.T. pp. 79-80. Thus, appellant does not meet the requirements of the third MET. N.T. pp. 79-80; Ap. Ex. 2; OA Ex. 5.

Upon review of the record, the Commission determines the Office of Administration did not base its determination of ineligibility upon an erroneous interpretation of appellant’s work experience. Jenkins credibly testified appellant’s experience lies in the monitoring and implementation of a program, not in the oversight of any employee’s daily work activities. Because appellant’s job duties do not include planning and coordinating the work of others, the Office of Administration did not commit any mistake of fact in determining appellant did not meet the METs for the Employment Security Manager 2 (CS-2023-53606) position. *Goodridge, supra*. Accordingly, we enter the following:

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 Jennifer E. Nestor challenging the Office of Administration, Executive Office's determination of ineligibility for Employment Security Manager 2 (CS-2023-53606-06122) and sustains the action of the Office of Administration, Executive Office's determination that appellant is not eligible for the Employment Security Manager 2 (CS-2023-53606-06122) position.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Pamela M. Iovino
Commissioner

Issued: April 18, 2024