

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael J. Mazurkiewicz,	:	
Petitioner	:	
	:	
v.	:	No. 975 C.D. 2013
	:	Submitted: October 25, 2013
State Civil Service Commission	:	
(Department of General Services),	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: December 20, 2013

Michael J. Mazurkiewicz (Employee), representing himself, petitions for review of an order of the State Civil Service Commission (Commission) that dismissed Employee’s appeal of his furlough under Section 802 of the Civil Service Act.¹ The Department of General Services (DGS) furloughed Employee from his Surveyor 2 position based on a lack of funds and lack of work. Employee contends the Commission’s adjudication was not supported by substantial competent evidence. Employee further contends Hearing Commissioner James W. Martin (Hearing Commissioner) should have recused, and that he committed several errors of law and abuses of discretion during the hearing. Employee raises several additional issues, including whether the Commission erred in denying his discrimination claim. Upon review, we affirm.

¹ Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §741.802.

I. Background

The Commission found the following facts. Employee worked as the only Surveyor 2 in DGS's surveyor unit, which consisted of four individuals located in Harrisburg. They performed on-site field surveys, title searches and other research on DGS projects.

In October 2011, DGS submitted its initial fiscal year 2012-2013 budget proposal. The initial proposal assumed the available money would be the same as allotted during fiscal year 2011-2012. However, the Commonwealth's Budget Office ultimately directed DGS to revise its budget proposal to reflect a five percent reduction from the fiscal year 2011-2012 allotment.

DGS directed its Deputy Secretary for Public Works, Elizabeth O'Reilly (Deputy Secretary O'Reilly) to determine how DGS could provide its core functions despite the reduction in funds. Deputy Secretary O'Reilly reviewed the costs of the surveyor unit and concluded that the use of contract surveyors available on a statewide list would be more cost effective than maintaining in-house surveyors. In an effort to streamline costs, DGS abolished all positions in the surveyor unit, including Employee's Surveyor 2 position.

In September 2012, DGS notified Employee by letter that he would be furloughed from his regular Surveyor 2 employment based on lack of funds and lack of work. Employee timely appealed under Section 951(a) of the Civil Service Act.²

² Added by the Act of August 27, 1963, P.L. 1257, as amended, 71 P.S. §741.951(a).

In an appeal contesting an employee's furlough, the appointing authority must establish a lack of work or a lack of funds necessitating the furlough. Stover v. Dep't of Env'tl. Res., 636 A.2d 1275 (Pa. Cmwlth. 1994). In November 2012, the Commission held a hearing at which DGS presented testimony from Deputy Secretary for Administration James Henning (Deputy Secretary Henning) and Deputy Secretary O'Reilly in support of its decision to furlough Employee.

Deputy Secretary Henning testified the Budget Office, anticipating a shortfall in projected revenues, instructed all state agencies to reduce their proposed fiscal year 2012-2013 budgets by five percent. Notes of Testimony (N.T.), 11/29/12, at 42. For DGS, this represented budget cuts of about \$3,500,000. Id. at 43. In addition to dropping or reducing certain programs and not filling some vacancies, DGS asked its deputy secretaries to look for cuts within their programs. Id. at 43-44. DGS's surveyor unit fell within this category. Id. at 44.

Deputy Secretary O'Reilly testified DGS instructed her to assess and evaluate the Department's Public Works programs in an effort to allow DGS to continue to provide its core functions despite the budget cuts. Id. at 14. In so doing, O'Reilly, with the help of salary and benefits data provided by Human Resources Director Connie Tennis (HR Director), calculated the total costs for the four-member surveyor unit for the calendar year 2011. Id. at 15-17. Using starting salaries rather than the unit's actual salaries, Deputy O'Reilly estimated the total cost for using in-house surveyor units for all three construction regions

(Harrisburg, Kutztown and Pittsburgh) would have totaled \$974,000 for the calendar year 2011. Id. at 17-21.

However, O'Reilly testified DGS also contracted out surveyor work using a statewide list of approved surveyor firms. Id. at 13-14. O'Reilly opined, based on the average cost of contracts over the last three years (2009-2011), that contracting out all DGS surveyor work for the calendar year 2011 would have cost approximately \$302,021. Id. at 20-21.

Summarizing, O'Reilly testified, using in-house surveyor units would cost nearly three times as much as contracting out all surveyor work. Id. at 21. O'Reilly thus opined DGS's elimination of its surveyor unit constituted a means of more economically providing its core services. Id. at 22.

In opposition to DGS' presentation, Employee testified and submitted his own exhibits. In particular, Employee challenged DGS's position that a lack of work existed. Rather, Employee claimed, DGS placed economic restrictions on travel and other items that prevented the surveyor unit from performing available work.

Employee further testified he believed DGS furloughed the surveyor unit in an attempt to replace civil service employees with private contractors. N.T. at 62. Employee stated that the costs of the private contractors would be much higher than the costs of the surveyor units' salaries and benefits. Id.

In addition, Employee testified DGS and the Commonwealth would suffer from the quality of the work if the survey work was contracted out. In particular, Employee testified:

The idea that you're going to rely upon somebody surely [sic] on the fact that they have a seal and they're going to sit back and wait for the problem to happen is not a good process for the Commonwealth. Time to look at a project before you pay for it, that's the purpose of our section is to review the work for completeness and compare it with work that has been done in previous years.

Some of these properties the Commonwealth has had for over 120 years. Many encroachments, any boundary issues that the outside consultants are not aware of, they really don't know where to research our properties

And we find that over and over again, that again the Commonwealth is subject to the statute of frauds just like any individual who would go to sell a piece of property. We have to certify for that boundary and be able to defend it. You're not going to be able to get that level of service by contracting work out to people who have never worked on Commonwealth property.

Just because they are certified to complete a bid does not mean they are certified to complete a project. And that's all I have to say.

N.T. at 62-63. Further, on cross-examination, Employee testified:

Well, it's my belief that these outside contractors will have to be paid by somebody and it's going to be the Commonwealth. The Commonwealth is going to have to be able to have a source of funding to pay these outside professionals.

There can't be a lack of funding if they have money to pay an outside professional. They certainly have enough money to pay for my three guys to do the same amount of work for one-third of the price.

Id. at 69.

Viewing the evidence as a whole, the Commission determined DGS justified its furlough based on lack of funds. Comm'n Op., 5/13/13, at 8-9. Section 3(s) of the Civil Service Act defines "furlough" as "the termination of employment because of lack of funds or of work." 71 P.S. §741.3(s). An appointing authority can establish a lack of work sufficient to justify a furlough by showing: (1) the elimination of a position; (2) the elimination resulted from reorganization aimed at achieving efficiency; and, (3) the appointing authority's efforts at achieving efficiency were made in good faith. Dep't of State v. Stechel, 506 Pa. 203, 484 A.2d 755 (1984). A lack of funds can serve as the basis for an appointing authority's decision to reorganize. Id. Moreover, an agency can create a valid lack of work furlough by contracting out services previously performed by furloughed employees in order to enhance efficiency and achieve cost savings. Wright v. Dep't of Corr., State Corr. Inst. at Graterford, 553 A.2d 1056 (Pa. Cmwlth. 1989).

Here, the Commission found Deputy Secretary O'Reilly made her decision to eliminate the surveyor's unit and use contract surveyors in good faith based on cost effectiveness. Comm'n Op. at 9. Although Employee challenged O'Reilly's calculations and cost comparisons, the Commission did not find Employee's evidence persuasive. Id. The Commission possesses the inherent authority to determine the credibility of witnesses and the weight of their

testimony. McAndrew v. State Civil Serv. Comm'n, 736 A.2d 26 (Pa. Cmwlth. 1999). Consequently, the Commission concluded DGS established a lack of work sufficient to justify Employee's furlough under Section 802 of the Civil Service Act. Employee petitions for review.³

II. Issues

Still representing himself, Employee presents several issues for review. He contends the Commission relied upon uncorroborated hearsay that could not sustain the furlough. Employee further asserts Hearing Commissioner James W. Martin committed errors of law and abuses of discretion during the hearing. In addition, Employee asserts Hearing Commissioner should have recused given his past employment with DGS. Employee also argues the Commission erred in denying his discrimination claim. Employee also raises issues not set forth in his Statement of Questions Involved,⁴ including whether the Commission timely issued its adjudication under its regulations, and whether a quorum of the Commission adopted the adjudication.

III. Discussion

³ The standard of review involving agency adjudications is limited to a determination of whether the agency's findings were supported by substantial evidence, whether the agency erred as a matter of law or whether it violated constitutional rights. Cutler v. State Civil Serv. Comm'n (Office of Admin.), 924 A.2d 706 (Pa. Cmwlth. 2007).

⁴ Pa. R.A.P. 2116(a) provides in part (with emphasis added): "The statement of the questions involved must state concisely the issues to be resolved, expressed in the terms and circumstances of the case but without unnecessary detail. The statement will be deemed to include every subsidiary question fairly comprised therein. No question will be considered unless it is stated in the statement of questions involved or fairly suggested thereby."

A. Substantial Evidence

Employee first contends DGS failed to present substantial competent evidence supporting the Commission's adjudication. Rather, Employee asserts, the Commission "cherry-picked" uncorroborated hearsay, which cannot sustain DGS's furlough decision. See Pet'r's Br. at 5.

To that end, Employee argues DGS failed to provide a foundation of facts, such as a letter from the Budget Office or other proof that the General Assembly had, in fact, approved the policy to abolish positions within DGS. See Pet'r's Br. at 8.

Employee further asserts a "side by side comparison" of DGS's exhibits and Employee's exhibits demonstrates the cost effectiveness of preserving DGS's Surveyor 2 position and the deceptive numbers employed by DGS. See id.

As noted above, a Commonwealth agency is responsible for determining what work, in its judgment, is necessary to be performed, and how that work can be performed most efficiently. Stover. In making adjustments based on its determinations, an agency can eliminate or otherwise arrange for work. Id. Further, under the Civil Service Act, an agency can create a valid *lack of work* furlough in order to enhance operational efficiency and reduce costs. Id. (citing Stump v. Dep't of Labor & Indus., 624 A.2d 229 (Pa. Cmwlth. 1993)).

Also, an agency can create a valid lack of work furlough by contracting out work previously performed by the furloughed employees. Wright;

Dep't of Pub. Welfare v. Magrath, 321 A.2d 403 (Pa. Cmwlt. 1974). “It is up to the agency and not to the Commission or the Courts to determine what would best promote efficiency within the agency.” Wright, 553 A.2d at 1057. “In the exercise of its managerial discretion, [an agency] can furlough an employee for lack of work when the work the employee performed can be more efficiently performed by someone else.” Id. at 1058.

Here, the Commission accepted DGS’s evidence as credible and persuasive. Deputy Secretary Henning testified that after DGS submitted its initial budget proposal for fiscal year 2012-2013, the Budget Office, anticipating a shortfall in revenues, instructed all agencies to reduce their budget proposals by five percent of what they initially submitted. N.T. at 42. Five percent of DGS’s proposed 2012-2013 budget amounted to about \$3,500,000. Id. at 43. Employee made no hearsay objection to Henning’s testimony at the hearing.

More importantly, we reject Employee’s contention that DGS needed “to produce a foundation of facts ... to establish that the General Assembly had, in fact, approved the policy to abolish positions with [DGS].” Pet’r’s Br. at 8. As discussed above, Commonwealth agencies are afforded the discretion to determine how their work can be most efficiently performed. Stechel; Stover. In other words, DGS did not need instructions from the Budget Office or approval from the General Assembly to furlough Employee based on a lack of work or funds. Id.

Moreover, Employee made no hearsay objection to Deputy Secretary O’Reilly’s testimony. O’Reilly testified that DGS instructed her to assess and

evaluate DGS's Public Works programs in an effort to continue to provide DGS's core functions despite the more than \$3,000,000 in budget cuts. N.T. at 14.

O'Reilly further testified she prepared DGS's Exhibit No. AA-1. See Comm'n Hr'g, 11/29/12, Ex. AA-1. With the help of salary and benefits information provided by HR Director,⁵ O'Reilly calculated the total costs for DGS's in-house surveyor unit for the calendar year 2011. Id. at 15-17. Using starting salaries rather than the unit's actual salaries, Deputy O'Reilly estimated the total cost for using in-house surveyor units for all three construction regions (Harrisburg, Kutztown and Pittsburgh) would have totaled \$974,000 for the calendar year 2011. Id. at 17-21.

However, DGS also contracted out surveyor work using a statewide list of approved surveyor firms (statewide surveyor list). Id. at 13-14. O'Reilly prepared a two-page document showing the costs of the contracted surveyor work for the years 2009-2011. See Comm'n Hr'g, Ex. No. AA-2. O'Reilly opined, based on the average cost of contracts over the last three years (2009-2011), that contracting out all surveyor work for the calendar year 2011 would have cost approximately \$302,021. Id. at 20-21.

Therefore, O'Reilly testified from first-hand knowledge that using in-house surveyors would cost nearly three times as much as contracting out all

⁵ DGS's HR Director testified she supplied the salary and benefits information used by Deputy Secretary O'Reilly in preparing Exhibit. No. AA-1. See N.T. at 35. HR Director stated that she has access to this information as part of her position. Id. Employee did not object to HR Director's testimony. In fact, he posed no questions to her on cross-examination. Id. at 38.

surveyor work. Id. at 21. O'Reilly opined that elimination of the in-house surveyor unit, and contracting out surveyor work, constituted a more cost-effective means of providing DGS's core services. Id. at 22.

As noted, the Commission found O'Reilly's testimony more credible and persuasive than Employee's attempts to challenge it. The Commission is the sole fact-finder here. Daily v. State Civil Serv. Comm'n, 30 A.3d 1235 (Pa. Cmwlth. 2011). In addition, we cannot substitute our judgment for that of the Commission. Id. Where, as here, the Commission's findings are supported by substantial evidence, we will not disturb them. Id. Accordingly, we hold the Commission's findings are supported by substantial competent evidence. Moreover, the Commission's conclusion that DGS presented sufficient evidence of a lack of work to justify Employee's furlough is in accord with applicable law. Stecher; Stover; Stump; Wright.

B. Recusal/Quorum

Employee also contends Hearing Commissioner should have recused himself from the proceeding given the fact that he served as DGS's Deputy Secretary for Property Management from 1995 to 2002. Although we do not believe Hearing Commissioner's past employment with DGS, by itself, constitutes grounds for recusal, we hold Employee waived this issue by failing to raise it before the Commission. Pa. R.A.P. 1551(a); Campbell v. Dep't of Transp., 586 A.2d 517 (Pa. Cmwlth. 1991).

In a related argument, Employee challenges the validity of the Commission's adjudication on the basis that it was not adopted by a quorum. See

4 Pa. Code §105.15(c)(16) (a copy of the Commission’s adjudication in writing shall be adopted by a quorum). Section 201(a) of the Civil Service Act provides that the Commission shall consist of three full-time members. 71 P.S. §741.201(a). Section 202 provides in part: “Two members of the commission shall constitute a quorum.” 71 P.S. §741.202.

Here, Employee asserts Commission Chairman John E. Stevens resigned in December 2012, precluding his participation in and adoption of the Commission’s May 2013 adjudication. Further, Employee maintains Hearing Commissioner should have recused, which would have precluded him from participating in the Commission’s adjudication. As a result, Employee argues, Commission Odelfa Smith Preston, standing alone, could not constitute a quorum.

Employee’s assertion is devoid of merit. As discussed above, Employee never raised his contention that Hearing Commissioner should have recused himself at the hearing. Therefore, Employee waived the recusal issue. Pa. R.A.P. 1551(a); Campbell.

As a result, Hearing Commissioner and Commissioner Preston, both of whom signed the adjudication and order on behalf of the Commission, constituted a proper quorum for issuing the adjudication. Section 202 of the Civil Service Act, 71 P.S. §741.202; 4 Pa. Code §105.15(16).

C. Alteration of Testimony

In addition, Employee contends Hearing Commissioner “improperly altered” Deputy Secretary O’Reilly’s testimony from “I prepared this” (N.T. at 16) to “O’Reilly was advised.” See Pet’r’s Br. at 5. Essentially, Employee contends Hearing Commissioner mischaracterized O’Reilly’s testimony in his written opinion in relation to who prepared the cost-effectiveness calculations and who supplied the salary and benefits data.

We disagree. Hearing Commissioner noted in the adjudication that: “O’Reilly^[FN 1] was advised that the salary for the four positions assigned to the Surveyor unit in Harrisburg, was \$213,106 for statewide services.” See Comm’n Op. at 5. In the footnote, Hearing Commissioner noted HR Director testified she provided the salary and benefit costs used by O’Reilly in her calculations. See Comm’n Op. at 5 n.1. Moreover, Hearing Commissioner acknowledged in the same paragraph that O’Reilly made the cost-effectiveness calculations herself, and she concluded that contracting out the surveyor work would be more cost-effective than keeping surveyors on staff. Comm’n Op. at 5. As such, we dismiss Employee’s specious claim that Hearing Commissioner altered O’Reilly’s testimony.

D. Discrimination Claim

Employee also contends Hearing Commissioner erred in dismissing his discrimination claim. The Commission denied Employee’s claim of age discrimination under Section 951(b) of the Civil Service Act, 71 P.S. §741.951(b) based on insufficient allegations by Employee. See Comm’n Hr’g, Ex. C.

In his appeal form, Employee checked the box for “age” discrimination. See Pet’r’s Appeal at 2; Comm’n Hr’g, Ex. B. Other than checking that box, Employee failed to provide the Commission with any specific factual averments of age discrimination. The Commission’s regulations regarding claims of discrimination provide:

(c) Appeals alleging discrimination which do not include specific facts relating to discrimination may be dismissed. Specific facts which should appear on the appeal form include:

(1) The acts complained of.

(2) How the treatment differs from treatment of others similarly situated.

(3) When the acts occurred.

(4) When and how the appellant first became aware of the alleged discrimination.

(d) Acceptance of an amendment to an appeal is solely at the discretion of the Commissioners.

4 Pa. Code §105.12(c) and (d).

This Court also recognizes the Commission may, on its own volition, dismiss an appeal asserting a discrimination claim where the aggrieved party fails to allege discrimination with sufficient specificity. Craig v. State Civil Serv. Comm’n (Dep’t of Env’tl. Res.), 800 A.2d 364 (Pa. Cmwlth. 2002). Where an aggrieved party alleges discrimination, he bears the burden of proof “and is required to allege with specificity the basis underlying the claim of discrimination.” Id. at 365. “Discrimination cannot be inferred; there must be

affirmative factual support to sustain the allegations.” Id. To that end, general and conclusory allegations, standing alone, are insufficient to establish an actionable claim. Allen v. State Civil Serv. Comm’n (Pa. Bd. of Prob. & Parole), 992 A.2d 924 (Pa. Cmwlth. 2010).

Upon review of the information Employee provided in his appeal form, we agree that Employee failed to state specific facts supporting his claim that DGS furloughed him based on his age. Employee, however, asserts Deputy Secretary O’Reilly testified at the hearing as to “blatant disparate treatment.” See Pet’r’s Br. at 3. Again, Employee failed to state any specific facts supporting his claim. Moreover, our review of O’Reilly’s testimony does not reveal any evidence of discrimination.

Employee also contends Hearing Commissioner erred in dismissing his exhibits showing discrimination. However, the Commission had already dismissed Employee’s discrimination claim prior to hearing. Acceptance of an amendment to an appeal is solely within the Commissioners’ discretion. 4 Pa. Code §105.12(d). In light of Employee’s failure to set forth any specific facts in his discrimination claim, the Commission did not abuse its discretion in dismissing Employee’s exhibits purportedly showing discrimination.

For these reasons, we discern no error or abuse of discretion in the Commission’s dismissal of Employee’s age discrimination claim based on insufficient allegations. Allen; Craig.

E. Timeliness of Adjudication

Further, although not raised in his Statement of Questions Involved, Employee contends the Commission's adjudication is void as untimely because the Commission did not file it within 90 days of the conclusion of the hearing as required by 4 Pa. Code §105(c)(15). The Commission's hearing officially concluded with the filing of Employee's brief on January 25, 2013. The Commission issued its adjudication 108 days later on May 13, 2013.

The Commission's pertinent procedural regulations provide (with emphasis added):

(c) While in each case the Commission may adopt the procedures and conduct of the hearing in accordance with the requirements of justice and due process, generally the routine shall follow the following order:

* * * *

(15) The record shall be considered closed upon receipt of transcripts, depositions, and briefs and the hearing shall be deemed concluded at that time. The Commission will determine the facts upon the evidence of record and decide relevant questions of law within 90 calendar days after the conclusion of the hearing.

4 Pa. Code §105(c)(15).

When an administrative agency's interpretation of its own regulations is logical and not clearly erroneous, reviewing courts must afford great deference to that interpretation. Mack v. Civil Serv. Comm'n, 817 A.2d 571 (Pa. Cmwlth. 2003). As DGS points out, the Commission's regulation merely describes the

general practice before the Commission and does not impose a mandatory requirement for the issuance of a Commission decision within 90 days of the conclusion of the hearing. Rather, the regulation provides that the Commission *may adopt the procedures and conduct of the hearing in accordance with the requirements of due process*. Moreover, the regulation does not state that the Commission *shall* issue a decision within 90 days of the conclusion of the hearing, it merely provides that the Commission *will* issue a decision within 90 days of the conclusion of the hearing. Absent mandatory language such as “shall” in the regulation, Employee’s contention that the Commission’s adjudication is void as untimely fails. See Pass v. Commonwealth, 804 A.2d 77 (Pa. Cmwlth. 2002) (failure to follow a directory provision does not render the proceeding void).

Moreover, Employee failed to allege any harm caused by the additional 18 days it took the Commission to issue its adjudication. A party’s inability to show demonstrable prejudice indicates that party’s procedural due process rights were not violated. In re McGlynn, 974 A.2d 525 (Pa. Cmwlth. 1999).

For the above reasons, we discern no error or abuse of discretion the Commission’s adjudication holding that DGS, as the appointing authority, established that it properly furloughed Employee for lack of work under Section 802 of the Civil Service Act. Accordingly, we affirm.

ROBERT SIMPSON, Judge

