

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Valerie Gordy, :
Petitioner :
 :
v. :
 :
State Civil Service Commission :
(Department of Public Welfare), : 1488 C.D. 2014
Respondent : Submitted: February 20, 2015

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: June 11, 2015

Valerie Gordy (Gordy), *pro se*, petitions for review of the order of the Pennsylvania State Civil Service Commission (Commission) which dismissed her appeal challenging her non-selection for promotion as an Income Maintenance Casework Supervisor (IMC Supervisor) with the Philadelphia County Assistance Office (PCAO), Department of Human Services (DHS).¹

In the fall of 2013, the PCAO sought to fill nineteen positions with the classification of IMC Supervisor. From September 6 to 21, 2013, the PCAO posted Job Posting #418 which listed the following recruitment methods or “options to fill” the position: civil service lists, reassignment, reinstatement, demotion, transfer and promotion without examination. Job Posting #418 at 2; Reproduced Record (R.R) at 52.

¹ The Department of Public Welfare has changed its name to Department of Human Services.

PCAO's Executive Director and three Directors of Operations ultimately chose (from the available options listed) to fill the IMC Supervisor positions using the "competitive promotion without examinations" process ("PWOE"). (Emphasis added.)

Under Section 501 of the Civil Service Act (Act)², 71 P.S. §741.501, persons being promoted within a classified service³ may be promoted without examination provided that: "(1) such promotion is into a classified position immediately above the person's own position; (2) such promotion is based on seniority and meritorious service; (3) the person meets the minimum requirements for that position; and (4) the person satisfactorily completes a six month probationary period in the classified position." (Emphasis added.)⁴

Civil Service Regulation 95.7, 4 Pa. Code §95.7, likewise provides that PWOE may be accomplished under the following circumstances:

² Act of August 5, 1941, P.L. 752, *as amended*.

³ All positions existing or hereinafter created under the State Civil Service Commission are considered to be "classified service." Section 3 of the Act, 71 P.S. §741.3

⁴ Under this same Section, promotions may be made from "eligible lists established as a result of examinations...to determine the relative merit of candidates." (Emphasis added.) (hereinafter "Promotion With Examination"). The tests measure "the degree to which applicants or employees are qualified for appointment or promotion." Civil Service Regulation 95.7, 4 Pa. Code §95.7. When appointing or promoting "with examination" the selection is made from established lists which rank employees based on their scores. A "promotion list" is a list of persons who have been found qualified by a promotion examination. An "employment list" is a list of persons who have been found qualified by an entrance examination. Section 3 of the Act, 71 P.S. §741.3. The term "eligible list" as used in Section 501 of the Act, 71 P.S. §741.501, is a general term which encompasses these different types of lists. Section 3 of the Act, 71 P.S. §741.3.

(i) *Competitive promotion without examination.* The appointing authority shall post the vacancy, consider the eligible employees who express an interest and make the promotion decision based upon an objective review of each employee's meritorious service and seniority. Seniority for this purpose shall be the length of continuous service of an employee in the designated next lower classes if there has been no break in service. Eligibility for consideration for the promotion may be limited by the appointing authority to a particular geographic or program area. The posting shall, whenever possible, specify the classes determined to be next lower. Otherwise, the posting shall state that applications will be reviewed to determine if employees previously held regular status or currently hold regular status in a class for which there is a logical occupational, functional or career development relationship to the posted position or if there is a clear linkage between the required knowledges, skills and abilities of the previously or currently held class with those needed for the posted position.

Section 95.7 of the Civil Service Regulations, 4 Pa. Code §95.7. (Emphasis added.)

Management Directive 580.19(5)(b), Amended, *Promotion in the Classified Service Without Examination*⁵ explains, *inter alia*, Civil Service Regulation 95.7, 4 Pa. Code §95.7 and the policies, requirements and procedures for promoting employees in the classified service without examination:

(b) Employees selected for competitive or noncompetitive promotion without examination must:

⁵ This Court has held that Management Directive 580.19, as a properly issued directive, has the force and effect of law. Price v. Luzerne/Wyoming Agency on Aging, 672 A.2d 409, 412, n. 6 (Pa. Cmwlth. 1996), *appeal denied*, 688 A.2d 174 (Pa. 1997); Nosko v. Somerset State Hospital, 590 A.2d 844 (Pa. Cmwlth. 1991).

- (1) Presently hold or have held regular civil service status in the next lower classification with no break in service;
- (2) Meet the minimum experience and training requirements for the vacant classification; and
- (3) Meet agency established criteria for meritorious service and seniority.

According to Management Directive 580.19, when the “promotion without examinations [PWOE]” process is used, the appointing authority (in this case the PCAO) must “interview all employees” who meet the minimum experience and training requirements and established criteria for meritorious service and seniority and “make a selection using merit related criteria as established by the appointing authority.” Management Directive 580.19(7)(a)(3) and (4).

Forty-four candidates who applied for the IMC Supervisor positions met the minimum experience and training requirements, and established criteria for meritorious service and seniority. According to the job posting, the threshold “seniority” was defined as “a minimum of three (3) years (780 days) in the next lower class by the closing date of the posting.” Job Posting #418 at 2; R.R at 52. The minimum experience required for promotion consideration was two years of journey level experience as an Income Maintenance Caseworker (IMC). Meritorious service⁶ was defined as:

⁶ Meritorious service is verified from Employee Performance Reviews/Evaluations.

(1) the absence of any discipline above the level of Written Reprimand during the 12 months preceding the closing date of the posting, and (2) the last due overall regular or probationary performance evaluation was **Commendable or Higher**. (Emphasis in original.)

Job Posting #418, at 2; R.R at 52.

Once candidates were determined to have met the minimum requirements and established criteria for meritorious service and seniority, panel interviews were used to select among them. Brenda Cunard (Cunard), who is Caucasian and forty-eight years old, supervised the Human Resource Analyst who was responsible for coordinating the interviews. Hearing Transcript (H.T.), March 14, 2014, at 114, 117.⁷ The purpose of the interview was to determine who, among the candidates who qualified for an interview, were best suited for the IMC Supervisor positions. H.T. at 118.

Panel interviews were conducted on November 15, 18, 19, and 20, 2013. All forty-four candidates were interviewed by District Administrators holding the classification of Income Maintenance Administrator 2 and by Assistant District Administrators holding the classification of Income Maintenance Administrator 1. H.T. at 120. Three panels of three persons each were created to conduct the interviews. Each candidate was asked the same five questions:

(1) Please explain why you are the best candidate for this job by giving an example in your recent history where you've been an asset to DPW by making a department priority a success;

⁷ The hearing transcript was not part of the reproduced record; therefore, citations are to the transcript itself which is contained in the certified record.

(2) Often workers take unexpected leave. Tell us about a time when you had to cover for your co-worker and handle your own regular assignments;

(3) Tell us about an experience you had in diffusing a hostile situation;

(4) As a supervisor, time and attendance, dependability, appearance and ethics are important qualities. Tell us how you have demonstrated these qualities in your current position; and

(5) Give us an example of a time when you utilized a skill that will help you as a supervisor.

List of Questions for All Candidates, at 1; R.R. at 24.

The panelists took turns asking the questions. After the interview each panelist reviewed his/her notes and scored the interview. The panelists were instructed to rate the candidates' answers according to the following scale:

4 points if: Candidate gives a complete answer, including a full description of the task, issue or problem; the action taken to complete the task, resolve the issue or correct the problem; and the result of the intervention.

3 points if: Candidate's answer includes a description of the task, issue or problem; the action taken to complete the task, resolve the issue or correct the problem; and the result of the intervention. However, the information is incomplete or vague.

2 points if: Candidate fails to address one or two of the three components of a complete answer.

1 point if: Candidate fails to address any of the three components of a complete answer.

Question/Response Package Evaluation Form, at 1; R.R. at 146.

The rankings were: 4 - “outstanding;” 3 - “very good;” 2 - “good;” and 1 - “weak.” H.T. at 196-198.

The panelists were to discuss the interview to insure that they “all captured the same information.” H.T. at 122-123. Applicants were ranked by interview score and the highest ranked candidates were selected to fill the nineteen IMC Supervisor positions.

Gordy, a fifty-seven year old African-American female, was among the forty-four candidates who interviewed for the IMC Supervisor position. Gordy was notified on November 12, 2013, that her interview would take place on November 19, 2013, at 11:45 a.m. Email to Valerie Gordy from Marina Salazar, Human Resource Analyst Recruitment and Placement, Department of Public Welfare, November 12, 2013, at 1-3; R.R. at 53-55.

At the time she interviewed, Gordy had been an IMC for eleven years.

Gordy’s interview panel was chaired by Lisa Wilkins (Wilkins), a fifty-year old African-American female. Also on the panel were Jacqueline Mazzitelli (Mazzitelli) a thirty-seven year old Caucasian female and Angel Segarra (Segarra), a forty-one year old Hispanic male.

Gordy was interviewed on November 19, 2013. Gordy only scored twenty points out of a possible sixty at her interview and was ranked at the bottom as forty-third out of forty-four candidates.

When two male coworkers, with fewer years' experience than Gordy received higher interview scores and were selected, Gordy filed an appeal to the Commission pursuant to Section 951(b) of the Act, 71 P.S. §741.951(b)⁸ and alleged violations of Section 905.1 of the Act which prohibits discrimination in the classified service:

No officer or employe of the Commonwealth shall discriminate against any person in the 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. §741.905a.

Gordy alleged that the hiring process, particularly the use of panel interviews, was skewed in favor of young people, whites and males. In her Appeal Request Form, she alleged:

Even though I am test qualified, have more work experience and higher seniority, the following persons who are younger, male and/or white were promoted to supervisor while I was not.

Jesse Mathis a younger black male was promoted to Chelton District from Ridge.

⁸ Section 951(b) of the Act, 71 P.S. §741.951(b), provides:

Any person who is aggrieved by an alleged violation of Section 905.1 of this act [71 P.S. §905a, added by the Act of August 27, 1963, P.L. 1257, *as amended*] may appeal in writing to the commission within twenty calendar days of the alleged violation. Upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing.

William Hancock a younger white male was promoted to Unity District from Ridge.

Jason Land a younger black male was promoted to Ridge District from South.

The PCAO-HR is seriously flawed and they are using confidential interviews and selected panel members to promote younger, white and/or male employees.

Appeal Request Form, December 10, 2013, Attachment at 1; R.R. at 5.

A public hearing was held before a Hearing Officer on March 14, 2014. The issue was whether Gordy's non-selection was for illegal, discriminatory reasons.

Gordy presented evidence that Jesse Mathis (Mathis), one of the candidates selected for the position was an African-American male who was thirty-seven years old at the time of his selection. He was twenty years younger than Gordy. She claimed he was not on the "certification list"⁹ and had six years in the next lower class title of IMC, compared to Gordy's eleven. Mathis received a perfect interview score of sixty. William Hancock (Hancock), another candidate selected for the position, was a Caucasian male, forty-two years old. He was fifteen years younger than Gordy. He had five years' experience and was forty-eighth on the certification list with a score of seventy-eight. Hancock received an interview score of forty-eight.

⁹ Gordy uses the term "certification list" which this Court believes is a reference to a "promotion list."

Gordy argued that the PCAO's decision to hire Mathis and Hancock based solely on their interview scores was "technical discrimination." She argued that the use of panel interviews was not identified on the job posting as one of the "options to fill" the IMC Supervisor position. She claimed it was unfair that she was not notified in advance that the panel interview would be the most important aspect in the consideration for promotion. Counsel for DHS objected to her testimony on the grounds that this theory was not stated as the basis for her appeal in her Appeal Request Form. The Hearing Officer sustained the objection.

Gordy also argued that the PCAO did not consider whether the candidates took the examination for IMC Supervisor and what score each received. She stated: "I am test certified" and "I believe [the interview selection process] ... is allowing those with less seniority than I, who are not test certified, to be promoted." H.T. at 33. She argued that, unlike her, Mathis did not appear on the certification list; yet, he was selected. She argued that based on her examination score she was more qualified for the position of IMC Supervisor than Mathis. She also argued that she had a higher examination score than Hancock. She argued that the interview panels selected fourteen candidates who were not on the "certification list" rather than selecting those who were and that this violated Section 501 of the Act, 71 P.S. §741.501; Section 506 of the Act, 71 P.S. §741.506¹⁰, and Section 95.7 of the Civil Service Commission Regulations, 4 Pa. Code. §95.7.

¹⁰ Section 506 of the Act, 71 P.S. §741.506, provides that "the director shall establish and maintain such eligible lists as are necessary or desirable to meet the needs of the service. These lists shall contain the names of those persons who have been found qualified for and have successfully passed the examination and shall be arranged in the order of final earned ratings."

Next, Gordy argued that the PCAO did not, in fact, properly apply the PWOE process because PCAO did not consider “seniority or meritorious service,” the criteria that are relevant in selection by PWOE. Instead, the PCAO relied solely on an “interview panel to score and rank.” H.T. at 47, 78-81. She argued that there was “too much arbitrariness for them to use that procedure [the interview] alone.” H.T. at 37. The interview panels “were not equal.” H.T. at 78. She asserted that some candidates were interviewed by panel members who were known to each other thus fostering favoritism and discrimination. She argued that the interview panels did not objectively rate the candidates, but rather allowed favoritism to taint the process. She cited as an example that Mazzitelli was Mathis’s Supervisor for many years and that Mazzitelli’s familiarity with Mathis contributed to his receiving the highest possible interview score. Similarly, William Hancock’s interview panel included Ryan Feczko, who was Hancock’s current Assistant District Administrator. Gordy argued that Mr. Feczko as a panelist contributed to Hancock’s high interview score. Gordy also testified that she knew one of her panelists, Mazzitelli. They had worked together at Ridge. Gordy argued that Mazzitelli serving as a panelist contributed to Gordy’s receipt of the lowest possible score. Gordy argued that rejection of a candidate based solely on the subjective panel interview violated Section 501 of the Act, 71 P.S. §741.501, and Section 95.7 of the Civil Service Commission Regulations, 4 Pa. Code. §95.7.

Cunard testified on behalf of the PCAO. She explained that under the PWOE process, candidates who met the minimum experience and training requirements, seniority and the requirements of meritorious service were eligible to be interviewed. H.T. at 119. She explained that based on the “sheer number of candidates” it was “not feasible” to have one panel of three people interview all

forty-four candidates. H.T. at 121. She explained that typically, five interviews are conducted each day. If one panel conducted all forty-four interviews, the panel members would have been taken away from their regular job duties for a total of nine days. This would have been “overly burdensome” because of the amount of work for which the panel members are responsible. H.T. at 121.

Cunard testified that the interviewers represent both genders and there are racially diverse interview panels. H.T. at 121. The panel who interviewed Gordy consisted of a Caucasian female, a Hispanic male and an African-American female. H.T. at 122.

Cunard testified that of the nineteen IMC Supervisor positions that were filled in November 2013, eight were filled by African-American females, three were filled by African-American males, two were filled by Caucasian females, three were filled by Caucasian males, one was filled by an Hispanic male, and two were filled by Hispanic females. Of the nineteen IMC Supervisor positions that were filled, eight of those positions were filled by persons over the age of forty, with the eldest being fifty-three years old. H.T. at 129-130.

Cunard also explained that the interviewers may recuse themselves from a panel if they feel they would not be objective. Also, each candidate is notified in advance of the panel members and may inform the PCAO if he/she believes that a particular individual should not be a part of his/her panel due to objectivity concerns. H.T. at 143. Gordy did not object to the inclusion of Mazzitelli on her panel.

Wilkins also testified on behalf of the PCAO. She was the chairperson for the panel which interviewed Gordy. Wilkins explained that Gordy did not do very well during her interview because “she didn’t really answer the questions.” H.T. at 195-196. For Questions 1, 2, and 3, Wilkins rated Gordy’s answers as a “1.” For Question 4, she rated Gordy’s answer as a “3” and for Question 5 she rated Gordy’s answer as a “2.” H.T. at 199. With respect to the first question, Gordy “did not elaborate.” H.T. at 200. With respect to the second question, Gordy “talked about how it really wasn’t her work to do. She didn’t elaborate on how she was able to complete her tasks in addition to the tasks that were delegated to her.” Id. With respect to the third question, Wilkins “didn’t feel she adequately answered the question.” Id. And, with respect to the fifth question¹¹, Wilkins “didn’t feel that she really answered the question. It asked her about a skill, but she didn’t really – she didn’t expand on her answer. She didn’t fully answer the question.” H.T. at 201. Wilkins opined that better candidates elaborated and expanded their answers. They gave “really detailed information” including “each step they took to handle a situation and what the favorable outcome was.” H.T. at 201. Wilkins testified that race, gender or age did not factor into her assessment of Gordy and that she was “only interested in the best candidate for the job.” H.T. at 202.

Mazzitelli also testified that Gordy’s answers to the interview questions were “inconsistent and incomplete” and that “Gordy hit on certain points of the question, but neglected to give concrete, circumstantial situations in which she necessarily was the cause and the effect of the result of what took place.” H.T.

¹¹ Wilkins gave Gordy a score of 3 out of 4 on the fourth question, so this was not an issue.

at 221-222. For Questions 1, 2, 3, and 5, Mazzitelli rated Gordy's answers as "1." For Question 4, she rated Gordy's answer as "2." Mazzitelli rated Gordy's total interview as a "6." H.T. at 220-221. Mazzitelli testified that she had supervised Gordy for one year approximately six years prior to the interview. She rated Gordy's interview based on her answers to the questions, not on her prior knowledge of her. She also denied that Gordy's age, race or gender affected how she graded the interview. H.T. at 225-226. At the interview, Mazzitelli did not reveal to the other panelists that she knew Gordy. H.T. at 206-208.

Segarra testified that Gordy's answers to the interview questions were "weak" and that Gordy did "not capture all the factors in her answers." H.T. at 243-244. For Question 1, 2, 3 and 4, Segarra rated Gordy's answers as a "1." For Question 5, he rated Gordy's answer as "2." He rated Gordy's total interview as a "6." Segarra denied that race, gender, or age had any bearing on his assessment of Gordy or any other candidate. H.T. at 245.

After the hearing, the Commission concluded that Gordy failed to meet her burden to prove that her non-selection for promotion was the result of age, gender or race discrimination. It also concluded that Gordy failed to establish that the PCAO used promotion selection procedures that were improper under the Act and related Regulations.

On appeal¹², Gordy lists four issues:

¹² In civil service cases, the Commission is the sole fact-finder. Bosnjak v. State Civil Serv. Commission, 781 A.2d 1280 (Pa. Cmwlth. 2001). As such, determinations as to witness credibility and resolution of evidentiary conflicts are within the Commission's sole province, and this Court will not reweigh the evidence or substitute our judgment even though we might have **(Footnote continued on next page...)**

1. Did the SCSC (Commission) err when it held that DPW [DHS] met its burden ‘because the credible testimony of its witnesses establishes that the separate interview panels were non-discriminatory and there were merit-related reasons why appellant [Gordy] was not selected’?

2. Did Ms. Gordy meet her burden, based upon the entire body of evidence that DPW [DHS] discriminated against her when it selected Mr. Hancock who ranked lower on the promotion list and had fewer years seniority in the next lower class than Ms. Gordy and who received special treatment because he was permitted to interview while on sick leave, and when it selected Mr. Mathis who was not on the promotion list and had fewer years of seniority in the next lower class than Ms. Gordy?

3. Did Ms. Gordy meet her burden of proving ‘technical discrimination’ because DPW [DHS] used a selection process that was non-public and not listed as one of the ‘options to fill’ the IMCWS position in the job posting and selected Mr. Mathis and Mr. Hancock for the IMCWS position?

4. Did SCSC [Commission] err when it failed to make findings concerning the use of separate interview panels in DPW’s [DHS] selection for the IMCWS position and DPW [DHS] selected Mr. Mathis and Mr. Hancock, and not Ms. Gordy for the position?

Gordy’s Brief, Statement of Questions Involved, at 8.¹³

(continued...)

reached a different factual conclusion. Thompson v. State Civil Serv. Commission, 863 A.2d 180 (Pa. Cmwlth. 2004). When reviewing a Commission decision, this Court views the evidence, and all reasonable inferences arising from the evidence, in a light most favorable to the prevailing party. Bosnjak.

¹³ Although Gordy raised these four issues in her Statement of Questions Involved, her brief contains nine sub-arguments which are listed in no particular order in relation to the four **(Footnote continued on next page...)**

There are two categories of discrimination that may be appealed to the Commission under Section 951(b) of the Act, 71 P.S. §741.951(b): “traditional discrimination” and “technical discrimination.” Pronko v. Department of Revenue, 539 A.2d 456 (Pa. Cmwlth. 1988). Traditional discrimination claims under Section 905.1 of the Act, 71 P.S. §741.905a, are based on factors such as race, sex, age, disability and national origin. Id. at 462. Technical discrimination claims are based on technical and procedural violations of the Act and related regulations. Reck v. State Civil Service Commission, 992 A.2d 977 (Pa. Cmwlth. 2010). In order to obtain relief for technical discrimination, an employee must show that he/she was, in fact, harmed because of the technical non-compliance with the Act or evidence that because of the peculiar nature of the procedural impropriety he/she could have been harmed but there is no way to prove that for certain. Price v. Luzerne/Wyoming Counties Area Agency on Aging, 672 A.2d 409 (Pa. Cmwlth. 1996).

I.

Use of Panel Interviews

Gordy contends that the PCAO committed “technical discrimination” because it used the panel interviews as the sole determining factor in the selection to fill the IMC Supervisor position in violation of the Act. She argues that by relying exclusively on the panel interviews, the selection process lacked any merit-

(continued...)

issues raised. This Court has, to the best of its ability, attempted to glean the basic essence of Gordy’s arguments and has organized its discussion under two main headings: (1) Whether the PCOA’s use of panel interviews during PWOE process violated the Act or Commission regulations; and (2) Whether Gordy met her burden of proving that her non-promotion was the result of race, gender or age discrimination?

based evaluative criteria relating to the essential functions of the IMC Supervisor position. She contends that pursuant to Section 501 of the Act, 71 P.S. §741.501, and Civil Service Regulation 95.7, 4 Pa. Code §95.7, the PCAO was required to make the promotion decision based on an objective review of each employee's meritorious service and seniority. She asserts that it made no sense to select candidates based on the panel interview with non-merit-related criteria and pass over someone who passed the merit-qualifying promotion exam and had more years of experience and seniority. She suggests that the candidates with the highest promotion examination scores and most years of experience should have been selected. This Court disagrees.

First, it was within PCAO's authority to decide which method of promotion to use ("the commission ... may permit promotions to be accomplished by any one of the following plans: (1) by appointment from open competitive lists; or (2) by achieving a place on an eligible list after a promotional examination...or (3) by promotion based upon meritorious service and seniority to be accomplished by appointment without examination"). The PWOE process is a promotion selection process that does not promote based on examination scores or straight seniority. This does not mean, as Gordy contends, that this particular selection process "lacks merit-based evaluative criteria." Candidates are still required to meet minimum threshold experience and training requirements. All candidates who meet the minimum threshold experience and training requirements stand on equal footing and are eligible to interview, regardless of examination score rankings or number of years' experience. The PCAO did not choose to promote "With Examination." The fact that Gordy had a higher examination score compared to the other candidates was not a relevant consideration in the PWOE process and, therefore, it was not evidence of discrimination.

Second, contrary to Gordy's contention, the PWOE process used by PCAO did not lack "merit-related criteria" relating to the essential functions of the IMC Supervisor position. The candidates were initially evaluated by PCAO on the basis of meritorious service and seniority as required by Section 501 of the Act, 71 P.S. §741.501, and Civil Service Regulation 95.7, 4 Pa. Code §95.7. All forty-four candidates met the minimum requirements for PWOE. All candidates had (1) at least two-years of journey level experience as an IMC; (2) no discipline above the level of Written Reprimand during the twelve months preceding the closing date of the posting; and (3) a probationary performance evaluation of "Commendable or Higher." All candidates met the three-year/780-day threshold for seniority.¹⁴

According to Management Directive 580.19, at Section 7a(2) and (3), meritorious service and seniority represent the threshold criteria that an applicant must meet before he or she is allowed to interview for the position to be filled by this method. Management Directive 580.19, at Section 7a(2) provides that "the employees who meet the criteria for competitive promotion without examination" are those "who meet the minimum experience and training requirements for the

¹⁴ Gordy asserts that she should have been promoted over Mathis and Hancock because she had "more" seniority than them. She had eleven years' experience as an IMC. Mathis had six years' experience as an IMC in comparison to Gordy's eleven years. Hancock had five years' experience as an IMC in comparison to Gordy's eleven years. However, the PCAO elected PWOE as the method of promotion, not "Seniority Promotion" where straight seniority is used exclusively to determine the order in which employees are to be promoted (often found in collective bargaining agreements or union agreements). The PCAO elected not to use a mechanical rule which guaranteed promotion to the most senior employees.

However, in accordance with Section 501 of the Act, 71 P.S. §741.501, seniority *was* considered as one factor in the evaluation. Management Directive 580.19 provides that the authorizing agent may establish criteria for seniority. Here, the PCAO designated a threshold seniority of at least three years/780 days of service in the next lower class by the closing date of the posting. Any person who had less than three years/780 days of service as an IMC was not eligible for an interview.

vacant classification;” “have or have held regular civil service status in the next lower classification as established by the appointing authority with no break in service” and “meet the appointing authority’s established criteria for meritorious service and seniority.” Management Directive 580.19 requires that an appointing authority “interview all employees who meet the criteria as stated in paragraph 7a(2) of this directive” to assess relative suitability for promotion, as long as the assessments are based on job-related criteria and be conducted in accordance with standards established by the Executive Director of the Commission. See 4 Pa. Code § 97.16; Price.

The final selection among equally qualified candidates based on the panel interview scores did not violate the Act or any Regulation.

In Price, Anne Marie Price (Price) had been employed by the Luzerne/Wyoming Counties Area Agency on Aging (Agency) as a Clerk Typist 2. In December 1993, the Agency posted a vacancy notice soliciting candidates for a Clerk Typist 3 position, serving as Executive Secretary to its Executive Director, Carole J. Lewis (Lewis). Price, 672 A.2d at 410.

The vacancy notice set forth Clerk 3 and Clerk Typist 2 as appropriate next lower positions for PWOE. The notice also set forth the selection criteria for determining PWOE as follows:

1. Meritorious Service to be determined from:
 - a. Performance Evaluation Reports-overall score from last two PERs completed.
 - b. Meritorious Service will be weighted 60%.

2. Seniority in class to be calculated from length of service in qualifying classes measured from first entry into the class, excluding periods of furlough, resignation, leave of absence, (other than Military or Educational Leave), and other separations. Seniority will be weighted 40%.

Price, 672 A.2d at 410-411.

Price and Karen A. Camasse (Camasse) were the only candidates for PWOE. Price, a four-year employee with overall evaluations of “excellent,” received a score of 13 out of a possible 15 points pursuant to the Agency's weighted scoring of meritorious service and seniority. Camasse, a two-year employee with overall evaluations of “excellent,” received a score of 11. Price, 642 A.2d at 411. The Agency deemed the two scores “relatively equal” and each candidate was interviewed by Lewis regarding each applicant's attitude, dependability, adaptability and organizational skills. Id. Afterwards, Price was informed that she was not selected for the position.

Price appealed to the Commission which dismissed her appeal. On appeal to this Court, Price argued that the Commission erred because the Agency's failure to promote her was based upon “non-merit criteria” which constituted “technical” discrimination. Price alleged that promotion to Clerk Typist 3 was improperly based upon the interview. She further asserted that she was never told that Lewis's assessment of her attitude, dependability, adaptability and organizational skills would be used to determine promotion. Price contended that the Agency's actions violated the Act and related Rules. This Court disagreed.

As in this controversy, Price and Camasse were initially evaluated by the Agency on the basis of meritorious service and seniority. Finding both candidates to be relatively equally qualified to be promoted, Lewis interviewed both candidates and questioned them about their impressions of the Clerk Typist 3 position, their previous work experience and their abilities to meet the demands and fulfill the responsibilities of the position. This Court held that the interview questions and Lewis's assessment of the suitability of both Price and Camasse for promotion were based upon job-related criteria.

This Court concluded that the Agency's reliance upon an interview wherein candidates for promotion to Clerk Typist 3 were questioned about “job-related criteria” did not result in “technical” discrimination against Price in violation of section 905.1 of the Act, but in fact, was “clearly” authorized by Section 97.16 of the Regulations, 4 Pa. Code §97.16. Price, 672 A.2d at 409.

Here, the PCAO demonstrated that the purpose of the panel interview was to determine who, out of the pool of equally-qualified candidates, was best suited for the IMC Supervisor position based on the completeness and substance of answers to questions which were designed to gauge the candidates' communication skills and elicit their experiences and abilities to deal with the daily issues and responsibilities facing supervisors. Candidates were questioned about job-related criteria, for example, their experience diffusing a hostile situation. The questions were tailored to the essential job functions and job duties outlined in Job Posting #418. Unfortunately, the consensus of Wilkins, Segarra, and Mazzitelli was that Gordy did not provide full or complete answers to most of the questions; therefore their ability to assess her judgment, background, and situational reaction was hampered, through no fault of their own.

Gordy also alleges that the Commission failed to make findings as to the essential functions and duties of the IMC Supervisor. She claims that had the Commission made such findings, it would have concluded that she was the most qualified for the position. Gordy makes the same arguments made by Cephus Moore (Moore) in Moore v. State Civil Service Commission (Department of Corrections), 922 A.2d 80 (Pa. Cmwlth. 2007). There, Moore, was a sixty-two year old African-American male with a bachelor's degree in business administration and a master's in public administration, who was employed as an HR Analyst 3 in the Department of Corrections (Department) for eleven years. In 2005, the Department posted a job opening for the HR Analyst 4 position to replace an employee who was retiring. The job description indicated that the minimum experience and training was one year as a HR Analyst 3. It described the essential functions of the position to include: administering the Department's employee benefit department, testifying in federal and state courts on disability claims, overseeing the Department's unemployment compensation plan, and supervising professional and clerical staff. Moore, 922 A.2d at 82. Eight applicants, including, Karen Malone (Malone) applied. Malone was a forty-three year old Caucasian female with a high school diploma and training in cosmetology, employed by the Department as a HR Analyst 3 for four years. The candidates were interviewed by a panel, including Timothy Musser (Musser), the Department's Human Resources Manager. Malone was selected.

Moore appealed his non-selection for promotion and alleged race and age discrimination and violation of the civil service rules. Moore presented evidence that he administered the benefits program for injured employees,

supervised an HR Analyst 2 handling claims under the Heart and Lung Act¹⁵, filed workers' compensation claims, handled unemployment claims, and conducted training. He also argued that he was precluded from highlighting his experience with Systems Applications Processes (SAP), a computer software program implemented by the Commonwealth, at the interview due to the Department's failure to give prior notice of all evaluative criteria.

The Department presented evidence that Malone participated in developing and maintaining SAP and she provided technical assistance to others in state government. The Department asserted that it selected Malone due to her broader HR experience and her SAP experience. The Department admitted that none of the interview questions pertained to the applicants' experience in SAP. Moore argued that experience and skills in SAP were not related to the job description or to the interview questions.

The Commission rejected Moore's arguments and found that Moore failed to prove that the differences in Malone's and Moore's experience made Moore "so obviously a better choice for the HR Analyst 4 position." Id. at 86. The Commission concluded that the Department selected Malone for legitimate non-discriminatory reasons based on her experience and skills related to SAP. The Commission concluded that Moore failed to meet his burden to show that his experience made him the better choice for the HR Analyst 4 position. The Commission made specific findings of fact as to Moore's duties as an HR Analyst 3. The Commission did not make findings as to Malone's functions and duties. Id. at 83.

¹⁵ Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§637-38.

On appeal, this Court agreed with Moore that the Commission failed to make necessary findings of fact. Although the Commission concluded that Malone was legitimately selected based on her skills and experience, the Commission did not support that conclusion with necessary findings of fact as to: (1) the functions and duties of an HR Analyst 4; (2) Malone's duties as an HR Analyst 3 (what her experience entailed); or (3) whether Malone possessed the necessary experience and knowledge to perform the HR Analyst 4 functions and duties.

Here, the essential functions of the IMS Supervisor were undisputed and were listed in the Job Posting #418, which is specifically referenced by the Commission. The job duties and functions were set forth as follows:

This is first level supervisory and professional work within any of the income maintenance programs involving applicant eligibility determinations for Public Assistant benefits. Responsibilities will include but not be confined to the assignment, review and evaluation of work for assigned unit workers; planning and conducting on-the-job training; interpreting program policy and procedure; conducting quality reviews of client case records; evaluating staff performance and preparing various reports.

The ability to effectively communicate orally and in writing; gather, analyze and evaluate information; select, interpret, and apply manual policies, procedures and regulations to ensure correct application of income maintenance programs, perform basic arithmetic calculations to check eligibility determination, travel, as needed, for training or special assignments; interact objectively and professionally with clients, applicants and staff under circumstances that may be stressful and difficult; ambulate through the office.

Job Posting #18 at 1; R.R. at 51.

Unlike in Moore, Gordy presented no evidence or argument that the nineteen candidates who were selected did not possess the necessary skills and experience to perform the functions and duties of IMC Supervisor. Further, she did not present any argument or evidence that she possessed far superior skills than the other candidates. Such failure meant that she failed to present evidence that would support a conclusion that the selection criteria lacked legitimacy. Gordy never made any argument, for example, that she had far superior skills than Mathis or Hancock in conducting on-the-job training, reviewing and evaluating work for assigned unit workers, or interpreting program policies and procedures. This is not a case like Moore, where Moore presented credible evidence regarding far superior educational background, experience and knowledge over the selected candidate. Therefore, it is wholly unnecessary for this Court in this situation to remand to the Commission to make findings of fact pertaining to the functions of the IMC Supervisor position.

Next, Gordy argues that the Commission failed to make findings with respect to the use of “multiple separate interview panels” to interview, score and rank candidates in the selection process. She claims that the use of separate interview panels was inherently unfair and unequal and violated the *Human Resources Guidelines for Interview Panel* which recommends using the “same panel members for all interviews.” *Guidelines for Interview Panels*, at 2; R.R. at 48. She argued that Mazzitelli and Segarra recalled that only three of the fifteen candidates they interviewed were promoted; leaving the majority of those promoted to Panel’s #1 and #2. Gordy argues that this further indicated a disparity between panels.

Contrary to Gordy's contention, the Commission specifically addressed this issue on page 24 of its Decision. Initially, it found that Gordy's evidence of separate interview panels was sufficient to establish a *prima facie* case of discrimination. It found that if, as Gordy alleged, the interview panels did not objectively rate the candidates, but rather allowed favoritism to taint the process, then she had presented evidence which, if believed or otherwise explained, could indicate that it was more likely than not that her non-selection for the position of IMC Supervisor was the product of discrimination.

However, the Commission ultimately concluded that once the burden shifted to the DHS, the DHS successfully advanced legitimate, non-discriminatory reasons for the use of multiple panels. Cunard testified that the DHS used three separate interview panels for practical, non-discriminatory, business reasons. That is, there were forty-four applicants for the IMC Supervisor position and that one panel could not efficiently interview them all. *See* Commission Decision, Finding of Fact No. 13 at 6. As the Commission pointed out, the PCAO took care to ensure that the interview panels were diverse by race and gender. Commission Decision, Finding of Fact No. 14 at 6.¹⁶

¹⁶ Gordy alleges that the Commission failed to make any findings as to the PCAO's *Selection Interview Guide*, which states:

[A] job applicant's selection or non-selection should not be based on information obtained in the interview alone. Information from other sources, such as the resume, application or references should be evaluated with the interview results to arrive at a decision.

Selection Interview Guide, Pamphlet #15 (February 2000 revised).

Contrary to Gordy's assertion, the Commission specifically noted that the PCAO *Selection Interview Guide* is precatory, not directory and that the salient issue was whether the panel interviews violated the Act or its Rules. Adjudication at 21, n. 13. In any event, this Court is unable to conclude that this provision was violated in any manner because the PCAO did not **(Footnote continued on next page...)**

Gordy next argues that the Commission failed to address the fact that Mazzitelli revealed to the other panelists that she knew Mathis, but did not reveal to the other panelists that she knew Gordy. Gordy argues that this resulted in the hiring of Mathis since it is more likely than not that a known and familiar candidate would have an advantage over an unknown candidate during the deliberation process.

The Commission found that DHS's witnesses all testified credibly that they rated Gordy's interview based upon her answers to the questions, and were not influenced by any other reasons such as familiarity, prior knowledge, race, age or gender.

It is within the purview of the Commission to determine the credibility of the witnesses. State Correctional Institution of Graterford, Department of Corrections v. Jordan, 505 A.2d 339 (Pa. Cmwlth. 1989). This Court will not disturb these findings that were supported by substantial evidence.

Finally, Gordy contends that DHS failed to disclose the panel interview process as the selection criterion in the posting for vacancy. The job posting did not list the panel interview as one of the "options to fill this position." She claims had she known in advance that selection was based solely on the interview she could have taken more time to prepare, responded with more detail or even hired a coach. Gordy's Appeal Request Form did not mention or raise any

(continued...)

base its decision solely on the interview. As noted, specific threshold criteria which would customarily be found in a "resume, application or references" was also considered.

issue with regard to the DHS's failure to notify candidates in the job posting that there would be a panel interview. Instead, Gordy alleged in her Appeal Request Form that the multiple panel interview process was skewed in favor of young people and whites and/or males. The Hearing Officer refused to hear testimony or argument on the issue of whether the use of panel interviews, in general, was appropriate. H.T. at 153, 164. Gordy waived the issue before the Hearing Officer; therefore, the Commission did not address it. This Court will not address it for the first time on appeal.¹⁷

II.

Did Gordy Meet her Burden of Proving that Discrimination Occurred?

Gordy argues that her non-selection for the IMC Supervisor position was the product of “traditional” race, sex and age discrimination. As proof, she offered evidence that the PCAO selected young, white, male applicants rather than an older, African-American female. This Court, like the Commission, is not persuaded by Gordy's argument.

In discrimination claims arising under Section 905.1 of the Act, 71 P.S. §905a, the employee claiming discrimination in personnel actions has the burden of presenting evidence to support such a charge. Cola v. State Civil Service Commission (Dep't of Conservation & Natural Res.), 861 A.2d 434 (Pa. Cmwlth. 2004). To do so, the employee must present sufficient evidence that, if believed and otherwise unexplained, indicates more likely than not that discrimination occurred. Moore.

¹⁷ The issue lacks merit in any event. The job posting clearly indicated that PWOE was an option and panel interviews are a part of that process.

As stated, Gordy is female, African-American and fifty-seven years old. Of the nineteen applicants selected for the IMC Supervisor position, eight were filled by African-American females, three were filled by African-American males, two were filled by Caucasian females, three were filled by Caucasian males, one was filled by an Hispanic male, and two were filled by Hispanic females. Of the nineteen IMC Supervisor positions that were filled, eight of those positions were filled by persons over the age of forty, with the eldest being fifty-three years old. H.T. at 129-130.

After the Supervisor positions were filled, the PCAO had eighty-five African-American female IMC Supervisors; fourteen African-American male IMC Supervisors; thirteen Caucasian female IMC Supervisors; eighteen Caucasian male Supervisors; twelve Hispanic female IMC Supervisors and six Hispanic male IMC Supervisors. H.T. at 135-136.

These statistics simply do not support Gordy's argument that her non-selection was the product of race, sex or age discrimination.

The order of the Commission is affirmed.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Valerie Gordy,	:	
Petitioner	:	
	:	
v.	:	
	:	
State Civil Service Commission	:	
(Department of Public Welfare),	:	1488 C.D. 2014
Respondent	:	

ORDER

AND NOW, this 11th day of June, 2015, the order of the Pennsylvania State Civil Service Commission in the above-captioned matter is hereby affirmed.

BERNARD L. McGINLEY, Judge