

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ed L. Collins, :
Petitioner :
 :
v. : No. 1410 C.D. 2007
 : Submitted: April 7, 2008
State Civil Service Commission :
(Department of Public Welfare), :
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: May 1, 2008

Ed Collins petitions for review of an adjudication of the State Civil Service Commission (Commission) which upheld the Department of Public Welfare's (Department) suspension and removal of Collins from his probationary position as a purchasing agent. In doing so, the Commission dismissed Collins' appeal and held that his suspension and removal was not the result of racial discrimination or retaliation for his opposition to policies he perceived to be discriminatory. In this case we consider whether the Commission's adjudication was supported by substantial evidence.

Collins began employment with the Department on April 10, 2006, when he was appointed to the position of Purchasing Agent 2 in the Bureau of Contract Policy, part of the Department's Procurement Division. Collins was

appointed for a probationary period of six months. Collins supervised the Bureau's Specialized Services Section, which is the unit responsible for processing contracts, grants and other procurement documents for the Department. Collins' probationary period was eventually extended for an additional six months. During the extended probationary period, Collins was suspended pending investigation for allegedly falsifying information in the Department's Procurement Tracking System. Thereafter, Collins was removed from his position effective January 5, 2007, for (1) unsatisfactory performance during his probationary period, and (2) falsification of the Procurement Tracking System.

Collins appealed to the Commission pursuant to Section 951(b) of the Civil Service Act (Act), 71 P.S. §741.951(b).¹ He alleged that his removal was due to discrimination on the basis of his race, African-American, in violation of Section 905.1 of the Act, 71 P.S. §741.905a.² Collins also claimed that the Department retaliated against him for complaining about and opposing

¹ Act of August 5, 1941, P.L. 752, *as amended*, added by the Act of August 27, 1963, P.L. 1257. Section 951(b) states:

Any person who is aggrieved by an alleged violation of section 905.1 of this act 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).

² Section 905.1 was added by the Act of August 27, 1963, P.L. 1257. It states, in pertinent part:

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 ... race

....

71 P.S. §741.905a.

discriminatory practices. The Commission conducted hearings on March 19 and 29, 2007.

Collins appeared on his own behalf and was the only witness to do so. Collins testified that he was the only African-American employed as a Purchasing Agent in the Department's Bureau of Contract Policy. Collins claimed that when he was hired, he was not provided with any formal training. Rather, he was given a copy of a procurement manual and was told to direct any questions to his two subordinates, both of whom were more experienced than Collins. Collins described the initial working conditions as friendly and courteous. According to Collins, problems arose in July 2006 regarding his attendance at a series of monthly Business Exchange Breakfasts sponsored by the Governor's Advisory Commission on African-American Affairs.

Collins attended the Business Exchange Breakfast in June 2006, with the permission of his supervisor, Daniel Boyd, Director of Procurement. Approximately one week before the July breakfast, Collins provided Boyd with a copy of the event flyer as notice that he would be attending. The day before the July breakfast, Boyd returned the flyer to Collins with a note indicating that Collins would have to use leave to attend. After he attended the breakfast, Collins requested a meeting with Boyd's supervisor, Kevin Friel, the Director of the Bureau of Contract Policy, to discuss what he perceived as a contradiction between Boyd's position and the Department's policy for attending such events. Collins testified that he was troubled by Boyd's views on minority businesses and felt that his Bureau's leave policy was discriminatory insofar as he believed other Department employees did not have to use leave to attend the breakfasts.

Collins also testified about problems he perceived with his training, which he repeatedly voiced to Boyd and Friel. Collins stated that he was not granted approval for training courses conducted outside of the Harrisburg area; he was instead advised that he could attend training when it was available locally. Collins testified that during this period, several white employees received training, two of whom were hired after him and one of whom was his subordinate.³ Collins stated that he approached Friel about training and Friel indicated that Collins would be notified in the future of training, but this never happened.

Collins testified that during this time period Boyd began to criticize his work. Collins believed that he was making “normal mistakes” that could easily be corrected or which had no major consequence to the Department. Nevertheless, Collins felt that Boyd’s tone was a reaction to his opposition to what Collins believed were “discriminatory policies.” Notes of Testimony, March 19 and 29, 2007, at 31-32 (N.T. ___).

Collins testified that he submitted a copy of the flyer for the September Business Exchange Breakfast to Boyd approximately one week before the event. Collins attended the breakfast, which was held in Pittsburgh, and did not arrive at work until 12:00 p.m. or 1:00 p.m. Upon his return, Collins retrieved an e-mail from Boyd implying that Boyd was not aware of his absence and that an explanation was required as to Collins’ whereabouts that morning. Collins met with Boyd and Friel to discuss the matter, at which time he voiced his concerns

³ These employees are David Kern, Mac Spiker, Teddi Szymanski and Gloria Wilbur. Spiker and Szymanski were allegedly hired after Collins and Wilbur was his subordinate. Notes of Testimony, March 19 and 29, 2007, at 27-28 (N.T. ___).

regarding Boyd's views on minority and women-owned businesses. According to Collins, Friel was not responsive and attempted to "turn this into a communication issue." N.T. 37. Collins testified that he believed this was a harassment meeting and that Friel was supporting Boyd's position without commenting on Collins' concerns about the Procurement Division's views of minority and women-owned businesses. Collins believed that the issue of whether he was required to use leave to attend the breakfasts had been settled in his favor by the Department's Human Resources department.

Collins discussed a performance evaluation he received on September 29, 2006. Collins received an overall rating of "unsatisfactory." He met with Boyd and Friel regarding the evaluation and he testified that the meeting did not go well and that Boyd "pretty much badger[ed] my performance" for 45 minutes. N.T. 43. Friel adjourned the meeting after the exchange became heated. At a private meeting with Friel the next day, Collins reiterated his concerns regarding his training and career development. He stated that "[t]here's something else going on in this Bureau with Dan Boyd and others." N.T. 44. Collins added that "an African-American doing the same thing as a white individual is perceived differently and [Boyd] was proceeding in that manner with me in the Bureau...." N.T. 45. Collins informed Friel that he felt "barriers are being created ... and in my opinion it can only be race." N.T. 47.

Collins' probationary period was extended for six months following his performance evaluation. Boyd developed a work plan to address Collins' performance deficiencies. Collins reviewed the work plan and submitted responses to Boyd. Collins felt that the work plan contained discriminatory language and

held him to a higher standard than other employees in the unit. For example, Collins addressed a statement forbidding him from sending emails that were antagonistic in nature; he contended that the statement “implied something that only applied for Ed Collins. Ed Collins is the only one who [is] antagonistic.” N.T. 63. Collins also believed a statement regarding the distribution of work in his section implied that he was not doing enough work. Collins asserted that no white supervisors were being similarly micro-managed. Collins testified that Boyd did not discuss his responses and asked him to sign a final version of the work plan that incorporated only a few adjustments as per Collins’ suggestions and which contained the same discriminatory language. Collins did not sign the work plan.

Collins was suspended from his position pending investigation on November 20, 2006. The stated reason for the suspension was Collins’ “alleged falsification of the Procurement Tracking System on November 3, 2006.” Commission’s Exhibit A. The Department’s Procurement Tracking System is a database which is used to record and monitor the internal processing of contract documents through the required reviews and approvals. According to Collins, anyone in the Department could access the Procurement Tracking System to determine the status of a particular document. There were no guidelines for how the system was to be used, and information in the system could be changed freely by anyone having access.

Collins testified that his suspension pertained to an assignment received by his unit on or about October 11 involving a transfer of contract funds from one vendor to another. Collins delegated the assignment to himself. Collins testified that, at some point, he was contacted by Boyd regarding the status of the

document. At that time Collins checked the tracking system, which indicated that the document went to Legal Counsel, which was “somewhere it shouldn’t have gone.” N.T. 73. Collins testified that when he cross-referenced his own records,⁴ they indicated that the document had not gone to Legal Counsel but had gone to the Comptroller. Collins contacted Legal Counsel and was advised they did not have the document; he informed Boyd of this fact and, on or about November 3, they concluded the document was lost. Collins then “updated the tracking system” and resubmitted copies of the documents from his own records. N.T. 74, 75. Collins testified that he removed information regarding the initial submission of the assignment and “updated to what the current status was on the tracking system as to where the document as of a new particular date was routed.” N.T. 80-81. Collins stated that he was unaware of any rule requiring that all information relating to the initial submission be retained and that he had made similar adjustments in the past.

Boyd and Friel appeared on behalf of the Department and testified regarding Collins’ attendance at the Business Exchange Breakfasts and his requests for additional training. As for the breakfasts, Boyd testified that initially he was unfamiliar with the nature of these events and that he made a series of inquiries to determine whether Collins needed to use leave to attend the June breakfast. After he contacted the Department’s Bureau of Human Resources, Boyd concluded that Collins’ attendance at the breakfasts was not work-related. Collins objected to

⁴ Collins testified that his first action upon receiving the assignment was to create an “MR Report,” which he described as “essentially the exact documents that we prepared before forwarding the document for approval ... in case something gets lost.” N.T. 72.

using leave, prompting Boyd to contact the Governor's Office. Boyd learned that if Collins was invited to the breakfasts he would not have to use leave to attend. Collins was not required to use leave to attend the June and July breakfasts; he did not attend the August breakfast.

Boyd recalled receiving a copy of the flyer for the September breakfast from Collins. Boyd testified that he discarded the flyer without reading it and was therefore unaware that this breakfast was to be held in Pittsburgh. Boyd assumed all of the breakfasts were held in Harrisburg. Boyd acknowledged sending an email to Collins on the morning of the breakfast inquiring as to his whereabouts, and that Collins responded that he had been travelling back from Pittsburgh. Boyd recalled a contentious meeting with Collins and Friel following the September breakfast; however, they did not require Collins to use leave to travel to or attend that event. Collins was never disciplined for attending any of the Business Exchange Breakfasts.

With respect to Collins' training, Boyd testified that he had served in Collins' position for three years prior to Collins' appointment. Boyd testified that he had numerous one-on-one discussions and training sessions with Collins and provided "hands-on training for just about every document that he was to process in the performance of his duties." N.T. 302. Boyd also gave Collins a desk reference guide for most of the documents he would have to process. Boyd and Friel did not approve the additional training requested by Collins because it was intended for his own personal development and was not required for the performance of his duties. Boyd and Friel also declined to approve training that would require out-of-town travel, especially since the courses selected by Collins

were sponsored by the Department and would eventually be offered in Harrisburg. Boyd and Friel expressly denied approving training for any other employees under their supervision, including white employees, during the time period in question.

Boyd testified at length about Collins' job performance and the circumstances surrounding the extension of his probation. Boyd noticed performance issues shortly after Collins was appointed. These included internet usage at unauthorized times and being away from his desk for extended periods of time making personal calls on his cell phone. Boyd testified that, notwithstanding his hands-on training, Collins' handling of his work was "sloppy, inconsistent. Supervisory things weren't being done very well. His communications ... were very poor." N.T. 306. Boyd recalled having numerous conversations and meetings with Collins regarding his performance issues.

Boyd testified that Collins' September 29 evaluation rated his performance as "unsatisfactory" due to Collins' inattention to detail, his neglect of his supervisory responsibilities, his poor communication skills, and his inability to process documents correctly. N.T. 313. As a result, Collins was placed on an extended probationary period and received a work plan designed to provide him with the guidance he needed to achieve satisfactory performance. Boyd testified that the quality of Collins' work during the extended probationary period did not improve.

Boyd and Friel testified regarding the incident with the Procurement Tracking System that led to Collins' suspension and removal. As stated previously, Collins did not deny that he made modifications to the tracking log. According to Boyd, internal emails as well as time-stamped copies of the

document at issue demonstrated that although Collins logged the document out to Legal Counsel on October 13, it never left his desk. This kind of mishandling of documents was one of the performance issues that Collins had been warned about, and Boyd surmised that Collins altered the tracking information so no one would know his errors caused the delay in processing. Boyd testified that Collins' obfuscation of the status of the document delayed payment to the vendor for approximately six weeks. When asked why Collins was suspended, Boyd replied, "[b]asically, I couldn't trust him anymore." N.T. 338.

Friel echoed many of Boyd's observations. Friel was most troubled by the fact that on two occasions during the investigation Collins claimed that he had no record of the document being returned to his unit. The physical records indicated, however, that Collins was twice in possession of the document when it was supposedly lost. In Friel's view, the issue surrounding the log had less to do with protocol and more to do with integrity and honesty. Friel testified that he had no trust in the Bureau's recordkeeping as a result of this incident.

Based upon the evidence of record, the Commission determined that Collins established a *prima facie* case of racial discrimination. Nonetheless, the Commission held that the Department presented sufficient non-discriminatory reasons for its actions, and that those were in fact the reasons for Collins' removal. Accordingly, the Commission dismissed Collins' appeal. Collins now petitions this Court to review the Commission's adjudication.

We begin with the standard of proof for analyzing claims of traditional discrimination arising under Section 905.1 of the Act, 71 P.S. §741.905a.⁵ This standard has been articulated as follows:

If the plaintiff produces sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred, the defendant must be heard in response. Absent a response, the “presumption” of discrimination arising from the plaintiff's *prima facie* case stands determinative of the factual issue of the case. In other words, if the employer rests without producing evidence, the plaintiff must prevail if he or she has produced sufficient evidence to make out a *prima facie* case. If, however, the defendant offers a non-discriminatory explanation for the dismissal, the presumption drops from the case. As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then “decide which party’s explanation of the employer's motivation it believes.”

Henderson v. Office of the Budget, 560 A.2d 859, 863 (Pa. Cmwlth. 1989) (quoting *Allegheny Housing Rehabilitation Corp. v. Pennsylvania Human Relations Commission*, 516 Pa. 124, 131, 532 A.2d 315, 319 (1987)). In applying the

⁵ Section 905.1 states, in pertinent part:

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 ... race
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71 P.S. §741.905a.

foregoing standard, we are mindful that “[j]udging issues of credibility and resolving evidentiary conflicts are functions of the Commission and not this Court.” *Silvia v. Pennhurst Center, Department of Public Welfare*, 437 A.2d 535, 536 (Pa. Cmwlth. 1981). “This Court will not weigh, but only examine the evidence before it and will not substitute its judgment for that of the Commission.” *Id.*

Before this Court,⁶ Collins argues that the Commission’s adjudication was not supported by substantial evidence. He contends that the evidence proved that the stated reasons for his removal – unsatisfactory performance and falsification of the Procurement Tracking System – were a pretext for discriminating against him on the basis of his race. Collins also maintains that the Commission erred in finding that his removal was not the result of retaliation for engaging in protected activities.

Collins first asserts that, contrary to the Commission’s findings, the evidence of record demonstrated that both of the proffered reasons for his discharge were pretextual. Beginning with the Procurement Tracking System log, Collins maintains that he never denied altering the tracking information; therefore, he was not dishonest. Collins suggests that Boyd and Friel claimed this was an

⁶ Our review is limited to determining whether constitutional rights have been violated, errors of law have been committed, or whether the findings of the Commission are supported by substantial evidence. *Cola v. State Civil Service Commission (Department of Conservation and Natural Resources)*, 861 A.2d 434, 436 (Pa. Cmwlth. 2004). The reviewing court is not directed to inquire into the Commission’s adjudication, but rather only to determine whether it was supported by substantial evidence. *Id.* Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quoting *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 275, 501 A.2d 1383, 1387 (1985)).

issue of honesty and integrity only because there was a lack of proof that he falsified the log. Collins also argues that there were no policies against updating the log to reflect the actual status of a project.

Collins' arguments are without merit. There was more than substantial evidence to support the Commission's finding that Collins falsified the information in the Procurement Tracking System log. The Commission credited Boyd's testimony that Collins mishandled the underlying documentation and then altered the tracking information so no one would know his errors caused a six-week delay in the payment of a vendor. Boyd's testimony was further corroborated by internal emails, time-stamped copies of the documents, and the testimony of Sallie Rodgers, Senior Assistant Counsel in the Department's Office of Legal Counsel.⁷ That Collins admitted to altering the log in no way diminishes the fact that his motive for doing so was dishonest. Moreover, the Commission disbelieved Collins' explanation that he modified the log merely to reflect his resubmission of the documents he had initially received on October 11. We agree with the Commission that the Department's allegation that Collins falsified the Procurement Tracking System log was not pretextual and that that incident, standing alone, was sufficient to justify Collins' removal.

Collins also maintains that the second proffered reason for his removal, unsatisfactory performance, was pretextual. Collins cites statements by both Boyd and Friel that they thought highly of Collins and expected him to someday rise to the position of Assistant Director or Director of Procurement.

⁷ Rodgers testified that there was no record that the documents were forwarded to her office, as noted by Collins on the original log. The Commission found Rodgers to be a credible witness.

Collins believes the preponderance of the evidence actually demonstrated that his performance was satisfactory.

Collins' selective view of his supervisors' initial impressions of him does not establish discrimination by a preponderance of the evidence. The testimonial evidence overwhelmingly supported the Department's view that Collins' performance was unsatisfactory. Boyd testified credibly that Collins' handling of his work was "sloppy" and "inconsistent;" his supervisory skills were deficient; he demonstrated poor communication skills; and he was unable to process documents correctly. N.T. 306. Boyd also testified that the quality of Collins' work did not improve during the six-month extended probationary period. We agree with the Commission that the Department's unsatisfactory performance rating was not pretextual and was supported by a preponderance of the evidence.

Collins' second issue before this Court concerns a retaliation claim he presented to the Commission as an alternative ground for relief. The Commission analyzed Collins' claim using the standard for retaliation claims adopted by the Pennsylvania Human Relations Commission. Under that standard,

[a] *prima facie* case of retaliation requires a complainant to show that: (i) she was engaged in a protected activity; (ii) her employer was aware of the protected activity; (iii) subsequent to participation in the protected activity complainant was subjected to an adverse employment action; and (iv) there is a causal connection between participation in the protected activity and the adverse employment action.

Spanish Council of York, Inc. v. Pennsylvania Human Relations Commission, 879 A.2d 391, 399 (Pa. Cmwlth. 2005). Collins agrees with the standard but argues that it was misapplied. Specifically, Collins contends that the Commission did not

address whether he engaged in “protected activity.” As best we can tell from Collins’ brief, he believes that the “protected activity” was his attendance at the Business Exchange Breakfasts and his complaints to his supervisors regarding allegedly discriminatory practices, such as denying him additional training. Collins believes that the temporal proximity of his negative performance review to these activities demonstrates retaliation.

Assuming *arguendo* that the activities identified by Collins were “protected,” we agree with the Commission that Collins’ evidence failed to show a causal connection between his removal and any of those activities. Regarding the use of leave to attend the Business Exchange Breakfasts, Collins admitted that he learned about the breakfasts through his role as president and founder of Blacks in Government, not through his Department employment. Nonetheless, Collins’ supervisors never denied him permission to attend the breakfasts, never disciplined him for doing so, and never required him to use leave, even when he traveled back and forth to Pittsburgh for the September 2006 breakfast. Their concerns and inquiries regarding the Department’s leave policy for the breakfasts were all resolved in Collins’ favor. In short, the Commission properly concluded that Collins presented no credible evidence linking his removal to objections he made to the Department’s leave policy.

As for Collins’ training-related complaints, the Commission found, as fact, that Boyd provided the necessary training to Collins and was qualified to do so since he had served in the same position for three years. The additional training courses that Collins wished to attend were for his own personal development and not necessary for his specific job. His supervisors denied his request to attend the

courses for budgetary reasons, because out-of-town travel would have been required. Instead, Collins' supervisors asked him to wait until the courses were offered in the Harrisburg area. Again, the Commission correctly found, based on the evidence before it, that there was no causal connection between Collins' removal and his objections to his supervisors' training decisions. "Temporal proximity," standing alone, is insufficient.

For all of the foregoing reasons, we affirm the order of the Commission.

MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ed L. Collins,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1410 C.D. 2007
	:	
State Civil Service Commission	:	
(Department of Public Welfare),	:	
Respondent	:	

ORDER

AND NOW, this 1st day of May, 2008, the order of the State Civil Service Commission in the above-captioned matter, dated June 29, 2007, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge