IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jefferson County Children and Youth Services, Petitioner	:	
v.	:	No. 899 C.D. 2014
	:	Submitted: October 10, 2014
State Civil Service Commission (Crance), Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: May 11, 2015**

Petitioner Jefferson County Children and Youth Services (CYS) petitions for review of an order of the State Civil Service Commission (Commission), which sustained Respondent Nancy S. Crance's (Crance) appeal and ordered CYS to reinstate Crance and pay back wages. We now affirm.

Crance began working for CYS on October 15, 2013, as a probationary Clerk Typist 2. On October 20, 2013, CYS issued a letter to Crance explaining that it was terminating her employment. In the letter, CYS explained that its reason for terminating Crance's employment was because she complained on more than one occasion about the fact that she had to transcribe all of the dictation while Cindy Lewis (Lewis), who held the same position, did not. CYS also explained that Lewis brought it to CYS's attention that Crance made comments directly to Lewis, questioning why she did not have to transcribe

dictation. The reason that Lewis does not transcribe dictation is because she has a hearing disability, which prevents her from doing so.

Crance appealed the termination of her employment, and the Commission conducted a hearing on January 30, 2014. During the hearing, Crance testified on her own behalf. CYS presented the testimony of Hayley Whitling (Whitling), CYS' Human Resources Coordinator; Deborah Cowfer (Cowfer), a Fiscal Technical Supervisor employed by CYS; and Lewis.

On April 29, 2014, the Commission issued an adjudication overruling CYS's termination of Crance's employment and ordering CYS to return Crance to her position as a probationary Clerk Typist 2 within 30 days and to reimburse her for wages and emoluments since October 25, 2013. In doing so, the Commission made the following findings of fact:

> 8. The position description for Clerk Typist 2 (Local Government) lists twelve "essential functions of the job;" the second essential function is "types letters, reports, documents from handwritten draft, dictated sources, or original source documents into draft or final form."
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> 9. [Crance] transcribed dictation seven hours a day for seven of the nine days that she worked at the appointing authority and she received compliments for her efficiency in doing it.
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> 10. [Crance] complained to Cowfer that she transcribed all of the dictation and Lewis none. Cowfer told appellant that Lewis has a hearing disability that prevents her from transcribing dictation. Cowfer told [Crance] that the appointing authority tried to accommodate Lewis so that she could transcribe dictation, but without success. [Crance] replied that dictation is an essential function of the Clerk Typist 2 (Local Government) position and the appointing authority had a responsibility to enable Lewis to perform the essential functions.

11. By memorandum dated October 23, 2013, [Crance] submitted a grievance to Cowfer in which she argues that there are two Clerk Typist 2s (Local Government), but only one, [Crance], is transcribing dictation. [Crance] argues that this is unfair given that transcribing dictation is an essential function of the position.

12. [Crance] asked Lewis about her disability two or three times. [Crance] asked Lewis about her predecessor's job duties and Lewis explained that the predecessor transcribed all of the dictation. [Crance] asked Lewis why she did not transcribe dictation and Lewis explained it was because she could not; "things sound muffled" to Lewis. [Crance] replied "that's a good excuse." Lewis perceived appellant's reply as a "joke."

13. Lewis reported what [Crance] said to her to Cowfer, but not because she was concerned by it nor because she took it personally.

14. [Crance] asked Lewis about her hearing disability the first two days that she was employed by the appointing authority. The following week, [Crance] only talked to Lewis about work-related matters.

15. Lewis was not offended by [Crance] asking about her hearing disability.

16. Cowfer did not ask [Crance] about what Lewis reported that she said. Cowfer told Lewis to let her know if it continued.

17. [Crance] did not say anything to Lewis questioning that she is hearing disabled. She did not constantly ask Lewis what her disability was. She did not ask Lewis what her excuse was for not transcribing dictation.

18. Whitling and Cowfer met with [Crance] about her transcribing all of the dictation. [Crance] indicated that she did not feel that she should be responsible for all of it; Lewis should do part of it. Whitling explained that "in the past we have tried to find

> ways for [Lewis] to be able to" transcribe dictation, but "nothing has worked."
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> 19. After [Crance] left the meeting, Cowfer told Whitling about "comments" that [Crance] made to Lewis about her disability. Whitling recommended to the appointing authority's commissioners that [Crance] be removed because "she was creating a hostile work environment" for Lewis and "made harassing comments towards her."

(Commission's decision at 4-7.)

Based on the findings of fact, the Commission determined that Crance's comments to Lewis were not inappropriate and that the comments did not constitute "a legitimate, non-discriminatory reason for her removal," particularly "given that Lewis was not offended" by the comments.[1] (*Id.* at 10.) The Commission concluded, therefore, that Crance met her burden to prove that "her

[1] In reaching that conclusion, the Commission reasoned:

> The Commission finds that [Crance's] comments to Lewis are not a legitimate, non-discriminatory reason for her removal given that Lewis was not offended by them. We also note that Cowfer failed to raise the issue with [Crance] before her removal. In other words, because [Crance] neither harassed Lewis nor exposed her to a hostile work environment, the appointing authority had no legitimate reason to remove her. Curiously, Lewis testified that while she was working with [Crance], she did not think that [Crance] "had a problem with me," but at the hearing, she changed her mind, and decided that "this is all because I have a hearing disability." The Commission cannot agree, given that by Lewis's own account [Crance's] comments to her were not inappropriate. Based on the foregoing, we conclude that the appointing authority has not presented evidence of a legitimate, non-discriminatory reason for removing [Crance], *i.e.*, evidence that [Crance] made inappropriate comments to Lewis.

(Commission's decision at 10.)

removal was based on a mistake-of-fact, that is, non-merit factor discrimination." (*Id.* at 10-11.) CYS then petitioned this Court for review.[2]

On appeal,[3] CYS argues that the Commission erred as a matter of law in concluding that the decision to terminate Crance's employment during her probationary period was premised on a "mistake of fact." CYS also argues that the Commission erred as a matter of law because Crance's questions and comments directed to Lewis were proper, merit-based criteria upon which she was evaluated. Finally, CYS argues that the Commission's decision was not based on substantial evidence.

"It is well established that a probationary status civil service employee does not enjoy the job security afforded to regular status employees who may be removed only for just cause." *Personnel Dep't, City of Phila., v. Hilliard*, 548 A.2d 354, 356 (Pa. Cmwlth. 1988) *(Hilliard)*. Section 603(a) of the Civil Service Act (Act)[4] provides, in part, that "[a]t any time during the probationary period, the appointing authority may remove an employe if in the opinion of the appointing authority the probation indicates that such employe is unable or unwilling to perform the duties satisfactorily or that the employe's dependability does not merit continuance in the service." Under the Act, "a probationary

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[2] CYS also filed with this Court an application for supersedeas, which the Honorable P. Kevin Brobson denied by single-judge memorandum opinion and order, filed September 25, 2014.

[3] Our scope of review of the Commission's adjudication is limited to determining whether constitutional rights were violated, an error of law was committed, and whether necessary findings of fact are supported by substantial evidence. *Adams Cnty. Children and Youth Servs. v. Ruppert*, 559 A.2d 71, 73 (Pa. Cmwlth. 1989).

[4] Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. § 741.603(a).

employee may seek administrative or judicial review of his dismissal only where he alleges that his dismissal was based on discrimination." *Hilliard*, 548 A.2d at 356. Specifically, Section 905.1 of the Act[5] provides:

> No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or *other non-merit factors*.

(Emphasis added.)

The probationary employee bears the burden to prove that the employee's dismissal was based upon discriminatory reasons. *Adams Cnty. Children and Youth Servs. v. Ruppert*, 559 A.2d 71, 73 (Pa. Cmwlth. 1988) *(Adams County CYS)*. A probationary employee "cannot satisfy this burden by alleging that there were not enough merit factors assessed against him[,] … because there is no quantitative standard" to apply. *Hilliard*, 548 A.2d at 356. Rather, "as long as the removal is job-related and not tainted by discriminatory motives a dismissal of a probationary employee will not be disturbed." *Id.* If the probationary employee cannot prove discrimination, "then his dismissal must stand without any right of appeal as to the validity of the determination of unsatisfactory work performance." *Dep't of Health v. Graham*, 427 A.2d 1279, 1280 (Pa. Cmwlth. 1981).

The Courts have identified two distinct types of discrimination that can form the basis for reversing an employment action—traditional discrimination (*e.g.*, race, gender, or "non-merit" based factors) and technical discrimination,

[5] Added by the Act of August 27, 1963, P.L. 1257, 71 P.S. § 741.905a.

which may arise when an employer violates procedures the Act directs employers to follow. *Pronko v. Dep't of Revenue*, 539 A.2d 456, 461 (Pa. Cmwlth. 1988). In this case, Crance asserted traditional discrimination based on non-merit factors, *i.e.*, mistake of facts.[6]

In *Adams County CYS*, we affirmed a decision of the Commission which reinstated a probationary employee (Ruppert) based on its conclusion that the agency had engaged in discrimination based on a mistake of fact. In so doing, we relied upon and summarized our earlier decision in *State Correctional Institution at Graterford v. Goodridge*, 487 A.2d 1036 (Pa. Cmwlth. 1985). We wrote:

> We note that this case falls under the unusual heading of "mistake of fact discriminations". We have, on previous occasions, dealt with this type of discrimination. Most important for purposes here is . . . *Goodridge*. . . . In *Goodridge* the employee had been hired as a corrections officer trainee at Graterford State Correctional Institution. On his application for employment, he was

[6] In *Nosko v. Somerset State Hospital*, 590 A.2d 844 (Pa. Cmwlth. 1991), we explained:

> "The fundamental controlling premise underlying employment with the classified service is, as the Civil Service Act instructs, that the merit concept prevails." *Magnelli v. Pennsylvania Liquor Control [Bd.]*, . . . 408 A.2d 904, 906 ([Pa. Cmwlth.] 1979), *cert. denied*, 449 U.S. 993 . . . (1980). The merit "concept requires 'personnel actions' of the Commonwealth to be based upon merit criteria relevant to the proper execution of the employee's duties. The criteria must be job-related and in some logical and rational manner touch upon competency and ability." *Magnelli*, . . . 408 A.2d at 906 (quoting *[Dep't of Transp.] v. Desikachar*, . . . 349 A.2d 796, 797 ([Pa. Cmwlth.] 1976); *See also Balas v. [Dep't of Pub.] Welfare*, . . . 563 A.2d 219, 223 ([Pa. Cmwlth.] 1989).

Nosko, 590 A.2d at 847.

asked whether he had ever resigned from a job after being informed that his employer intended to fire him. He was also asked whether there were any circumstances in his past life which, if they became known, would disqualify him for a position in a corrections institution. Goodridge answered both questions in the negative and was subsequently hired. Thereafter, while doing a background report, the Bureau of Corrections discovered that ten years earlier when Goodridge had been a police officer in New York his commanding officer had asked him to resign after he had taken overdoses of sedatives and accidentally discharged a firearm. Based upon this information, the Bureau of Corrections concluded that Goodridge had falsified his employment application and removed him from his position. He appealed and the Commission directed that he be reinstated. It did so because it found that Goodridge *had not lied on his employment application* because he had terminated his employment with the New York Police voluntarily and not upon threat of being discharged. It also determined that he was psychologically capable of bearing a weapon. *The Commission concluded that the appointing authority's action in dismissing Goodridge was based upon a misapprehension concerning the facts of the termination of his previous New York employment and was thus premised upon a non[-]merit factor, rendering it discriminatory.* It ordered reinstatement and the Bureau of Corrections appealed.

On appeal to our Court, the Bureau of Corrections did not question the Commission's findings, but contended only that because it sincerely believed, based upon the information it had received, that Goodridge had lied on his application its action in dismissing Goodridge was not a personnel action based upon non[-]merit factors. In other words, the Borough argued, it might have been mistaken about the facts, but it was the Bureau's good faith belief as to those facts that was the determinate factor. Thus, the Bureau maintained that the personnel action was work related and not based upon non[-]merit factors. We agreed that the Bureau's charges were indeed related to Goodridge's fitness to become a corrections officer, but observed:

> [W]e are concerned not with the charges. We are concerned with their basis in fact, which [Goodridge] has been given the right to test by appeal to the Civil Service Commission and which the Commission after hearing found were baseless. This we believe established that his removal was for a non-merit factor. To hold, as the Bureau urges, that although the charges were untrue, its action dismissing him must be upheld, renders his right to appeal a nullity. The Bureau's thesis that because its functionaries believed the charges the removal was not for a non-merit factor rests on the proposition that in order to establish an act of discrimination the victim must show that the Bureau intended to discriminate. The law is clearly to the contrary.
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> [*Goodridge*], . . . 487 A.2d at 1038–39. We, thus, agreed with the Commission that the action of the Bureau, although taken without malice or wrongful intent, had the effect of removing Goodridge from his employment for a non[-]merit factor.

Adams Cnty. CYS, 559 A.2d at 74-75 (emphasis added).

Thus, in *Adams County CYS*, we recognized that in some circumstances an apparent merit-based termination of employment may actually constitute a non-merit based termination if based upon a mistake of fact. In order to determine whether a mistake of fact existed, the Commission was required to look at the underlying factual basis for the termination. Although *Goodridge* involved an examination of charges related to pre-employment conduct, the Court in *Adams County CYS* considered charges related to the conduct of the probationary employee that occurred during employment. The Court in *Adams County CYS*, presumably recognizing that generally the evaluation of a probationary employee's work performance lies exclusively with the appointing

agency,[7] acknowledged that the "*charges* in both *Goodridge* and [*Adams County CYS*] were certainly merit related." *Id.* at 75 (emphasis in original). Nevertheless, because "those charges were determined to be factually *unfounded* there no longer existed a merit-based reason to support the personnel action." *Id.* at 75-76 (emphasis in original). We reasoned that because the intent of the Act "is to premise personnel actions upon job-related criteria, . . . where removal is based upon non[-]merit factors, in the form of mistaken facts, it is discriminatory." *Id.* at 76.

CYS argues that the Commission, in applying a "mistake of fact" analysis, actually improperly applied a "for cause" standard, which is not applicable to probationary employees. CYS characterizes the Commission's determination as being based on a conclusion that because Lewis "was not offended at the moment Crance asked her the questions about her impairment, a 'mistake of fact' occurred." CYS contends that the Commission, in engaging in such an analysis, improperly evaluated the reasonableness of CYS' decision. In other words, CYS contends that the Commission erred in failing to credit Crance's

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[7] In *Goodridge*, we made

> clear that the appointing authority is the exclusive judge of the merit or lack of merit of a probationary employee's work performance and that there is nothing in the . . . Act . . . which gives the . . . Commission, the judiciary or any other seat of power, the right to review the employer's judgement or overturn its personnel actions based on that judgement.

Goodridge, 407 A.2d at 1039. We were "mindful that a probationary employee is subject to dismissal at the will of the appointing authority so long as the action is not because of discrimination." *Id.* at n.2. Where a probationary employee's dismissal is not the result of discrimination, the Commission lacks "the authority to review the reasonableness of the appointing authority's judgment concerning the employee's work performance." *Id.*

violation of CYS' workplace harassment policy as an appropriate merit-based factor upon which to evaluate Crance.

With regard to substantial evidence, CYS does not argue in its brief that the findings of fact are not supported by substantial evidence. Indeed, CYS appears to agree with the Commission's findings of fact, and CYS even states that "the Commission did not make any factual findings different from those asserted by CYS." (Petitioner's br. at 19.) CYS, while not disputing the findings of fact, however, disagrees with the Commission's consideration of what it refers to as the reasonableness of CYS' decision to terminate Crance's employment for a violation of its workplace harassment policy, which CYS claims is not evidence of a mistake of fact. CYS argues that because "[t]here was no evidence of a mistake of fact[,] . . . the Commission's decision could not have been supported by substantial evidence." (*Id.* at 27.)

We disagree that the Commission applied a "for cause" standard or evaluated the reasonableness of CYS' decision to terminate Crance's employment based upon a merit-based factor. Instead, the Commission found that a mistake of fact occurred when CYS determined that Crance harassed Lewis and exposed her to a hostile work environment. The Commission found that Crance, in fact, had not harassed Lewis or created a hostile work environment. In support of its determination, the Commission pointed to Lewis' testimony that while she was working with Crance, she did not believe that Crance had a problem with her. The Commission appears to have reasoned that if Lewis did not believe that Crance had a problem with her at that time, then she could not have been experiencing harassment or a hostile work environment. The Commission noted that Lewis testified that it was not until the hearing that she changed her mind. Had the

Commission determined that Crance had at some level engaged in harassment or created a hostile work environment, then CYS would have had an unfettered right to terminate her employment and the Commission would have been precluded from considering the reasonableness of CYS' actions. That, however, is not what occurred. Instead, the Commission found that Crance had not engaged in harassment or the creation of a hostile work environment, such that a mistake of fact existed. It is within the province of the Commission to decide issues of credibility and resolve evidentiary conflicts, and we will not reweigh the evidence on appeal. *State Correctional Institution at Albion v. Bechtold*, 670 A.2d 224, 226 (Pa. Cmwlth. 1996). Because the Commission found that the termination was based upon a mistake of fact, no merit-based foundation existed for the employment decision. "[W]here removal is based upon non[-]merit factors, in the form of mistaken facts, it is discriminatory." *Adams Cnty. CYS*, 559 A.2d at 76. The Commission, therefore, did not err when it sustained Crance's appeal and ordered CYS to reinstate Crance and pay back wages.

Accordingly, the order of the Commission is affirmed.

P. KEVIN BROBSON, Judge

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v.	:	No. 899 C.D. 2014
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O R D E R

AND NOW, this 11th day of May, 2015, the order of the State Civil Service Commission is hereby AFFIRMED.

P. KEVIN BROBSON, Judge