

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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|--|---|------------------------------|
| Daphne Y. Butler, | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 1265 C.D. 2007 |
| | : | SUBMITTED: December 28, 2007 |
| State Civil Service Commission | : | |
| (Delaware County Mental Health/ Mental Retardation Unit), | : | |
| Respondent | : | |

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 19, 2008

Daphne Y. Butler, acting *pro se*, petitions for review of the June 8, 2007 order of the State Civil Service Commission (Commission) that denied her request for reconsideration, thereby reaffirming its prior orders denying her requests for a hearing regarding her demotion and her Performance Evaluation Report (PER) due to insufficient allegations of discrimination.¹ We affirm.

In June 2006, Butler was working for the Delaware County Mental Health/Mental Retardation Unit (County) as a Clerk Typist 3, regular status, when she was promoted to the position of Clerical Supervisor 1, probationary status. On November 30, 2006, the County extended Butler's probation due to her inability to

¹ The Commission issued both orders at Appeal No. 25214 of its docketing system.

demonstrate satisfactory performance as a supervisor. On January 26, 2007, Butler's manager conducted an evaluation in which he rated her performance as a Clerical Supervisor 1 as satisfactory and recommended that she be placed in regular status. On February 8, 2007, Butler's manager provided her with a written warning referencing her behavior concerning the need to cover phones during lunch time. On March 27, 2007, Butler's manager conducted another evaluation, this time rating her performance in the range of fair to unsatisfactory, and recommending that she be returned to her former position of Clerk Typist 3, regular status. A detailed explanation was attached to the evaluation form, which stated as follows:

PERFORMANCE EVALUATION REPORT
DAPHNE BUTLER
MARCH 27, 2007

Quality of Work: Ms Butler demonstrates good quality of work in completing meeting minutes. Her work is neat and accurate.

Work Habits: Ms Butler demonstrates fair quality of work habits. Ms Butler does not seem to demonstrate the ability to plan for problems or anticipated delays in completing assigned work. Ms Butler does demonstrate good care of equipment and supplies.

Relationship with People: Based on information given to me, and from what I have observed, Ms Butler demonstrates unsatisfactory relationships with people within the Office of Mental Retardation. I have not observed teamwork, but rather an attitude of telling staff what to do in an authoritative manner. Ms Butler has demonstrated a lack of cooperation with others and people in the office have asked me why she seems angry. Ms Butler lacks tact and diplomacy in dealing with others in the office. Ms Butler does not show empathy toward

her staff but rather approaches them in a disciplinary manner.

Dependability: Ms Butler demonstrates fair quality of dependability. There are times during the day when Ms Butler is either not in her work area or has visitors for lengthy periods of time. Ms Butler does not go beyond the exact requirements of a task.

Quantity of Work: Overall, Ms Butler demonstrates a fair quality in the quantity of work completed. Individual tasks may be completed in a timely manner.

Initiative: Ms Butler demonstrates an unsatisfactory quality in the area of initiative. When Ms Butler was sent for supervisory training, she reported that she learned nothing because she kept telling the instructor that she never gets any support at her office. On some occasions, Ms Butler jumps to conclusions that are not accurate. Ms Butler made no attempt to obtain feedback from one of her staff who attended a receptionist training in Philadelphia. Ms. Butler does not seek help from her supervisor in addressing problems within her unit. She is not resourceful in exploring solutions to get the tasks completed when faced with obstacles.

Ability as Supervisor: Ms Butler demonstrates unsatisfactory quality as a supervisor. This was a main reason for extending probation in December. After a very brief period where Ms Butler began to show some improvement, she again demonstrated unsatisfactory quality. I have not observed Ms Butler's ability to stimulate her staff and arouse their enthusiasm. On one occasion, Ms Butler allowed a training experience to be lost because she did not recognize the need to explain the importance of the training nor did she explain the fact that travel expenses would have been covered. Ms Butler interprets instructions to her liking rather than to the exact meaning of the instructions. Although Ms Butler showed some improvement in early January, her performance in February and March was unacceptable for a supervisor.

Since Ms Butler continues in probation, I have met with her on a regular basis during this probationary period, and I cannot see significant improvement. Attempts to explain more appropriate ways to work with people are either ignored or meant [sic] with silent opposition. Supervision with Ms Butler is often met with a lack of cooperation. She has often said that she is here from 8 to 4 to get the job done. Any situation that is brought to her attention is met with the feeling that someone is out to get her. After consultation with the MH/MR Administrator, it is recommended that Ms Butler should return to her former position as Clerk Typist III in regular status.

James S. Carlin
March 27, 2007

Certified Record (C.R.), Item No. 1; Reproduced Record (R.R.) at 16-17a. The evaluation is as follows:

PERFORMANCE EVALUATION REPORT

ANNUAL

| | | | | | |
|--------------------------------------|-------|------|---|--------------------------------|-----------------|
| EMPLOYEE Daphne Butler | | | AGENCY Department of Human Svcs. OMR | | SOCIAL SECURITY |
| CLASS TITLE Clerical Supervisor I | | | AGENCY 021 | BUR M423 | CLASS L0005 |
| SALARY | RANGE | STEP | EVALUATION PERIOD | PRESENT STATUS Probationary | |
| LOCATION Delaware County | | | ANNIVERSARY DATE | DATE REG. STATUS STARTS | |

| GENERAL PERFORMANCE FACTORS - All Employees should be evaluated on the first six factors | Excellent | Very Good | Good | Fair | Unsatisfactory |
|---|-----------|-----------|------|------|----------------|
| 1. QUALITY OF WORK - Completeness, accuracy, neatness, professional or technical proficiency. | | | X | | |
| 2. WORK HABITS - Planning and organization of work; care of equipment and supplies. | | | | | X |
| 3. RELATIONSHIP WITH PEOPLE - Ability to get along with others. Efficiency in dealing with the public. | | | | | X |
| 4. DEPENDABILITY - Degree to which employee can be relied upon to work steadily and effectively, punctuality, regularity of attendance. | | | | | X |
| 5. QUANTITY OF WORK - Amount of work performed. | | | X | | |
| 6. INITIATIVE - Resourcefulness; versatility; originality; ability to conceive and carry out program improvements. | | | | | X |
| 7. ANALYTICAL ABILITY - Thoroughness and accuracy of analysis of data, facts, laws, rules and procedures. | | | | | |
| 8. ABILITY AS SUPERVISOR - Proficiency in training employees. In planning, organizing, laying out work for unit. Activity in promoting cost reduction leadership. | | | | | X |
| 9. ADMINISTRATIVE ABILITY - Promptness of action; soundness of decision; application of good management principles. | | | | | |
| 10. SAFETY - Application of accident prevention techniques and unit's safety record. | | | | | |
| 11. COMMITMENT TO AFFIRMATIVE ACTION. | | | | | |
| OVERALL EVALUATION | | | | | X |

COMMENTS (CONTINUE ON ADDITIONAL SHEETS OF 8 1/2 x 11 WHITE PAPER)
Please see attached sheet.

James S. Caslin *Casework Manager II* 3/27/07
EVALUATOR SIGNATURE (Employee's Immediate Supervisor) TITLE DATE

D. L. Lewis *Human Services Dir.* 3/27/07
REVIEWING OFFICER SIGNATURE (Evaluator's Immediate Suprv.) TITLE DATE

I intend to sign *3/27/07*
I WOULD LIKE TO DISCUSS THIS REPORT WITH REVIEWING OFFICER. YES NO AS REQUESTED, REVIEWING OFFICER DISCUSSED REPORT. DATE

I ACKNOWLEDGE THAT I HAVE READ THIS REPORT AND THAT I HAVE BEEN GIVEN AN OPPORTUNITY TO DISCUSS IT WITH THE EVALUATOR. MY SIGNATURE DOES NOT MEAN THAT I AGREE WITH THE REPORT.

15a

C.R., Item No. 1; R.R. at 15a. By letter dated March 28, 2007, the County implemented the manager's recommendation and demoted Butler from the new position of Clerical Supervisor I, probationary status, to her former position of Clerk Typist 3, regular status.

In April 2007, Butler filed an appeal with the Commission from her demotion, reassignment and PER. C.R., Item No. 1.² Therein, she alleged that the County discriminated against her on the basis of race, sex, age and other non-merit factors including education, communication skills, organizational level, economic status, physical appearance, lack of flexibility, lack of private space within which to work and other factors unbeknownst to her. She checked "probationary" in the block asking for her latest civil service status.

In two separate orders dated May 18, 2007, the Commission denied Butler's request for a hearing regarding her demotion and her PER, stating that Butler as a probationary employee had the burden of establishing a claim of discrimination as the basis of her appeal and that she failed to indicate "acts, which if proven, would constitute discrimination, although requested to do so on the Appeal Request Form." C.R., Item Nos. 2 and 3; R.R. at 7a and 8a.³ In response, Butler filed a request for reconsideration of the Commission's two orders, maintaining that she was not a probationary employee and that the County engaged

² In a November 13, 2007, order, this court granted the Commission's application to strike pages 3a-6a of the reproduced record wherein Butler included an appeal request form different from that found in the certified record.

³ In the second May 2007 order, the Commission denied Butler's request for hearing regarding her PER on the additional ground of untimeliness. In its June 8, 2007, order denying Butler's request for reconsideration, however, the Commission acknowledged that Butler's request was submitted within the twenty-day time limit.

in technical discrimination in violation of the Civil Service Act (Act)⁴ and numerous provisions of the Commission's regulations. The Commission rejected her request for reconsideration, again citing insufficient allegations of discrimination. Butler's petition for review to this court followed.⁵

The essential issues on appeal are as follows:⁶ 1) whether the Commission erred in identifying Butler as a probationary employee; 2) whether it erred in denying her request for a hearing regarding her demotion and PER based on insufficient allegations of discrimination; and 3) whether its denial of her request for a hearing violated her right to due process, right to equal protection and her property interest in her reputation.

I.

Butler argues that the Commission erred in identifying her as a probationary employee and in using that designation to limit her basis of appeal to discrimination only. Referencing her January 26, 2007, PER, Butler first maintains that she was a regular employee because her manager gave her a satisfactory evaluation and indicated that she was to be placed in regular status. She notes that in *Wernersville State Hospital v. Peters*, 659 A.2d 67, 69 (Pa. Cmwlth. 1995), this court held that the "Act requires an affirmative act by the appointing authority, evaluation of the employee's performance and notification to him or her that such was satisfactory, before the probationary employee attains regular status."

⁴ Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1-741.1005.

⁵ In light of the fact that the denial of reconsideration is a matter of administrative discretion, this court's review is limited to determining whether the Commission abused its discretion. *Fleher v. Dep't of Transp., Bureau of Driver Licensing*, 850 A.2d 34 (Pa. Cmwlth. 2004).

⁶ Butler raises seven issues on appeal. Because some are interrelated, we have reordered, consolidated and rephrased them for consideration and disposition.

Also in support of her assertion, Butler cites Section 603(b) of the Act⁷ and 4 Pa. Code § 97.39. Section 603(b) provides that, “[i]f the employe’s work has been satisfactory, the employe shall be notified by the appointing authority in writing prior to the completion of the probationary period that the employe will attain regular status in the classified service upon completion of the probationary period.” 71 P.S. § 741.603(b). The Commission’s regulation provides that:

The appointing authority shall notify the employee in writing whether the services of the employee have or have not been satisfactory prior to the expiration of the employee’s probationary period. If the employee’s performance has been satisfactory, the appointing authority shall confer regular status upon the employee.

4 Pa. Code § 97.39.

Butler additionally contends that the Commission erred in determining that she was not a regular employee because in the March 28, 2007, letter demoting her, the County described her as returning to her previously held position of Clerk Typist 3, regular status. She argues that as a regular employee, she was entitled to a hearing under Sections 951(a)⁸ and 706(a) of the Act. In pertinent part, those sections provide as follows:

Section 951. Hearings ----

(a) Any regular employe in the classified service may . . . appeal in writing to the commission [from] . . . [a]ny permanent . . . demotion on the grounds that such action has been taken in his case in violation of the provisions of this act, *upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing.*

⁷ 71 P.S. § 741.603(b).

⁸ This section was added by the Act of August 27, 1963, P.L. 1257.

.....
Section 706. Demotions ----

(a) An appointing authority may demote to a vacant position in a lower class any employe in the classified service who does not satisfactorily perform the duties of the position to which the employe was appointed or promoted and who is able to perform the duties of the lower class. *In case of such demotion the employe shall have all rights of appeal as provided in this act. . . .*

71 P.S. §§ 741.951(a) and 741.706(a) (emphasis added).

In response, the Commission rejects Butler's contention that she automatically achieved regular status as a Clerical Supervisor 1 because her manager gave her a satisfactory evaluation and recommended that she be placed in regular status. Also citing *Peters*, the Commission maintains that no affirmative act occurred to confer regular status on Butler. It emphasizes that Butler has not identified any form of written notification showing that the County granted her regular status as a Clerical Supervisor 1. Butler in her original appeal form indicated that her latest civil service status was "probationary." It notes that this court in *Peters* held that, "the General Assembly did not intend that an employee be given the benefits of regular status with the mere passage of time." 659 A.2d at 69.

Moreover, the Commission rejects Butler's reliance upon the March 28, 2007, demotion letter wherein the County described her as returning to her previously held position of Clerk Typist 3, regular status. It maintains that Butler's argument is misleading in that the determinative status is the one attached to the position *from which* she was demoted (Clerical Supervisor 1), not the one *to which* she was demoted (Clerk Typist 3). Thus, the Commission contends that, as a probationary employee, Butler had to present sufficient allegations of discrimination on appeal. We agree.

In *Pennsylvania Department of Public Welfare v. State Civil Service Commission (Lane)*, 707 A.2d 589 (Pa. Cmwlth. 1998), this court considered what constituted an affirmative act in light of our holding in *Peters*. Already employed by the DPW, Lane was promoted to a new position and given a six-month probationary period. Three weeks before the expiration of that period, another man succeeded Lane's supervisor and decided to extend the probationary period to nine months in order to have additional time in which to fully evaluate Lane's performance. Lane appealed to the Commission, which determined that, because there was no indication that Lane's extended probationary period was based on merit factors, Lane's former supervisor would have given him a satisfactory rating had he conducted an evaluation. Thus, the Commission overruled the extension and ordered that Lane be granted regular status. The DPW appealed and this court reversed, concluding that, "[b]y [the Commission] substituting its inference as to what [the former supervisor] *might* have done in place of the duly authorized action of the agency, the Commission indirectly accomplished that which *Peters* forbids: construing the passage of time without negative action as the equivalent of affirmative action." *Id.* at 591 (emphasis in original).

In the present case, the certified record reflects that when the County chose to implement the manager's recommendation to demote Butler, the Director of County Personnel affirmatively acted by issuing a written letter to that effect, thereby notifying Butler of its decision. The record contains no similar written affirmation by the County following the manager's recommendation that Butler be placed in regular status.⁹ Thus, the Commission's determination that the manager's

⁹ The certified record reflects that the manager's only written action subsequent to the positive January 2007 PER but prior to the negative March 2007 PER was his February 2007 (Footnote continued on next page...)

recommendation was just that, a recommendation, and not an actual conferral of regular status as contemplated by 4 Pa. Code § 97.39, is supported by the record. Accordingly, we conclude that the Commission did not err in determining that Butler's civil service status was probationary.

II.

Butler next argues that the Commission erred in determining that she failed to present sufficient allegations of technical discrimination on appeal. She maintains that she clearly alleged violations, pointing to specific instances and dates. Further, she maintains that she was materially harmed by the violations, that she was allowed no opportunity to review or defend against unsubstantiated statements upon which the personnel action was based, that she was fiscally harmed by the violations, that she suffered harm to her reputation and that she was unfairly stigmatized by her removal from the Clerical Supervisor 1 position based on "unconfirmed reports of non-job related factors."

The Commission acknowledges that Butler made allegations in her request for an appeal that the County engaged in technical discrimination.¹⁰ Citing *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409 (Pa. Cmwlth. 1996), the Commission contends that Butler also was required to have alleged facts in her request indicating that she was harmed by the alleged technical violations. It points out that she did not include such allegations in either her request for an appeal or request for reconsideration, raising them for the first time in her brief to this court. Finally, the Commission maintains that, even if she had

(continued...)

written warning to Butler concerning her unacceptable behavior regarding the need to cover phones during lunch time.

¹⁰ Butler did not pursue her allegations of "traditional discrimination," e.g. race, gender.

pursued those allegations at all levels of the litigation, they would have been insufficient as too general and vague. We agree.

As the Commission notes, this court in *Price* held that the complaining individual had to present evidence that he “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 the individual could have been harmed but there is no way to prove that for certain.” *Id.* at 413 (emphasis in original). Butler’s specific allegations of technical rules violations are as set forth below.

Butler alleges that the County violated 4 Pa. Code § 99.14 (supervisor will show employee component parts of evaluation and employee will be given a chance to review those parts with the rater and reviewing officer) because a human resource representative, who was neither the rater nor the reviewing officer, delivered the March 2007 PER to her, and neither the rater nor the reviewing officer gave her the opportunity to review her PER with them. Initially, we note that the evaluation form bears a check box immediately under the signature line for the employee which states, “I would like to discuss this report with the reviewing officer yes no.” Neither box was checked, and on the signature line the notation appears, “refused to sign.” Moreover, even assuming for these purposes that she was denied an opportunity to meet with her supervisor, Butler has never suggested, even at this late date, how she was harmed by the failure to have the evaluation reviewed with her in person.

She also alleges that the County violated 4 Pa. Code § 99.11(b) (PERs will be based on job-related factors) because several components of the March 2007 PER were not related to her job. Having reviewed this evaluation, we fail to

understand this statement. It was a detailed review of Butler's work performance and we cannot discern any aspects unrelated to her job.

Butler next alleges that the County violated 4 Pa. Code § 105.3 (notice of involuntary demotion issued to regular employees shall include a clear statement of the reasons therefor). While the notice letter itself contained no reasons, it stated, "Your performance deficiencies are outlined in the enclosed Performance Evaluation Review and Narrative." C.R., Item No. 1; R.R. at 14a. As noted above, it clearly detailed her performance deficiencies. In addition, as the Commission points out, 4 Pa. Code § 105.3 applies only to *regular* employees, not probationers.

She also alleges violations of 4 Pa. Code § 105.5 (written notice of a personnel action shall be provided to employee at least one work day in advance of the effective date of the action), but, again, she fails to even suggest how she might have been harmed by such a violation.

Finally, she points out that because the County violated these notice regulations, its personnel action could be nullified. 4 Pa. Code § 105.1(b) (notice requirements are mandatory and failure to adhere to the same may nullify personnel action). However, 4 Pa. Code § 105.1 (b) provides that, "[f]ailure to adhere to the requirements set forth in this section and §§ 105.2—105.5 *may* nullify the personnel action." (Emphasis added). While the notice requirements of 4 Pa. Code § 105.1 are mandatory, noncompliance is not grounds for automatic nullification of the personnel action. *State Corr. Inst. at Pittsburgh, Dep't of Corr. v. Adamson*, 567 A.2d 763 (Pa. Cmwlth. 1989). This provision does not nullify the principle that harm must be shown. At all events, this provision is of no moment since there were insufficient allegations of technical violations.

III.

Butler finally argues that the Commission's denial of her request for a hearing violated her rights to due process, equal protection and deprived her of her property interest in her reputation.¹¹ These arguments are somewhat obscure and conclusory, but we will attempt to address them. With respect to her due process claim, the simple answer is that since her demotion was from a probationary assignment, she can assert no property right in that particular job, and so has no constitutional right to notice and a hearing following demotion to her previous position. Although she asserts a protected property right in her reputation, she fails to allege any way in which her reputation was damaged, other than by the demotion itself. To accept Butler's apparent premise that any adverse job action is subject to due process requirements because of some possible harm to the employee's reputation, would be to accord due process protection to all probationary employees in contravention of clearly settled law to the contrary.

As to equal protection, nothing in Butler's brief, let alone the record, suggests that any other person or group was treated differently. Her conclusory allegation that the Commission selectively enforced the Act is simply devoid of support.

Accordingly, we affirm the order of the Commission.

BONNIE BRIGANCE LEADBETTER,
President Judge

¹¹ In her brief to this court, Butler raises the additional argument of whether the County's demotion decision stigmatized her thereby depriving her of a liberty interest without due process of law. Because she did not pursue this contention at all levels of litigation, we conclude that she waived any right to raise it for the first time before this court. Pa. R.A.P. 1551(a).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daphne Y. Butler, :
 :
 Petitioner :
 :
 :
 v. : No. 1265 C.D. 2007
 :
 :
 State Civil Service Commission :
 (Delaware County Mental Health/ :
 Mental Retardation Unit), :
 Respondent :

ORDER

AND NOW, this 19th day of December, 2008, the order of the State Civil Service Commission in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge