

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael G. Frankowski,	:
Petitioner	:
	:
v.	: No. 1706 C.D. 2012
	: Submitted: March 8, 2013
State Civil Service Commission	:
(Department of Conservation and	:
Natural Resources),	:
Respondent	:

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: June 25, 2013

Michael G. Frankowski (Frankowski) petitions for review of an order of the State Civil Service Commission (Commission), dated August 8, 2012, ordering the removal of Frankowski's name from any and all eligible lists certified to the Department of Conservation and Natural Resources (DCNR) only for the positions of Semi-Skilled Laborer, Clerk 1, and Clerk 2, for a period of one year retroactive to May 7, 2012. We find no error in the Commission's decision, however, we will quash the appeal on other grounds.

Frankowski took the civil service examination and was on the list of eligible candidates for the aforementioned positions with DCNR.¹ During an interview for a Clerk 1 position at Gifford Pinchot State Park, Frankowski disclosed his criminal background; he was arrested and convicted at age twenty-three of twenty-five felony counts of possession of child pornography. By letter dated April 5, 2012, DCNR notified Frankowski that it had requested that the Commission remove his name from the certification lists for the three job titles on the basis of his felony convictions, noting that Frankowski was sentenced to twenty-three months of probation and was required to register on the Megan's Law Website, on which he is listed as a Lifetime Offender.² DCNR's letter stated, "[c]onsidering all of our employees come in contact with the public and many of which are children, it would be inappropriate for [DCNR] to consider you for employment." (Certified Record (R.) Item 1, Exhibit A to Transcript from Hearing held 7/17/12 (Exhibit A), letter dated April 5, 2012, Reproduced Record (R.R.) at 68a.) By letter dated May 17, 2012, Frankowski was advised by the Commission

¹ In a letter dated April 15, 2012 from Frankowski's counsel to DCNR, counsel states that the essential functions of the three positions are described as follows in the Commission's official Test Announcements: "Semi-Skilled Laborers cut grass and weeds, cut and stack wood, pick up trash, load or unload rock... dig holes, plant trees, help others with painting, carpentry, masonry, or other construction work, and use hand or power tools and equipment... Clerks 1 retrieve materials, gather and provide information, process forms and documents, and perform arithmetic computations and other general clerical duties. Duties at the Clerk 2 level increase in scope and complexity and are performed with greater independence than at the Clerk 1 level. Duties at the Clerk 2 level may also function as lead workers. (R. Item 1, Exhibit A, R.R. at 70a; Frankowski's Brief at 11.)

² (April 5, 2012 letter from DCNR, R. Item 1, Exhibit A, R.R. at 68a.) *See also* Court Summary from Cumberland County Court of Common Pleas, Docket, *Commonwealth v. Michael Gerald Frankowski*, No. CP-21-CR-0002286-2006, Megan's Law Public Report, PA State Police (R. Item 1, Exhibit A, R.R. at 30a-67a.)

of DCNR's request, and Frankowski requested oral argument before the Commission, which occurred on July 17, 2012. The oral argument was conducted before Commission Chairman Stevens and Commissioner Preston; also present were Jason Swarthout, Chief of DCNR's Organizational Management and Staffing Division, Commission Chief Counsel Fred Smith, Frankowski, and Frankowski's counsel. At the commencement of the oral argument/hearing, Commission Chairman Stevens stated that the proceeding was being convened pursuant to Management Directive 580.34,³ to provide the parties the opportunity to state their positions for the record, with each side to be permitted seven-and-one-half minutes to do so. (R. Item 1, Transcript of hearing held 7/17/12, Harrisburg, PA (Transcript) at 7-8, R.R. at 7a-8a.) Mr. Swarthout stated that DCNR's request to remove Frankowski from the eligible lists was directly related to Frankowski's criminal history in relation to the jobs and the environment in which he would work if hired for those positions. (R. Item 1, Transcript at 11, R.R. at 11a.) Swarthout stated that each of the three positions is seasonal, most likely with

³ The operation of the civil service, and the means and manner of appointment of employees is governed by the Civil Service Act (Act), Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§741.1 – 741.1005, and the regulations promulgated thereunder. Section 203 of the Act assigns the Commission with the duty to establish Rules for making effective the provisions of the Act. 71 P.S. §741.203. The Commission adopted Rule 97.13, 4 Pa. Code § 97.13, which provides for an appointing authority to object to an individual's name being included on eligible lists. Procedures for objecting to and removing an individual's name from eligible lists are set forth in **Management Directive 580.34 (Amended)**. “[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 of 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); *Reneski v. Department of Public Welfare*, 479 A.2d 652, 653 (Pa. Cmwlth. 1984).

DCNR's Bureau of State Parks, which provides outdoor and recreational and environmental educational services. (R. Item 1, Transcript at 10, R.R. at 10a.) He stated that this type of work involved interaction with the public, and specifically with larger numbers of children than any other Commonwealth agency, given the large numbers of scouts, YMCA groups, and elementary school children who visit Pennsylvania's State Parks and recreational areas in the Bureau of Forestry. (R. Item 1, Transcript at 11, R.R. at 11a.) Swarthout emphasized the significance of the work environment, with remote locations at beaches, swimming pools, changing facilities, and cabins where Mr. Frankowski might be alone with children or able to view them inappropriately without being detected; he submitted that Semi-Skilled Laborers perform functions such as cleaning restrooms, changing areas, and cabins, working by themselves for hours at a time, without being seen by a supervisor or another employee. (R. Item 1, Transcript at 12, R.R. at 12a.) Swarthout concluded his argument by stating that DCNR had a reasonable concern that too many risk factors existed in the State Parks system for an individual with Frankowski's criminal history, given the large numbers of children, unsupervised environment, and easy access to remote locations and areas where children could be found alone. (R. Item 1, Transcript at 12-13, R.R. at 12a-13a.) He stated unequivocally that hiring an individual with this type of background would go against "everything that our State Parks stand for" and "could erode the trust and confidence with the public, our local communities, national peers, and cast the [Gifford Pinchot State Park] and [DCNR] in a negative light." (R. Item 1, Transcript at 14, R.R. at 14a.)

Before the Commission, Frankowski's counsel argued essentially that the rights of her client have been violated, because he meets the stated job

requirements; i.e., he is a Pennsylvania resident presently of good moral character and is able to perform the essential functions of the job; she argued that the job announcements fail to state that applicants with criminal convictions cannot be considered. She stated that Frankowski's convictions occurred eight years previously, he has fulfilled the terms of his twenty-three month probation, he has undergone extensive counseling, and he is, in short, a different person today. (R. Item 1, Transcript at 17-19, R.R. at 17a-19a.) Frankowski's counsel argued that Frankowski is not prohibited from entering any State Park; she offered Frankowski's sexual offender assessment wherein he was found not to be a "Sexually Violent Predator," and submitted that there is a distinction between a lifetime registrant of the Megan's Law website and a Sexually Violent Predator.⁴ (R. Item 1, Transcript at 18, R.R. at 18a; Exhibit A, Pennsylvania Board of Probation and Parole, Sexual Offenders Assessment Board letter dated June 18, 2007, R.R. at 126a.) Before the Commission, Frankowski described his ongoing pursuit of a business degree at Millersville University; his stable relationship with his fiancée; and his successful three-year history of working, without incident, in close proximity to a day-care center where children can be found. (R. Item 1, Transcript at 20-21, R.R. at 20a-21a.) Frankowski also submitted letters of support

⁴ The Pennsylvania Sexual Offenders Assessment Board (SOAB) is responsible for conducting assessments of certain convicted sex offenders in order to assist the court in determining whether they meet the legal criteria for classification as a "Sexually Violent Predator." If a sex offender is classified by the court as a Sexually Violent Predator, he or she is subject to lifetime registration with the Pennsylvania State Police (with in-person verification on a quarterly basis), lifetime sex offender counseling (with a provider approved by the SOAB), and community notification. (<http://www.soab.state.pa.us>.)

and recommendation from various individuals. (R. Item 1, Exhibit A, R.R. at 86a-101a.)

In its Order, the Commission specifically limited its scope to lists certified by DCNR as requesting agency only, thereby permitting Frankowski's name to be included on lists certified for similarly classified positions in other Commonwealth agencies. (R. Item 2, Commission Order dated August 8, 2012, R.R. at 148a.) The Order states that the Commission is granting DCNR's request "upon careful review of [DCNR's] Removal Request dated May 7, 2012, [Frankowski's] response thereto, the oral arguments and other written submissions presented by the parties." (*Id.*)

Initially, we must note that in the related case of *Frankowski v. State Civil Service Commission*, __ A.3d __ (Pa. Cmwlth. No. 638 C.D. 2012, filed May 7, 2013), this Court held that:

[T]he Act does not grant prospective employees the right to appeal a merit-related eligible list removal. In fact, Section 28(c) of the Act expressly denies probationary employees a right of appeal when their employment is terminated for unsatisfactory work. 71 P.S. § 741.1005 (c). Therefore, a person who is not yet an employee has no right to a hearing simply because he was not offered employment for a reason not contrary to law.

__ A.3d at __, slip op. at *7 (footnote omitted).

Therefore, we must enter an Order quashing Frankowski's appeal. However, in an abundance of caution, we shall briefly discuss the merits as argued by Frankowski in his brief.

Frankowski argues, first, that the Commission erred by failing to give a reason for the removal of his name from the eligible lists and in so doing, denied

him due process under the Pennsylvania and United States Constitutions. Regulations governing the amendment of an eligible list were promulgated under the Civil Service Act (Act), Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1 – 741.1005:

Amendment of an eligible list. (a) Basis for amendment. The director, with the approval of the Commission, may amend an eligible list to: correct a clerical error; indicate a change in veterans' status; add or remove a name; or suspend or alter eligibility for certification or for appointment. **The reasons for the amendment shall be entered in, or be evident from the records on file.** (emphasis added.)

4 Pa. Code §95.63(a). The Commission was under no obligation to articulate, in its Order, its reasons for removing Frankowski's name from the eligible lists.⁵ The Commission's Order specifically noted that it had carefully reviewed the oral arguments and written submissions by both parties; the statements of the DCNR representative, coupled with the written submissions by DCNR identified and admitted into the record at the oral argument, amply explain the basis upon which DCNR sought to remove his name. Thus, DCNR's reasons were manifestly evident from the records on file, and it was within the Commission's discretion to approve DCNR's request.

⁵ Section 951(a) of the Act provides that any *regular employee* in the classified civil service may appeal to the Commission from a notice issue by an appointing authority that permanently separates the employee, suspend him for cause, furloughs or demotes the employee. 71 P.S. §741.951(a). Section 952(a) of the Act requires the Commission in those cases to schedule and hold a public hearing, and report its findings and conclusion to the parties directly involved in the action. 71 P.S. §741.952(a). Here, Frankowski was not a Commonwealth employee.

Next, Frankowski argues that the Commission capriciously disregarded his statements and the competent evidence of record he submitted and/or based its conclusions on wholly arbitrary grounds, and failed to engage in fact finding as to whether or not he is a sexual predator and a threat to children. 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 v. Urban Redevelopment Authority of Pittsburgh*, 496 A.2d 1331, 1335 (Pa. Cmwlth. 1985). Here, the Commission expressly stated in its Order that it had considered Frankowski's response to DCNR's removal request, Frankowski's statements at oral argument and those of his counsel, and Frankowski's written submissions.⁶ However, the Commission also expressly stated that it had also considered the statements made by DCNR's representative at oral argument and DCNR's submissions, which included Frankowski's court summary and criminal docket as well as the Megan's Law Public Report identifying him as a lifetime offender and reporting his offense as "Sexual Abuse of Children." (R. Item 1, Exhibit A, R.R. at 26a-67a.) Before the Commission, DCNR's representative argued that given Frankowski's criminal background, hiring him could pose a risk to the large numbers of children who frequent its State Parks and erode public trust and confidence in its ability to

⁶ Written submissions included letters from Frankowski's counsel to DCNR and to the Commission; 2011 admissions acceptance letter from Millersville University; 2011 letter from PA Board of Pardons informing Frankowski that his clemency application had been filed; unofficial academic transcript; 2007 Sexual Offender Assessment Board letter; letters of recommendation from Frankowski's parish priest, his professional counselor, and eight letters from various family friends addressed to Hon. Edgar B. Bayley at the time of Frankowski's sentencing in 2007; and several additional letters of recommendation dated in November, 2011. (R. Item 1, Exhibit A, R.R. at 105a-144a.)

safeguard them. The Commission approved DCNR's request to remove Frankowski from its eligible list after a careful review of the entire body of evidence presented, and its actions cannot be characterized as arbitrary or capricious.

Frankowski also argues that the Commission failed to apply merit-based criteria in its evaluation of Petitioner. Management Directive 580.34 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-based criteria using the procedures indicated in Section 7 of this directive.” (Management Directive 580.34 § 6a(2).) 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 lists has been prepared.” (Management Directive 580.34 § 7a(2)(a).) Here, the basis of DCNR’s request was directly related to the effect of Frankowski’s felony conviction for possession of child pornography on his ability to serve in the positions identified, given the testimony of DCNR’s representative regarding the environment in which Frankowski would work if hired for such positions. Frankowski does not dispute that large numbers of children frequent the State Parks, or that the positions for which the eligible lists were prepared are located in remote areas, where children can be found alone. We find that the basis for DCNR’s request for the removal of Frankowski’s name was merit-related, and reject Frankowski’s argument that the Commission erred in approving DCNR’s request.

Frankowski asserts that the Commission failed to apply, or misapplied 18 Pa. C.S. § 9125(b),⁷ which limits an employer's ability to use a criminal conviction in the hiring process. We disagree. DCNR properly considered Frankowski's felony convictions for possession of child pornography as they related to his suitability for employment in the State Park system, where large numbers of children congregate, employees are left unsupervised for extended periods of time, and children may be unattended by adults or may be disrobing in remote locations. DCNR's representative testified that while all civil service applicants are required to disclose criminal convictions, an affirmative response does not bar employment, but rather mandates that a respective hiring agency may request additional information and will review the job relatedness of an applicant's criminal record. (R. Item 1, Transcript at 13, R.R. at 13a.)

With regard to Frankowski's final argument, that the Commission discriminated against him by failing to apply standards promulgated by the Equal Employment Opportunity Commission (EEOC) in conjunction with its Eradicating Racism and Colorism in Employment (E-RACE) initiative,⁸ we again refer to this

⁷Section 9125 (b) of the Criminal History Record Information Act (CHRIA), 18 Pa. C.S. §§ 9101-9183, provides:

Use of information. – Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied.

18 Pa. C.S. § 9125(b).

⁸ In his brief, Frankowski cites the EEOC's efforts to evaluate pre-hiring processes, background checks, and other criteria to determine issues, criteria, and barriers that contribute to race and color discrimination in the workplace. DCNR notes that Frankowski is not a member of any **(Footnote continued on next page...)**

Court's prior published opinion in *Frankowski* wherein we held that Section 951(b)⁹ of the Act provides a specific method for challenging alleged unlawful discrimination, and there, as here, Frankowski failed to utilize the method established by the general assembly for hearing and adjudicating such a claim; as such, it cannot be heard *sub judice*. __ A.3d at __, slip op. at *8-9.

For the above reasons, Frankowski's petition for review is quashed.

JAMES GARDNER COLINS, Senior Judge

(continued...)

racial class the E-RACE guidance was crafted to protect, and that EEOC's E-RACE initiative is merely guidance, and not the law in Pennsylvania. (DCNR's Brief at 18.)

⁹ Section 951 was added by the Act of August 27, 1963, P.L. 1257, and provides, in relevant part:

Any person who is aggrieved by an alleged violation of section 905.1 of this act [prohibiting discrimination because of political or religious opinions or race, national origin or other non-merit factors] 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.

71 P.S. § 741.951(b).

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State Civil Service Commission	:
(Department of Conservation and	:
Natural Resources),	:
	:
Respondent	:

ORDER

AND NOW, this 25th day of June, 2013, Michael G. Frankowski's petition for review is quashed.

JAMES GARDNER COLINS, Senior Judge