

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Board of Probation and Parole,	:	
	:	
Petitioner	:	
	:	
v.	:	51 C.D. 2010
	:	
State Civil Service Commission (Hoffman),	:	
	:	
Respondent	:	
	:	
Erick Hoffman,	:	
	:	
Petitioner	:	
	:	
v.	:	111 C.D. 2010
	:	Submitted: September 17, 2010
	:	
State Civil Service Commission (Pennsylvania Board of Probation and Parole),	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: November 18, 2010

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I. Introduction

In these consolidated appeals, the Pennsylvania Board of Probation and Parole (PBPP), and Erick Hoffman (Candidate), petition for review of an order of the State Civil Service Commission (Commission) that sustained Candidate's appeal from PBPP's rejection of his application for employment as a parole agent 1. The Commission's order overruled PBPP's rejection of Candidate, which PBPP based on Candidate's failure to pass a background check, and directed PBPP to immediately arrange for Candidate to take the standard medical and psychological testing required for all parole agent 1 candidates. Contingent on Candidate passing

these tests, the Commission directed PBPP to appoint him to a parole agent 1 position in its Philadelphia District Office within 30 days.

On appeal, PBPP contends the Commission erred in determining that Candidate established discrimination based on disability and other non-merit related factors in violation of Section 905.1 of the Civil Service Act (Civil Service Act).¹ PBPP further contends the Commission's determination that discrimination occurred is not supported by substantial evidence. Candidate, representing himself, contends the Commission erred in not awarding him back pay. For the reasons that follow, we affirm.

II. Background

Candidate's work history is as follows. He served in the U.S. Air Force from 1978 through 1982. He served in the Massachusetts Air National Guard from 1989 through 1994, including three years as a law enforcement specialist. He received an honorable discharge. Thereafter, from October, 1998 through April, 1999, Candidate worked for the Pennsylvania Department of Corrections as a corrections officer at SCI-Frackville. From April, 2001 until October, 2004, Candidate worked as a deputy sheriff for Lebanon County.

¹ Section 905.1 of the Civil Service Act, Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §741.905a, added by the Act of August 27, 1963, P.L. 1257, provides (with emphasis added): "No officer or employe of the Commonwealth shall discriminate against any person in the 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."

Additionally, from July, 2002 through May, 2005, Candidate worked as patrolman for the Capitol Police, who are employed by the Commonwealth's Department of General Services (DGS). In August, 2004, DGS suspended Candidate for ten days on the charge of "unprofessional behavior." In May, 2005, following a back injury, Candidate retired on disability. In October, 2006, Candidate obtained employment as a county caseworker 2 with the Schuylkill County Children and Youth Services (CYS).

At some point after obtaining his county caseworker position, Candidate applied for a parole agent 1 position, which is considered a law enforcement position. Candidate took the Commission's examination for parole agent 1 three times, and he interviewed for the position approximately 25 times. After taking the examination in 2007, Candidate interviewed for vacancies in PBPP's district offices.

Thereafter, Candidate learned PBPP did not select him for a parole agent position. Candidate filed discrimination complaints with the Pennsylvania Human Relations Commission (PHRC) challenging his non-selection in those districts.

In August, 2008, Candidate also appealed his non-selection to the Commission. Candidate alleged discrimination, retaliation for his previous civil service appeal, violations of the Civil Service Act and its regulations, and violations of the statute commonly known as the Veterans' Preference Act, 51 Pa. C.S. §§7101-09. However, the Commission denied his request for a hearing as

untimely. Candidate appealed to this Court, but he ultimately discontinued his appeal. See Hoffman v. State Civil Serv. Comm'n (Pa. Bd. of Prob. & Parole), Pa. Cmwlth., No. 1987 C.D. 2008 (notice of discontinuance filed January 6, 2009).

In October, 2008, PBPP requested three certification lists from the Commission for parole agent 1 for its Philadelphia District Office. Candidate's name appeared on the Code 11 Employment Certification List (list used to fill a vacancy by appointment or promotion of a qualified applicant who passed all parts of an examination for a particular job title and is available where the vacancy exists). Candidate's name also appeared on the Code 14 Interagency Employee Certification List (list of qualified employees from any agency, including state and local government, who passed all parts of the examination for a particular job title and are available where the vacancy exists).

Of the 125 names on the Code 11 list, Candidate, an available military veteran, tied for the highest earned score with a final earned rating of 107.00. PBPP appointed one candidate from the Code 11 list, a military veteran with a final earned rating of 98.00.

In early December, 2008, while his PHRC complaints challenging his previous non-selection remained pending, Candidate interviewed for parole agent 1 vacancies in Philadelphia. Candidate was one of seven applicants ultimately recommended to fill the vacancies.

When selecting individuals for parole agent 1 positions, the interview panel sends the names of candidates they are recommending to PBPP's Bureau of Human Resources. PBPP's Human Resources Director (HR Director) oversees PBPP's selections and appointments.

Every candidate recommended for a parole agent 1 position goes through a background investigation. A candidate who passes the background investigation is then subject to a medical examination and a psychological examination.

In December, 2008, PBPP's District Director in Philadelphia, Dennis Powell (District Director), recommended Candidate's selection for a parole agent 1 position in Philadelphia. See Reproduced Record (R.R.) at 269a-70a. When asked why this candidate is being recommended, District Director indicated Candidate as the "best candidate interviewed for the position." Id. at 270a.

HR Director Brenda Estep signed the form and sent a request for a background check to Paul Read, the Director of PBPP's Office of Professional Responsibility (OPR). In mid-December, 2008, OPR Director began Candidate's background investigation with a criminal check. As part of the investigation, OPR Director contacted Connie Tennis, DGS's Director of Human Resources (DGS Director). In early January, 2009, OPR Director and DGS Director exchanged a series of e-mail messages regarding Candidate's employment history with the Capitol Police. See R.R. at 258a-62a.

In particular, DGS Director's e-mails to OPR indicated that DGS suspended Candidate for ten days in August, 2004, for unprofessional behavior. DGS Director advised that Candidate's "unofficial working file" contained "voluminous background material" supporting the suspension. Id. at 260a. DGS Director also attached DGS's August, 2004 suspension letter.² Id. at 261a-62a. DGS Director's e-mail message also indicated Candidate resigned from DGS after being approved for a disability retirement. See id. at 258a-59a. In response to OPR Director's request, DGS Director sent Candidate's "official" and "unofficial"³ personnel files to OPR.

² DGS set forth three reasons for the suspension. First, during an investigation, Candidate provided misleading and contradictory information to DGS and the Office of Inspector General (OIG) regarding his involvement with APOA (American Police Officers Association) and RPOA (Reserve Police Officers Association). Candidate indicated he stopped acting as president of APOA when he began his employment with DGS in June, 2002. Candidate also indicated he no longer worked for RPOA.

However, while employed as a Capitol Police officer, Candidate sent e-mails as APOA's president, signed agreements on behalf of APOA with three states regarding APOA fundraising irregularities, gave a business card listing himself as APOA's president to a Department of State employee, signed contribution letters as APOA's president, and received monetary compensation from RPOA.

Second, Candidate also conducted APOA business during working hours or while displaying his Capitol Police badge while wearing civilian clothes and without obtaining approval. In June, 2003, while clearly displaying his Capitol Police badge, Candidate visited the Special Investigations Unit at the Department of State's Bureau of Charitable Organizations and requested that it forward calls it received about APOA to Candidate as a "professional courtesy." Candidate also used Commonwealth computers and e-mail to conduct APOA or RPOA business.

Third, DGS found that Candidate engaged in "scandalous behavior" by signing settlement agreements, consent judgments and compliance orders with Attorneys General Offices in New Hampshire, Connecticut and Massachusetts in consumer protection actions concerning APOA's fund raising irregularities.

³ DGS Director explained that pursuant to Management Directive 505.18, intended to maintain a uniform system of personnel information for agencies under the Governor's jurisdiction, and to preserve and protect employees' privacy interests, only information that can **(Footnote continued on next page...)**

In mid-January, 2009, Candidate e-mailed Joyce Jordan-Brown (Investigator Jordan-Brown), a PHRC investigator involved in one of Candidate's PHRC complaints. He asked if she could inquire about the status of PBPP's background investigation. See id. at 271a. The next day, Investigator Jordan-Brown *erroneously* replied that the PBPP background investigation process would begin after Candidate signed a settlement and withdrawal agreement in the PHRC/EEOC proceedings. See id. In actuality, PBPP began its background investigation in early December, 2008.

In any event, on January 23, 2009, Candidate signed a confidential settlement agreement and general release with PBPP as to certain claims against it. See id. at 272a-77a. In Paragraph 1 ("Purpose"), Candidate acknowledged the settlement agreement "resolves any and all claims" by Candidate against PBPP filed before the Commission and PHRC. Id. at 272a. In Paragraph 2 ("Consideration"), PBPP agreed "to offer [Candidate] a Parole Agent I position with the Philadelphia District Office at Pay Group 6, Level 1 (approximately \$38,306.00/year) if he successfully passes the background check that is conducted by the Board's Office of Professional Responsibility." Id. at 273a (emphasis added).

Several days later, on January 30, 2009, OPR Director notified HR Director that OPR completed Candidate's background report. OPR Director

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be released to the public is kept in the "official" personnel file. Reproduced Record (R.R.) at 23a-24a.

included the report with the memorandum. See id at 264a-67a. The background report referenced and attached DGS's 2004 suspension letter, and also indicated "applicant is on a permanent disability retirement from [the State Employees' Retirement System]." Id. at 266a (emphasis added).

By letter dated February 11, 2009, HR Director notified Candidate that he would not be offered a parole agent 1 position. HR Director's letter stated:

In accordance with the Settlement Agreement you entered into with [PBPP] on January 23, 2009, your name was referred to [OPR] so that a background investigation relating to your personnel and professional character could be conducted. The investigation was initiated upon our notification that you were a recommended candidate for a position in Philadelphia. The results of the investigation were submitted to me on January 30, 2009 for review. This is to inform you that you have not successfully passed the background investigation review.

The background investigation indicates that while you were employed as a Capitol Police Officer in [DGS], you received a substantial disciplinary penalty in 2004 for providing misleading and contradictory information during an investigation, scandalous behavior, and conducting business other than that of the Commonwealth during working hours. This activity is considered inappropriate and undesirable for a Parole Agent, and as such, you are being removed from consideration for a Parole Agent position within the Philadelphia District.

Accordingly, per Section 2 of the Settlement Agreement, you will not be offered a Parole Agent position at [PBPP].

Id. at 241a.

Candidate appealed his non-selection to the Commission.⁴ At an evidentiary hearing, Candidate presented testimony from DGS Director, HR Director and OPR Director. Candidate also testified on his own behalf.

HR Director testified she made PBPP's decision to reject Candidate from further consideration for a parole agent 1 position. See R.R. at 162a. HR Director based her decision solely on the information in Candidate's background investigation, including his ten-day suspension. Id. at 162a-64a. HR Director considered the discipline significant and the charges in the suspension letter to be particularly serious. Id. at 163a, 171a, 213a-14a. Candidate provided false and misleading information to DGS during an investigation regarding his APOA business activities. Id. at 213a-14a. DGS also charged Candidate with "badging," that is, displaying his Capitol Police badge while not in uniform, and while conducting APOA business, in order to obtain favors. Id. at 213a-15a.

HR Director testified these charges touch on Candidate's honesty, integrity and trustworthiness. Id. at 215a. She stated Candidate's credibility could now be questioned in court, which raised a red flag. Id. at 216a. Therefore, she believed Candidate could not credibly represent PBPP. Id.

⁴ Candidate initially alleged PBPP discriminated against him based upon race, sex, violation of the Civil Service Act and regulations, age, disability, and other non-merit factors. He later withdrew his claims of race, sex and age discrimination. Thus, the Commission reviewed his claims of discrimination based on violations of the Civil Service Act and regulations, disability and other non-merit factors.

HR Director did not review Candidate's application for the parole agent 1 position. Id. at 191a-92a. However, she considered Candidate's prior employment and was aware of his law enforcement background. Id. at 172a-73a. Nevertheless, HR Director did not consider Candidate's law enforcement background as an asset for a parole agent. Id. at 173a-74a.

In addition, HR Director testified the settlement agreement in the PHRC proceedings played no role in her decision to reject Candidate. Id. at 195a. PBPP conducted the background investigation during the settlement negotiations. Id.

HR Director further testified PBPP provided Candidate with veterans' preference points and consideration. Id. at 189a-90a. She also stated that even if Candidate passed the background check, he would still need to pass the medical and psychological examinations to be appointed as a parole agent. Id. at 161a-62a.

Based on the evidence, the Commission did not accept PBPP's "premise" for rejecting Candidate, his ten-day suspension as a Capitol Police officer. See Comm'n Dec. at 38. In support of its decision, the Commission found PBPP presented "conflicting testimony regarding how related the duties of parole agent 1 and Capitol Police officer are." Id. at 37. Although HR Director did not consider Candidate's law enforcement background and experience to be an asset for a parole agent position, she "ostensibly" based rejection on a suspension he received in another law enforcement position because of concerns as to how it would impact his abilities to perform the law enforcement duties of the parole

agent position. Id. The Commission further noted DGS did not find the conduct underlying the ten-day suspension to be sufficiently serious to warrant termination. Id. DGS could have suspended Candidate up to 60 days. Id. at 37-38 (citing Section 803 of the Civil Service Act, 71 P.S. §741.803).

Thus, the Commission determined PBPP's rejection of Candidate based upon the ten-day suspension in his background constituted discrimination based upon a non-work-related factor. As a result, the Commission held Candidate presented evidence establishing discrimination in violation of Section 905.1 of the Civil Service Act, 71 P.S. §741.905a.

Having determined Candidate established that PBPP's rejection of his application because of the ten-day suspension constituted discrimination based upon a non-merit factor, the Commission further decided:

we need not address [Candidate's] other claims of intentional discrimination or violation of veterans' preference rights. We note, however, that [Candidate] has presented credible evidence in support of each of his remaining discrimination claims.^[5]

⁵ The Commission commented DGS Director had no legitimate reason to mention Candidate's disability retirement in the e-mail messages to OPR Director. Comm'n Dec. at 38-39. The background report also mentions that Candidate took a disability retirement. Id. The Commission was also troubled by HR Director's and OPR Director's testimony concerning the nature and use of the background investigation. Id. at 39. HR Director totally discounted Candidate's law enforcement background except for the one negative incident in 2004. Id.

The Commission further expressed concern over whether PBPP acted in accord with Candidate's veterans' preference rights. Id. at 40-42. Also, in light of its determination that PBPP's rejection of Candidate in 2009 based on his DGS suspension in 2004 constituted non-merit discrimination, the Commission declined to determine whether PBPP knew of the DGS **(Footnote continued on next page...)**

Comm'n Dec. at 38 (footnote added).

The Commission then determined the appropriate remedy. See Section 952(b) of the Civil Service Act, 71 P.S. §741.952(b) (where decision is in favor of employee or aggrieved person, the Commission shall make such order as it deems appropriate to secure that person's rights under the Civil Service Act). The Commission sustained Candidate's appeal, overruled PBPP's rejection of Candidate, and directed PBPP to arrange for Candidate to undergo medical and psychological testing required for all parole agent 1 candidates. The Commission further ordered that if Candidate passes these tests, PBPP appoint Candidate to a parole agent 1 position in its Philadelphia District Office within 30 days of the Commission's order.

However, the Commission denied Candidate's request for back pay. The Commission explained, "[s]ince appointment of all candidates to a Parole Agent 1 position is conditioned upon each candidate passing medical and psychological exams, and [Candidate] had not completed those at the time he was rejected, we deny [Candidate's] request for back pay." Comm'n Dec. at 44.

The Commission also denied Candidate's request for attorney fees and costs. Noting the lack of any specific legislation authorizing an award of these

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suspension when it entered into the settlement agreement conditioning Candidate's appointment upon his passing the background check. Id. at 42-43.

items, the Commission determined it lacked the authority to award attorney fees and expenses. Both PBPP and Candidate petition for review.⁶

III. Issues

In its petition for review, PBPP contends the Commission erred when it determined PBPP discriminated against Candidate because of a disability, other non-merit related factors, or a technical or procedural violation of the Civil Service Act or its regulations, in violation of Section 905.1 of the Civil Service Act. PBPP also contends the Commission's determination that discrimination occurred is based on findings regarding the settlement agreement that are not supported by substantial evidence.

In his petition for review, Candidate contends the Commission erred in not awarding back pay contingent on his successfully passing the medical and psychological examinations.

IV. Discussion

A. Discrimination

1. Contentions

PBPP first contends the Commission erred in determining Candidate presented evidence establishing PBPP discriminated against him based upon a disability, other non-merit related factors, or a technical violation of the Civil

⁶ The standard of review involving agency adjudications is limited to a determination of whether the agency's findings are 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).

Service Act or its regulations, in violation of Section 905.1 of the Act. PBPP argues the rejection of Candidate was not based upon any traditional discriminatory factors, and it did not violate the Civil Service Act or its supporting regulations.

a. Standards of Proof for Discrimination

First, PBPP asserts there are two categories of discrimination that may be appealed to the Commission under Section 951(b) of the Civil Service Act, 71 P.S. §741.951(b):⁷ “traditional discrimination” and “technical discrimination.” See Moore v. State Civil Serv. Comm’n (Dep’t of Corrs.), 922 A.2d 80 (Pa. Cmwlth. 2007); Pronko v. Dep’t of Revenue, 539 A.2d 456 (Pa. Cmwlth. 1988). Traditional discrimination claims under Section 905.1 of the Civil Service Act are based on factors such as race, sex, disability and national origin. Id. Technical discrimination claims are based on technical and procedural violations of the Civil Service Act and related regulations. Id.

In Moore, this Court addressed the standard of proof for traditional discrimination claims enunciated by the Supreme Court in Allegheny Housing Rehabilitation Corp. v. Pennsylvania Human Relations Commission, 516 Pa. 214, 532 A.2d 315 (1987). It may be summarized as follows.

⁷ Section 951(b), added by the Act August 27, 1963, P.L. 1257, as amended, provides, “Any person who is aggrieved by an alleged violation of section 905.1 of this act [prohibition of discrimination] 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).

First, the plaintiff must produce sufficient evidence to establish a *prima facie* case. Moore. To do so, the plaintiff must present sufficient evidence that, if believed and otherwise unexplained, indicates more likely than not that discrimination occurred. Id. Given the critical role of circumstantial evidence in discrimination cases, the *prima facie* burden of proof is not an onerous one. Id. Absent a credible response from the defendant, a presumption of discrimination arises and the plaintiff's *prima facie* case stands determinative of the factual issue of the case. Id.

If however, the defendant offers a non-discriminatory explanation for the personnel action, the presumption drops from the case. Id. As in other civil litigation, the tribunal must then evaluate the entire body of evidence under the preponderance standard and determine which party's explanation of the employer's motivation it believes. Id.

Conversely, no showing of discriminatory intent is required by a plaintiff in a non-selection for promotion case alleging a technical violation of the Civil Service Act, usually referred to as "procedural discrimination." Id. To obtain relief, the plaintiff in such a case must show that he or she was, in fact, harmed by the non-compliance with the Civil Service Act or, because of the peculiar nature of the procedural impropriety, the plaintiff could have been harmed, but there is no way to prove that for certain. Id.

b. Candidate's *Prima Facie* Case

PBPP asserts that Candidate failed to establish a *prima facie* case of traditional discrimination based either on disability or other non-merit related factors. PBPP notes that although the Commission decided the case on the ground that Candidate's rejection constituted discrimination based upon a non-merit factor, in *dicta* the Commission stated Candidate "presented credible evidence in support of each of his remaining discrimination claims." See Comm'n Dec. at 38.

i. Discrimination Based on Disability

First, PBPP asserts Candidate failed to present any evidence of disability discrimination, let alone establish a *prima facie* case of disability discrimination. Indeed, Candidate testified that although he retired from the Capitol Police due to a back injury, he was not disabled when he began working at his CYS caseworker 2 position. See R.R. at 43a.

Further, although OPR Director's background report noted Candidate received a disability retirement from DGS, OPR Director's job was to gather the facts that pertained to Candidate's employment with DGS.

ii. Veterans' Preference; Rule-of-Three

Second, PBPP asserts it afforded Candidate his veterans' preference rights. Candidate received the ten additional points to which he was entitled. Further, PBPP "selected" him as one of seven recommended candidates for the available positions in Philadelphia. PBPP also claims it did not violate the "rule-of-three" in Section 602 of the Civil Service Act, which provides (with emphasis

added): “If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the three highest ranking available persons on the certification of eligibles.” 71 P.S. §741.602. Here, PBPP “selected” Candidate for the position pending a background check.

iii. Discrimination Based on Non-Merit Factors

The primary issue is whether the Commission erred in determining Candidate established discrimination based upon non-merit factors. In particular, PBPP notes the Commission’s specific determination, that Candidate’s ten-day suspension by DGS was not sufficiently merit-related to allow rejection during the background investigation for a parole agent position, is reviewable as a matter of law. See Dep’t of Env’tl. Res. v. Bartal, 618 A.2d 1062 (Pa. Cmwlth. 1992) (whether an appointing authority actually considered a particular factor is a question of fact; however, the Commission’s determination as to the *propriety* of such consideration is a conclusion of law).

Citing Bartal, PBPP asserts the Commission misapplied the law. In Bartal, we recognized (with emphasis added):

[A]ny “personnel action” carried out by the Commonwealth is to be scrutinized in the light of such merit criteria, as has the party failed to properly execute his duties, or has he done an act which hampers or frustrates the execution of the same. The criteria must be job-related an [sic] in some rational and logical manner touch upon competency and ability.

618 A.2d at 1067 n.10.

PBPP asserts DGS's ten-day suspension of Candidate was its sole and only reason for rejecting his application. It found the suspension to be merit-related to the parole agent position. HR Director's February 11, 2009, letter to Candidate provided in part (with emphasis added):

The background investigation indicates that while you were employed as a Capitol Police Officer in [DGS], you received a substantial disciplinary penalty in 2004 for providing misleading and contradictory information during an investigation, scandalous behavior and conducting business other than that of the Commonwealth during work hours. This activity is considered inappropriate and undesirable for a Parole Agent, and as such, you are being removed from consideration for a Parole Agent position within the Philadelphia District.

R.R. at 241a. The acts Candidate committed, PBPP argues, will hamper and frustrate the execution of a parole agent's duties and specifically touch upon his competency and ability to do his job.

More specifically, PBPP explained that Candidate provided misleading and contradictory information to DGS and the Office of Inspector General (OIG) regarding his involvement in two police fundraising organizations: APOA and RPOA. Candidate untruthfully claimed to be no longer involved with either the APOA or the RPOA. While employed as a Capitol Police officer, he signed agreements on behalf of APOA pertaining to fundraising irregularities in three other states. Candidate also signed contribution letters on behalf of APOA and received compensation from RPOA.

Further, Candidate conducted APOA business during working hours. He also conducted APOA business while displaying his Capitol Police badge in civilian clothes. In particular, Candidate, while displaying his badge, visited the Special Investigations Unit of the Department of State's Bureau of Charitable Organizations in his capacity as an APOA official. He requested that all calls to the Unit regarding APOA be forwarded to him as a "professional courtesy."

PBPP asserts this information immediately raised red flags with HR Director. Like police officers, parole agents carry badges and are held to a higher expectation of honesty, trust and integrity. Candidate significantly compromised his honesty, trust and integrity. In short, Candidate's conduct more than touched on his competency and ability to perform a parole agent's duties, it engulfed it.

In addition, PBPP asserts Candidate presented no evidence which contradicts PBPP's determination that the ten-day suspension was merit-related. Rather, Candidate merely presented conclusory allegations of discrimination without any factual support.

PBPP further contends the Commission created what amounts to new case law by determining, "[i]n order to be a sufficiently merit-related reason to satisfy the requirements in the Civil Service Act, there must be a reasonably close proportionality between the past discipline and its impact upon the candidate's ability to perform the duties of the current position in question." Comm'n Dec. at 36. It asserts the Commission erred in rejecting "the notion that an individual's

conduct is either ‘merit-related’ or ‘not merit-related’ entirely independent of context.” See id. at n.18.

PBPP argues that the Commission’s proper role is to determine whether PBPP discriminated against Candidate based on non-merit factors, not whether the merit-related factors were proportional to Candidate’s ability to perform the duties of a parole agent 1. In other words, PBPP asserts the Commission found PBPP had merit-related reasons for rejecting Candidate, but erroneously determined that because they were not proportional, they must be discriminatory.

PBPP also contends the Commission improperly revised the roles of HR Director and OPR Director in PBPP’s selection process. It asserts the Commission erroneously determined HR Director should have placed greater weight on Candidate’s law enforcement background and because she did not, discrimination is present. HR Director’s role is to take the names of recommended candidates and obtain a background check. If that is successful, HR Director moves the recommended candidate through the medical and psychological examinations.

In short, PBPP asserts that HR Director does not need to review Candidate’s law enforcement background. PBPP’s field managers already reviewed Candidate’s background and recommended him. HR Director’s function is limited to looking for red flags in the background report. If a red flag is raised,

HR Director must determine if it will adversely affect the selected candidate's position.

Similarly, OPR Director's role is to conduct the background investigation and gather facts. It is not OPR Director's role to form an opinion about the relevancy or importance of a particular candidate's background or history.

For these reasons, PBPP argues that the Commission erred in finding discrimination based on HR Director's and OPR Director's decision not to place great weight on Candidate's previous law enforcement experience.

Finally, PBPP contends the Commission erred in finding discrimination based on the fact that DGS did not terminate Candidate, but only suspended him for ten days. PBPP asserts the level of discipline imposed by a former employer should have no bearing on whether a potential employer deems the underlying misconduct serious. Although not reflected by the record, PBPP asserts that if Candidate committed these acts as a parole agent, PBPP would terminate him.

2. Analysis

a. Disability, Veterans' Preference, Rule-of-Three

Regarding Candidate's attempt to establish a *prima facie* case of disability discrimination, the Commission questioned why the background report indicated Candidate took a disability retirement from DGS. Nevertheless, it did

not determine whether PBPP discriminated against Candidate based on disability. Absent a concrete ruling by the Commission, we decline to address this issue. See Philips Bros. Elec. Contractors, Inc. v. Pa. Turnpike Comm'n, 960 A.2d 941 (Pa. Cmwlth. 2008) (pursuant to ripeness doctrine, courts will not give answers to academic questions or render advisory opinions).

For the same reason, we decline to address PBPP's contention that Candidate failed to establish violation of rights under either the Veterans' Preference Act, 51 Pa. C.S. §§7101-09, or Section 602 of the Civil Service Act, 71 P.S. §741.602 (appointing authority shall select a person who is among the three highest ranking available persons on the certification list). The Commission noted *it could not determine* whether PBPP violated Candidate's veteran's preference rights or the "rule-of-three." See Comm'n Dec. at 38, 40.

Because the Commission did not render any legal conclusions as to whether PBPP violated Candidate's rights under the Veterans' Preference Act or Section 602 of the Civil Service Act, we decline to review these issues on appeal. Philips Bros.

b. Discrimination Based on Non-Merit Factors

In civil service cases, the Commission is the sole fact finder. Bosnjak v. State Civil Serv. Comm'n, 781 A.2d 1280 (Pa. Cmwlth. 2001). As such, determinations as to witness credibility and resolution of evidentiary conflicts are within the sole province of the Commission, and we will not reweigh the evidence or substitute our judgment even though we might have reached a different factual

conclusion. Thompson v. State Civil Serv. Comm'n, 863 A.2d 180 (Pa. Cmwlth. 2004). When reviewing a decision of the Commission, we view the evidence, and all reasonable inferences arising therefrom, in a light most favorable to the prevailing party. Bosnjak.

Moreover, we recognize the Commission is given broad powers in the supervision and administration of the civil service system. State Corr. Inst. at Graterford, Bureau of Corrs. v. Goodridge, 487 A.2d 1036 (Pa. Cmwlth. 1985). The Commission's interpretation of the Civil Service Act, including the phrase "other non-merit related factors," in Section 905.1 of the Civil Service Act, is entitled to great weight. Id.

Nonetheless, as noted above, whether an appointing authority considered a particular factor in a personnel action is a question of fact. Bartal. However, the Commission's determination as to the *propriety* of such consideration is reviewable as a conclusion of law. Id.

It is well established in Pennsylvania civil service law that any personnel action taken by an appointing authority "must be based upon merit criteria which are relevant to the proper execution of the employee's duties, are job related, and which touch in some logical and rational manner upon competency and ability." Kealy v. Commonwealth, 496 A.2d 80, 82 (Pa. Cmwlth. 1985). "Merit-related criteria include whether the employee failed to properly execute his duties or has acted in such a way that hampers or frustrates the execution of his duties." Thompson, 863 A.2d at 184.

Here, PBPP rejected Candidate based on his ten-day suspension in 2004 for “providing misleading and contradictory information during an investigation, scandalous behavior, and conducting business other than that of the Commonwealth during work hours.” R.R. at 241a. PBPP further stated, “This activity is considered inappropriate and undesirable for a Parole Agent” Id. In particular, PBPP asserts Candidate’s suspension notice indicates he engaged in acts which would hamper or frustrate the execution of a parole agent’s duties and touch on his ability to perform the parole agent position. Therefore, PBPP argues, it had merit-related reasons for rejecting Candidate from the parole agent 1 position.

In reaching its decision, the Commission discussed its concept of proportionality. Comm’n Dec. at 35-36. More significant to our analysis, however, is the Commission’s extensive discussion of the “conflicting testimony regarding how related the duties of Parole Agent 1 and Capitol Police Officer are.” Id. at 37.

In this regard, the Commission noted HR Director testified she did not consider Candidate’s law enforcement background and experience in her decision to reject Candidate based on the ten-day suspension. Id. In fact, the Commission found HR Director did not even review Candidate’s employment application. Comm’n Dec., Finding of Fact (F.F.) No. 59. This is supported by HR Director’s testimony. R.R. at 191a-92a. Nevertheless, HR Director rejected Candidate based on a ten-day suspension he received in another law enforcement position for the

reason that it would impact on his ability to perform his law enforcement duties as a parole agent 1. Comm'n Dec. at 37.

In overruling Candidate's rejection, the Commission reasoned in part:

Based upon the record before us, we do not accept [PBPP's] premise that rejecting [Candidate] was appropriate for a Parole Agent 1 position because he had a ten-day suspension as a Capitol Police Officer more than four years ago. [PBPP] cannot have it both ways. If [HR Director] did not consider [Candidate's] work experience in law enforcement to be related to his work as a Parole Agent 1, [PBPP] cannot say that a ten-day suspension is adequate grounds to reject [Candidate] because it was a serious penalty while Candidate was in another law enforcement position with the Commonwealth.

Id. at 38 (emphasis added).

Although PBPP attempts to cast the issue as one of law, a reading of the Commission's decision in a light most favorable to the prevailing party convinces us that the issue is one of fact. Regarding Candidate's *prima facie* case, the Commission gave great weight to circumstantial evidence: 1) Candidate's qualifications, including test scores, recommendations and "selection" by PBPP's District Director; 2) HR Director's failure to review Candidate's application or performance evaluations; and, 3) DGS's penalty involving the 2004 misconduct. Related to the last point, the Commission noted that much greater penalties were available to DGS, including termination, thereby calling into question the severity of the offense. As the fact-finder, the Commission has exclusive authority over credibility and evidentiary weight. Given the circumstantial evidence, we see no

error in a determination that Candidate met his *prima facie* burden of establishing non-merit discrimination.

Regarding Candidate's ultimate burden of proof, the Commission did not give significant weight to PBPP's evidence regarding its reason for rejecting Candidate. The Commission referenced PBPP's "conflicting testimony," and PBPP's "ostensibly basing [Candidate's] rejection on a ten-day suspension" Comm'n Dec. at 37 (emphasis added). It thereafter decided not to accept PBPP's "premise" that rejecting Candidate was appropriate because of the ten-day suspension. *Id.* at 38. Read in a light most favorable to the prevailing party, the Commission rejected PBPP's proof, especially testimony by HR Director, and determined the stated reason was a pretense for rejecting Candidate. Such a determination is entirely within the Commission's broad discretion as the fact-finder, even if inferences more favorable to PBPP could have been drawn.

The Commission has broad powers in the supervision and administration of the civil service system.⁸ Goodridge. This includes determining

⁸ For example, under Section 952(c) of the Civil Service Act, added by the Act of June 26, 1989, P.L. 47, 71 P.S. §741.952(c), the Commission has broad discretion, similar to that of a grievance arbitrator in a labor arbitration matter, to modify an appointing authority's penalty in a disciplinary action. See State Corr. Inst. at Graterford, Dep't of Corr. v. State Civil Serv. Comm'n (Terra), 718 A.2d 403 (Pa. Cmwlth. 1988). Under that standard, an arbitrator's decision must be upheld unless it is so manifestly unreasonable that no rational person, after reviewing the evidence, could agree with the outcome. *Id.* Although this case does not involve Section 952(c), we believe the situation here is analogous inasmuch as PBPP's District Director interviewed Candidate and selected him for the parole agent position. However, HR Director later removed Candidate from consideration based on his ten-day suspension in 2004.

what constitutes non-merit discrimination under Section 905.1 of the Civil Service Act. Id.

The Commission's determination is supported by substantial evidence discussed above. We also conclude that it is in accord with applicable law. See Thompson (merit-related criteria include whether the employee failed to properly execute his duties or acted in such a way that hampers or frustrates the execution of his duties). This Court will not re-weigh the evidence or substitute our judgment for that of the Commission. Id.

Further, where the Commission finds discrimination under Section 905.1 of the Civil Service Act, it has broad powers under Section 952(b) of the Act, 71 P.S. §741.952(b) (remedies) to fashion a remedy to secure the aggrieved individual's rights under the Act. Dep't of Gen. Servs. v. Civil Serv. Comm'n (Maddox), 707 A.2d 1207 (Pa. Cmwlth. 1998). Here, given PBPP's rejection of Candidate based solely on his ten-day suspension in 2004, the Commission did not abuse its discretion in directing PBPP to appoint Candidate to the parole agent position contingent upon his passing the medical and psychological examinations. Id.

B. Substantial Evidence

1. Contentions

In its final argument, again challenging *dicta* in the Commission's decision, PBPP essentially contends the Commission erred in finding discrimination occurred, based in any part on the settlement agreement and

negotiations in the PHRC proceedings. Specifically, PBPP asserts substantial evidence does not support the Commission's finding that PBPP's consideration in the settlement agreement, a conditional job offer based upon Candidate passing the background check, was illusory.⁹ In short, PBPP points out the Commission determined, "If PBPP representatives involved in the negotiation and execution of the settlement agreement were aware of the ten-day suspension at the time of its negotiation and execution and had already formed an adverse opinion of [Candidate] based on his background, their consideration in the settlement was illusory." Comm'n Dec. at 42-43 (emphasis added).

In particular, PBPP argues Findings of Fact Nos. 50 and 51 are not supported by substantial evidence. In Finding of Fact No. 50, the Commission noted Candidate e-mailed PHRC Investigator Jordan-Brown on January 14, 2009 and asked her to inquire as to the status of PBPP's background check. In Finding of Fact No. 51, the Commission noted Investigator Jordan-Brown replied the next day that the background check would begin after receipt of the signed settlement and withdrawal forms. Candidate submitted his e-mail message and Investigator Jordan-Brown's reply e-mail message into evidence. See Appellant's Ex. No. 9; R.R. at 271a. Consequently, Findings of Fact Nos. 50 and 51 are supported by substantial evidence.

⁹ Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Shade v. Pa. State Civil Serv. Comm'n (Pa. Dep't of Transp.), 749 A.2d 1054 (Pa. Cmwlth. 2000).

Nevertheless, PBPP asserts the record clearly shows Investigator Jordan-Brown provided Candidate with incorrect information. OPR Director, HR Director and DGS Director all testified the background check began before January 15, 2009. OPR Director began the background check in mid-December. F.F. No. 40; R.R. at 114a-115a. Further, OPR Director and DGS Director exchanged e-mail messages regarding Candidate's employment with DGS between January 8 and 12, 2009. F.F. No. 43; R.R. at 258a-62a.

PBPP also argues the Commission had no jurisdiction to consider whether PBPP's consideration in the settlement agreement was valid or not, since the agreement involved proceedings before the PHRC, not the Commission. Regardless, PBPP further argues the settlement agreement had no bearing on Candidate's rejection for the parole agent position. Rather, PBPP rejected Candidate because of what he did as a Capitol Police officer.

2. Analysis

Initially, we agree with PBPP that the record indicates OPR Director's background check began in mid-December 2009. We also note OPR Director did not forward the background report to HR Director until January 30, 2009, after the parties signed the settlement agreement in the PHRC proceedings. This supports PBPP's argument that the settlement agreement had no bearing whatsoever on HR Director's rejection of Candidate's application.

However, the Commission did *not* determine whether the PBPP's representative who negotiated the settlement agreement knew about the ten-day

suspension prior to the execution of the settlement agreement. Rather, the Commission stated:

Given the basis of our disposition of this appeal, we also need not reach a determination of whether [PBPP's] representative was aware of the ten-day suspension prior to the time the settlement agreement was reached.

Comm'n Dec. at 42. In light of the Commission's decision not to make a finding of fact or render a legal conclusion as to whether PBPP's consideration in the settlement agreement was illusory or whether HR Director or any other PBPP representative knew about the suspension prior to executing the settlement agreement, we decline to address this issue on appeal. Philips Bros. (courts will not give answers to academic questions or render advisory opinions).

C. Back Pay

1. Contentions

In his petition for review, Candidate, represents himself and contends the Commission erred in not awarding him back pay contingent upon his successful completion of the medical and psychological examinations for the parole agent 1 position. He asserts he could not complete the medical and psychological examinations because PBPP rejected him. Candidate argues an award of back pay is the norm when the aggrieved party is successful in a discrimination case. Kealy v. Pa. Liquor Control Bd., 527 A.2d 586 (Pa. Cmwlth. 1987).

Citing Section 952(b) of the Civil Service Act, Candidate further asserts that when a decision is made in favor of an aggrieved person, the Commission shall make such an order as it deems appropriate to secure that person's rights under the Act. 71 P.S. §741.952(b). Candidate claims an award of back pay, contingent upon his passing the medical and psychological examinations, would make him whole by placing him in the position he would have enjoyed had there been no discrimination.

2. Analysis

A decision of the Commission with respect to an award of back pay or lost wages for an aggrieved person's successful challenge to an appointing authority's personnel action will be upheld by this Court unless the Commission abused its discretion. Kealy v. Pa. Liquor Control Bd. If back wages are denied, the Commission must support its denial with findings and conclusions that are job-related and touch upon the employee's competency and ability. Id.

Here, the Commission found that parole agent 1 candidates who pass a background check must then pass medical and psychological examinations. F.F. No. 28. This finding is supported by HR Director's testimony. R.R. at 161a-62a, 207a-08a.

Since Candidate did not take the medical and psychological examinations at the time PBPP rejected him, the Commission denied his request for back pay. Comm'n Dec. at 44. Assuming the discrimination in the present case never occurred, Candidate still needed to pass the medical and psychological

examinations.¹⁰ Because the Commission did not know whether Candidate would pass these examinations, which are prerequisites to being appointed to a parole agent position, we conclude the Commission did not abuse its discretion in denying Candidate's request for back wages. See Trosky v. Civil Serv. Comm'n, City of Pittsburgh, 652 A.2d 813 (1995) (where employees did not establish they would have been promoted if employer complied with the local civil service law, they were not entitled to an award of back pay).

In addition, Candidate remained employed as a Schuylkill County CYS caseworker 2 and did not resign from that position until the Commission issued its decision. Consequently, an award of back pay for the parole agent 1 position effective prior to the Commission's decision would put Candidate in a financial position superior to that he would have enjoyed had the discrimination not occurred. Id. For this additional reason, the Commission did not abuse its discretion in denying Candidate's request for back wages. Id.

D. Remaining Issues

Although Candidate avers in his petition for review that the Commission erred in denying his request for back pay, PBPP argues Candidate does not raise any other issues. In addition, in the "Statement of the Question Involved" section of Candidate's brief, he asks only, "[w]hether the [Commission]

¹⁰ In his January, 2010 petition for review, Candidate averred he passed the medical and psychological examinations and was scheduled to start working as a parole agent 1 on February 1, 2010.

committed an error of law when it did not award back pay to this petitioner.”
Candidate’s Br. at 5.

Notwithstanding, Candidate raises the following additional issues in
his brief:

1. If, as stated in [PBPP’s] petition, they were not going to agree this petitioner’s complaint with the [PHRC], then why did [PBPP] legal counsel require this petitioner to sign a “Settlement Agreement,” a legal document that, to the best of this petitioner’s knowledge, has never been executed by any other applicant who was in the process of being selected for a civil service position?

2. Why weren’t the usual Civil Service procedures and State Management Directive Procedures followed, for example, requesting the last two performance evaluations for the Civil Service position this petitioner had been employed in previous to the Parole position?

3. Regarding the statement that I asked [PHRC Investigator Longwell] to withdraw all [PHRC] complaints, this is not correct. I only asked [PHRC Investigator Longwell] to withdraw the Scranton and Allentown ([PHRC Investigator Longwell] works for the [PHRC] Harrisburg District) complaints because [PHRC Investigator Longwell] told this petitioner the Scranton and Allentown complaints did not have merit. I did not ask [PHRC Investigator Longwell] to withdraw the Philadelphia complaint because the [PHRC] investigator in Philadelphia, [Investigator Jordan-Brown] stated to the petitioner that the Philadelphia complaint had merit.

4. If being suspended in a prior state position is such a critical issue and [HR Director] is “much more knowledgeable” of the “transgression of field agents,” why was David Knorr, who was suspended while previously employed as a Parole Agent and Parole Supervisor in Philadelphia, rehired by [PBPP] February

2010? Mr. Knorr was at entry level training with this Petitioner and freely admitted to this petitioner and several other agents attending the training that he was suspended while an [sic] working for [PBPP].

5. Neither [HR Director] nor [OPR Director] contacted this petitioner and enquired about the details of the suspension. This petitioner would have given his version of the events and references of employees of the Capitol Police who would have verified [Candidate's] version. The basic version is

Id. at 6-7 (footnotes omitted).

A petition for review must contain a general statement of the petitioner's objections. Pa. R.A.P. 1513(d)(5). "The statement of objections will be deemed to include every subsidiary question fairly comprised therein." Pa. R.A.P. 1513(d). However, issues, arguments or questions not fairly raised in the petition for review will be deemed waived and will not be addressed. Mostatab v. State Bd. of Dentistry, 881 A.2d 1271 (Pa. Cmwlth. 2005).

Here, Candidate's petition for review raises only the back pay issue. Therefore, Candidate's remaining issues must be considered waived. Mostatab.

In any event, in light of our holding that the Commission did not err in overruling PBPP's rejection of Candidate, Candidate's remaining issues are rendered moot. See Pub. Defenders Office of Venango Cnty. v. Venango Cnty. Court of Common Pleas, 586 Pa. 317, 893 A.2d 1275 (2006) (mootness doctrine requires that an actual case or controversy must be extant at all stages of review).

V. Conclusion

For the above reasons, the order of the Commission is affirmed.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Board of Probation and Parole,	:	
	:	
Petitioner	:	
	:	
v.	:	51 C.D. 2010
	:	
State Civil Service Commission (Hoffman),	:	
	:	
Respondent	:	
	:	
Erick Hoffman,	:	
	:	
Petitioner	:	
	:	
v.	:	111 C.D. 2010
	:	
State Civil Service Commission (Pennsylvania Board of Probation and Parole),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 18th day of November, 2010, for the reasons in the foregoing opinion, the order of the State Civil Service Commission is **AFFIRMED**.

ROBERT SIMPSON, Judge