

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Yakulik,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1982 C.D. 2009
	:	SUBMITTED: April 9, 2010
Civil Service Commission	:	
(Department of Public Welfare),	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 11, 2010

Petitioner, John M. Yakulik, proceeding *pro se*, petitions for review of the order of the State Civil Service Commission (Commission) denying his request for hearing and dismissing his appeal from the non-selection for promotion by the Department of Public Welfare (DPW). The Commission dismissed Yakulik's request because he failed to allege specific acts of discrimination by DPW's Ebensburg Center, Department of Public Welfare, as required by 4 Pa. Code § 105.12(c).

Yakulik is employed as an equipment operator B, a civil service position. According to Yakulik's completed request appeal form, he applied for a

promotion to full time Painter at the Ebensburg Center. Yakulik asserts that he was verbally notified by Gail Yeraty, human resources department, that he was not receiving the promotion. Yakulik contends that this denial was in violation of the Civil Service Act¹ (Act) and Rules and based upon non-merit factors. On his appeal request form, Yakulik checked both the “violation of Civil Service Act/Rules” box and the “other non-merit factors” box. Yakulik states that he was discriminated against because the vacancy was filled by non-qualified candidates; the vacancy was not posted on the civil service job net; DPW failed to follow the promotions list and engaged in nepotism. Yakulik attached his “Rank on Eligible List,” which indicates that his Final Earned Rating for the painter examination is a 115. This document also indicates Yakulik’s ranking on the employment list and promotion list for the four counties in which he had indicated he would accept a position. With respect to the promotions list, Yakulik is ranked in first position in Indiana County, tied for first position in two other counties, and ranked third in Cambria County.² On August 19, 2009, the Commission denied Yakulik’s request

¹ Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1 – 741.1005. Section 905.1 of the Civil Service Act, added by Section 25 of the Act of August 27, 1963, 71 P.S. 741.905a, 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.

71 P.S. § 741.905a.

² Yakulik included additional facts and documents in support of his allegation in his brief filed with this court. However, this court may not consider facts that were not of record before the Commission in determining whether the Commission properly dismissed the appeal. *Behm v. State Civil Serv. Comm’n*, 494 A.2d 1166, 1168-69 (Pa. Cmwlth. 1985).

for a hearing and dismissed his appeal. Thereafter, Yakulik filed a petition for review with this court appealing the Commission's denial of his request for a hearing.

Yakulik argues that the Commission erred in denying him a hearing because he alleged sufficient facts to satisfy the requirements set forth in 4 Pa. Code § 105.12(c). Section 105.12(c) provides:

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.

4 Pa. Code § 105.12(c). The Commission maintains that Yakulik failed to allege sufficient facts in his appeal request to satisfy the requirements of Section 105.12(c) and that the additional factual allegations raised in Yakulik's petition to review and brief cannot serve as a basis for this court to reverse the Commission's decision.

Two categories of discrimination are appealable to the Commission, traditional discrimination and technical discrimination. Traditional discrimination focuses upon such factors as race, sex, age, religion or labor union affiliation.

Pronko v. Dep't of Revenue, 539 A.2d 456, 462 (Pa. Cmwlth. 1988). Technical discrimination involves a violation of procedures required by the Act or the Rules. *Id.* The Commission only considered this case on a traditional discrimination claim basis. However, Yakulik also alleged violations of the Civil Service Rules, which constitutes a claim of technical discrimination.

An employee appealing his “non-selection for promotion may appeal this personnel action only on the basis of discrimination.” *Pannacci v. Dep't of Pub. Welfare*, 560 A.2d 288, 289 n.1 (Pa. Cmwlth. 1989). An employee bears the burden of establishing discrimination in a non-selection for promotion case. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409 (Pa. Cmwlth. 1996); 4 Pa. Code § 105.16. Affirmative factual allegations must support all claims of discrimination because discrimination cannot be inferred. *Craig v. State Civil Service Comm'n (Dep't of Env'tl. Prot.)*, 800 A.2d 364, 365 (Pa. Cmwlth. 2002). The Commission is authorized to dismiss an appeal, *sua sponte*, without a hearing if the appeal request form fails to state a claim. *Id.*

Yakulik alleged traditional discrimination based on non-merit factors as a basis for his appeal. Yakulik has not satisfied the requirements of Section 105.12(c) of the Code because he failed to allege any facts that support his claim of discriminatory action. Yakulik clearly states the acts complained of, *i.e.*, non-selection for promotion. However, Yakulik's central allegation that he was denied a promotion due to non-merit factors is not supported by any alleged facts. Yakulik failed to allege facts that showed how his treatment differed from the treatment of others similarly situated.³ *See* 4 Pa. Code § 105.12(c)(2). A bare

³ Yakulik also states that he is a veteran entitled to a preference when an appointment to a position is made pursuant 51 Pa. C.S. § 7104(a), commonly known as the Veterans Preference (Footnote continued on next page...)

allegation of discrimination without supporting facts is insufficient to satisfy the requirements of the Code. *Craig*, 400 A.2d at 365-66. We conclude that the Commission did not abuse its discretion in denying Yakulik's request for a hearing on the basis of a traditional discrimination claim.

Yakulik also alleged technical discrimination based upon a violation of the Civil Service Rules. Proof of a technical violation of the Act constitutes discrimination *per se* under Section 905.1 of the Act and requires no showing of intent because such violation generally represents the commission of an administrative error or mistake. *Pronko*, 539 A.2d at 462. However:

in order to gain some type of relief there must be evidence that the complaining individual 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 *could have* been harmed but there is no way to prove that for certain.

Id. Yakulik asserted that DPW filled the vacancies with non-qualified candidates and failed to hire from the promotions list. Section 602 of the Act, 71 P.S. § 741.601, requires that if a position is to be filled from a promotions list, then the appointing authority shall select a person who is among the three highest ranking available persons on the certification of eligibles. As noted above, in denying Yakulik's request for a hearing, the Commission did not consider whether Yakulik had alleged sufficient facts regarding the alleged technical violation. We conclude that this failure was error.

(continued...)

Act. However, the veterans preference does not apply to promotions. *Belle Vernon Sch. Dist. v. Local Union 782*, 670 A.2d 1201, 1203 (Pa. Cmwlth. 1996).

Accordingly, the Commission's order is affirmed with regard to Yakulik's claim of traditional discrimination and we remand for consideration of whether Yakulik asserted sufficient facts to allege technical discrimination.

BONNIE BRIGANCE LEADBETTER,
President Judge

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John Yakulik, :
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 Petitioner :
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 v. : No. 1982 C.D. 2009
 :
 :
 Civil Service Commission :
 (Department of Public Welfare), :
 Respondent :

ORDER

AND NOW, this 11th day of June, 2010, the order of Civil Service Commission is hereby AFFIRMED to the extent that it dismisses Petitioner's traditional discrimination claim. The matter is REMANDED for further proceedings on Petitioner's technical discrimination claim.

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge