

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wendy L. Patterson,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1777 C.D. 2012
	:	
State Civil Service Commission	:	Submitted: January 25, 2013
(Luzerne County Children and	:	
Youth Services),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: March 13, 2013

Wendy L. Patterson (Patterson), *pro se*, petitions for review of an Order of the State Civil Service Commission (Commission) granting a request filed by the Luzerne County Children and Youth Services (Agency) to remove Patterson's name from any eligible lists for appointment to the position of County Caseworker 2 for a period of two years retroactive to July 19, 2012. Because we conclude that the Commission did not err or abuse its discretion, we affirm.

On July 19, 2012, Agency submitted a Form SCSC-5275, Request for Removal of Eligible (Request) to the Commission to remove Patterson from consideration for appointment to Caseworker 2 positions within the Agency. (Request at 1, S.R. at 1b.) Agency stated that the justification for this Request was “[u]nsatisfactory responses from professional references.” (Request at 1, S.R. at 1b.) Agency noted that a reference provided information that Patterson: (1) did not give sufficient notice of her intent to resign when she left her former employment; (2) did not maintain records up to expected standards; and (3) would need close supervision during probation so that she was aware of policies and procedures, her duties, and responsibilities. (Request at 2, S.R. at 2b.) Agency noted further that this reference was surprised that their name was given as a reference and the reference requested that this information remain confidential. (Request at 2, S.R. at 2b.) Regarding the references Patterson supplied, Agency stated that two were reachable, one did not return Agency’s phone call, and one was not permitted to provide specifics due to a Human Resource policy. (Request at 2, S.R. at 2b.) Agency notified Patterson of its intent to file the Request to remove her name from eligible lists for the Caseworker 2 position, and that she had the right to file a response with the Commission opposing Agency’s Request by completing Form SCSC-5275R, Response to Request for Removal of Eligible (Response), within ten days. (Letter from Agency to Patterson, July 19, 2012, at 1, S.R. at 3b.)

On July 23, 2012, Patterson submitted her Response concerning the references she provided to Agency. On her Response, Patterson checked “No” where asked whether she requested an opportunity to appear in person before the Commission to present oral argument in response to Agency’s Request. (Response

at 1, S.R. at 7b.) Patterson attached a written explanation to her Response in which she stated that, “[a]t this time, my written response adequately states my position and a personal appearance will not be necessary. However, I do reserve the right to appear in person” if Agency provided more information or intended to appear before the Commission. (Response at 2, S.R. at 8b.) Also included in the certified record with Patterson’s Response are several emails. The first email, dated July 23, 2012, is from Patterson to Agency’s human services representative (Agency Representative), and states that Patterson was following up on a telephone conversation earlier that day disputing several of the issues Agency had raised about Patterson’s references in its Request, and requesting an explanation about Agency’s intentions to remove her from eligible lists. (E-mail from Patterson to Agency Representative, July 23, 2012, at 1, S.R. at 9b.)

The remaining emails included with Patterson’s Response are from Patterson to the Commission. The first e-mail challenges the veracity of the negative information alleged to have been provided by Patterson’s references and requests the identity of the reference that provided negative comments. (E-mail from Patterson to Commission, August 2, 2012, 3:35 p.m., at 1, S.R. at 13b.) The second e-mail states that Agency is depriving Patterson of her right to defend herself by refusing to reveal the identity of the reference providing any negative information and requests that she be given an opportunity for a hearing prior to a decision on Agency’s Request in order to confront these allegations. (E-mail from Patterson to Commission, August 2, 2012, 7:15 p.m., at 1, S.R. at 14b.) The final email from Patterson again requests a hearing so that Patterson could subpoena the document providing the negative reference and also explains why she did not

provide certain references. (E-mail from Patterson to Commission, August 6, 2012, at 1, S.R. at 15b.)

Upon the Commission's review of Agency's Request, the written submissions by the parties, and Patterson's civil service employment history, including Patterson's 2005 termination for cause as a Caseworker 2 with the Lackawanna County Child Welfare Service, the Commission issued an Order on August 10, 2012, granting Agency's Request and ordering Patterson's name be removed from eligible lists for Caseworker 2 employment for a period of two years retroactive to July 19, 2012. In reaching its decision, the Commission took official notice from its records that: (1) Patterson previously had been employed as a Caseworker by three different county agencies, but disclosed only one of these employers to Agency; and (2) the Commission had sustained Patterson's 2005 termination for cause by the Lackawanna County Child Welfare Service. (Order at 1-2, S.R. at 48b-49b.) Patterson submitted a Request for Reconsideration which included a request for a hearing and a copy of this Court's memorandum opinion and order in Lackawanna County Children and Youth Services v. Unemployment Compensation Board of Review (Pa. Cmwlth., No. 1751 C.D. 2006, filed May 21, 2007) (Request for Reconsideration, S.R. at 50b-61b.) The Commission denied Patterson's Request for Reconsideration. This appeal followed.¹

¹ Because this appeal involves discretionary acts of an agency, our review is limited to determining whether there has been a manifest and flagrant abuse of discretion or purely arbitrary execution of the agency's functions or duties. Gwynedd Development Group, Inc. v. Department of Labor and Industry, Bureau of Labor Standards, 666 A.2d 365, 369 (Pa. Cmwlth. 1995) (citing Lynch v. Urban Redevelopment Authority of Pittsburgh, 496 A.2d 1331, 1335 (Pa. Cmwlth. 1985)). An agency commits an abuse of discretion if it bases its conclusions upon wholly arbitrary grounds, in capricious disregard of competent evidence. Gwynedd, 666 A.2d at (Continued...)

Before this Court, Patterson essentially argues that the Commission: (1) should not have removed her name from eligible lists for Caseworker 2 employment; (2) should not have required her to disclose all former county employment; (3) should have provided her with a hearing; and (4) violated her constitutional right to free speech. The Commission responds that its actions were within its discretion pursuant to Section 203 of the State Civil Service Act (Act),² the “Rules of the Civil Service Commission” (Rules), and Management Directive 580.34 which are the applicable law, rules, and regulation governing this case.

Section 203 of the Act assigns the Commission with the duty to establish Rules for making effective the provisions of the Act. Pursuant to that duty, the Commission adopted Rule 97.13, 4 Pa. Code § 97.13, which provides for an appointing authority³ to object to an individual’s name being included on eligible lists.⁴ The procedures for objecting to and removing an individual’s name from

369-70 (citing Lily Penn Food Stores, Inc. v. Pennsylvania Milk Marketing Board, 472 A.2d 715, 719 (Pa. Cmwlth. 1984)). Therefore, even if this Court would have a different opinion about this matter, that is not sufficient to interfere with the agency’s action.

² Act of August 5, 1941, P.L. 752, as amended, 71 P.S. § 741.203.

³ “Appointing authority” is defined by the Commission’s Rules as “[t]he officers, board, commission, person or group of persons having power by law to make appointments in the classified service.” 4 Pa. Code § 91.3.

⁴ Rule 97.13 provides as follows:

Removal of eligible. An objection to the eligibility for certification or appointment of an eligible whose name appears on a certification shall be promptly raised by the appointing authority using the process established by the Director as set forth in Management Directive 580.34 (as amended) (relating to removal of eligibles for certification or appointment in the classified service). If

(Continued...)

eligible lists are set forth in Management Directive 580.34. This Management Directive has the force of law⁵ and provides, in pertinent part, that in order to remove an eligible candidate from a list, the appointing authority must “[b]ase objections to the eligibility for certification or appointment of an eligible on merit-related criteria using the procedures indicated in Section 7 of this directive.” (Management Directive 580.34 § 6a(2), S.R. at 68b.) Section 7a(2)(a) of Management Directive 580.34 provides that “[t]he basis for any request to remove the name of an eligible from a certification must be merit-related; e.g., the reason must touch upon the eligible’s competency and ability to perform in the position for which the eligible list has been prepared.” (Management Directive 580.34 § 7a(2)(a), S.R. at 70b.) Rule 97.13 further provides that, if the Commission sustains the objection, “the appointing authority need not consider the eligible for appointment.” 4 Pa. Code § 97.13. The Management Directive also provides that “the Commission will determine the length of time the list removal will remain in effect.” (Management Directive 580.34 § 7b(3), S.R. at 71b.)

the objection is sustained by the Director or Commission, the appointing authority need not consider the eligible for appointment.

4 Pa. Code § 97.13. “Eligible” is defined as “[a] person whose name is on an eligible list” and “eligible list” is defined as “[a]n employment list, promotion list, or reemployment list.” 4 Pa. Code § 91.3.

⁵ “[M]anagement directives announcing detailed policies, responsibilities and procedures that are relatively permanent in nature and which have been signed by the head of any commission under the Governor’s jurisdiction have the force of law when they are based upon authority or duty conferred by constitution, statute or regulation.” Cambria County Mental Health/Mental Retardation v. Pennsylvania State Civil Service Commission (Cotton), 756 A.2d 103, 107 (Pa. Cmwlth. 2000) (citing Reneski v. Department of Public Welfare, 479 A.2d 652, 653 (1984)).

Here, Patterson initially objects to the Commission's consideration of her 2005 dismissal from employment as a Caseworker 2 with the Lackawanna County Child Welfare Service when granting Agency's Request and removing her from eligible lists. Patterson maintains that the 2005 adjudication should not have been considered by the Commission in view of this Court's subsequent decision in Lackawanna County (concluding that Patterson was not ineligible for unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law⁶).

The issue of whether an employee is eligible for unemployment compensation benefits pursuant to the Unemployment Compensation Law is not the same as whether an employee was justly or properly terminated for cause from employment under the Act. The necessary findings of fact for the legal issues to be determined are different in each case, even though the cases arise out of the same set of circumstances.⁷ Therefore, Patterson cannot rely upon the findings and

⁶ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e). Section 402(e) provides, in part, that an employee shall be ineligible for compensation for any week “[i]n which h[er] unemployment is due to h[er] discharge or temporary suspension from work for willful misconduct connected with h[er] work. . . .”

⁷ Specifically, the issue before the Commission in 2005 when it adjudicated Patterson's appeal from her removal as a Caseworker 2 by the Lackawanna County Child Welfare Service was whether Patterson's removal was due to discrimination in violation of Section 905.1 of the Act, added by Section 25 of the Act of August 27, 1963, 71 P.S. § 741.905a. See Patterson v. Lackawanna County Child Welfare Service, Appeal No. 24345, S.R. at 16b-47b. The issue before this Court in Lackawanna County Children and Youth Services v. Unemployment Compensation Board of Review (Pa. Cmwlth., No. 1751 C.D. 2006, filed May 21, 2007), was whether the Unemployment Compensation Board of Review erroneously concluded that Patterson did not commit willful misconduct and, therefore, was not ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law.

conclusions in the unemployment compensation case as a means to negate the findings and conclusions in the Commission's 2005 adjudication of Patterson's employment termination.

The decision to remove Patterson from eligible lists is within the sole discretion of the Commission. (Management Directive 580.34 § 7b(1)(b), S.R. at 70b); Gwynedd Development Group, Inc. v. Department of Labor and Industry, Bureau of Labor Standards, 666 A.2d 365, 369-370 (Pa. Cmwlth. 1995) (citing Lynch v. Urban Redevelopment Authority of Pittsburgh, 496 A.2d 1331, 1335 (Pa. Cmwlth. 1985)). Administrative action will only be found to be arbitrary and capricious where it is unsupportable on any rational basis because there is no evidence upon which the action may be logically based. Lynch, 496 A.2d at 1335. Because the Commission's 2005 adjudication concluded that the Lackawanna County Child Welfare Service, as the appointing authority, established just cause for Patterson's dismissal as a Caseworker 2, and the basis for removing a name from eligible lists must be merit-related, it was not an abuse of discretion for the Commission to consider Patterson's prior dismissal when considering Agency's Request to remove her name from eligible lists for the same position of Caseworker 2. Because this decision was made in accordance with the applicable law, as set forth above, we cannot conclude that granting the Agency's Request and removing Patterson's name from eligible lists was a manifest or flagrant abuse of discretion within the totality of the circumstances of this case.

Patterson next argues that she should have been provided with a hearing because she made it clear in her Response to Agency's Request, and in subsequent

emails to the Commission, that if the Commission was contemplating using any of the false allegations made against her by Agency, she wanted the opportunity to confront the alleged references and challenge the false allegations by submitting written documentation. However, under these facts, the Commission did not abuse its discretion in not providing Patterson with a hearing.

Section 7b(1)(a) of Management Directive 580.34 provides, in pertinent part, that “[i]f a timely response to the list removal request is filed, the eligible may request an opportunity for *oral argument* before the Commission.” (Management Directive 580.34 § 7b(1)(a) (emphasis added), S.R. at 70b.) Section 7b(1)(b) provides, in pertinent part, that “[a]t its sole discretion, the Commission may grant or deny the request.” (Management Directive 580.34 § 7b(1)(b), S.R. at 70b.) Section 7b(1)(d) additionally provides that “[t]he Commission may, at its discretion, schedule a *hearing* in order to make a determination on the appointing authority’s request.” (Management Directive 580.34 § 7b(1)(d) (emphasis added), S.R. at 70b.)

When given the opportunity to appear in person before the Commission to present oral argument, the record establishes that Patterson specifically rejected the opportunity when she checked “No” on her Response. The “No” box states: “No, my written response adequately states my position. A personal appearance will not be necessary.” (Response at 1, S.R. at 7b.) This section of the Response is clear, presented in capital letters, and stands in contrast to the “Yes” box that states: “Yes, I would like to appear before the Commission.” (Response at 1, S.R. at 7b.) While Patterson reserved the right to appear in person in the narrative portion of

her Response and requested a hearing in the subsequent emails she sent to the Commission, the decision to schedule a hearing prior to considering Agency's Request was within the discretion of the Commission, pursuant to Section 7b(1)(d) of Management Directive 580.34. Moreover, our review of the contents of Patterson's Response and the subsequent emails to the Commission leads us to conclude that the Commission did not abuse its discretion by not scheduling oral argument or a hearing in this case. Therein, Patterson repeatedly asked to learn the identity of the reference that provided the allegedly false allegations against her. Since it was Patterson herself that provided the references to Agency when seeking appointment to the position of Caseworker 2, the Commission did not abuse its discretion by denying Patterson's requests to appear before the Commission in order to learn a particular reference's identity. Additionally, because the decision to schedule a hearing is discretionary, there has been no deprivation of speech;⁸ therefore, Patterson's contention that her constitutional right to free speech has been violated by the lack of a hearing has no merit.

Accordingly, the Commission's Order is affirmed.

RENÉE COHN JUBELIRER, Judge

⁸ The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech" U.S. Const. amend. I. Freedom of speech is not absolute[;] however, a violation occurs only when the restricted speech is constitutionally protected and when the government's justification for the restriction is insufficient. See Frisby v. Schultz, 487 U.S. 474, 479 (1988).

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(Luzerne County Children and	:	
Youth Services),	:	
	:	
Respondent	:	

ORDER

NOW, March 13, 2013, the Order of the State Civil Service Commission, dated August 10, 2012, in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge