

225a.) The letter also “stressed that under normal circumstances, [Farr] would have received at least a one-day suspension for [his] conduct.” Id.

On January 5, 2000, SCI-Chester suspended Farr for one day because he was either tardy or absent without leave nine times in 1999. On April 16, 2000, SCI-Chester suspended Farr for three days because he was tardy and absent without leave. On November 3, 2000, SCI-Chester suspended Farr for five days due to unacceptable attendance.

In a letter dated May 17, 2002, SCI-Chester notified Farr that he was terminated from his position as a corrections officer. The letter stated that “[t]he reason for your removal is ongoing lack of dependability characterized by tardiness, excessive use of non-prescheduled leave and unauthorized (AW) absences. With the most recent violation occurring on March 29, 2002” (R.R. at 275a.) The letter also listed the previous suspensions imposed because of Farr’s absences and tardiness.

Thereafter, on November 30, 2005, Farr completed an application for employment at the State Correctional Institution at Graterford (SCI-Graterford). A background investigation of Farr revealed that he had a 2005 warrant for his arrest, resulting from a parking ticket which he ultimately paid. The investigation also revealed that Farr had been removed from SCI-Chester for poor attendance.

Subsequently, the officials at SCI-Graterford requested that Farr’s name be deactivated from the List, primarily because of his poor attendance record at SCI-Chester. The Corrections Officer Trainee Background Review Panel (Panel), comprised of representatives from the Department, the Pennsylvania State Police and the Commission, then reviewed Farr’s information. The Panel concluded that Farr should be removed from the List.

In a letter dated June 9, 2006, the executive director of the State Civil Service Commission notified Farr that he concurred with the decision of the Panel to remove Farr's name from the List. The following reasons were given for the removal of Farr's name:

2005 - Lansdowne Borough, PA: Cited for parking violation and arrest warrant issued. Offense not listed on Department of Corrections Application for Employment;

2002 - State Correctional Institution-Chester: Removed for attendance issues after being suspended on three different occasions for the same reason;

1999 - Philadelphia, PA: Arrested for recklessly endangering and possessing instrument of crime. Found guilty, paid fines and costs, and placed on one year probation.

(R.R. at 176a.) Farr appealed to the Commission, challenging the deactivation of his name from the List. A hearing was thereafter held by the Commission. The Commission determined that Farr failed to present evidence establishing discrimination. As such, the Commission dismissed his appeal. This appeal followed.¹

We initially observe that Section 905.1 of the Civil Service Act (Act), Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §741.905(a), provides that:

No officer or employee of the Commonwealth shall discriminate against any person in recruitment,

¹ This court's review is limited to determining whether constitutional rights have been violated, errors of law committed, or whether the findings are supported by substantial evidence. Pennsylvania Game Commission v. State Civil Service Commission (Toth), 561 Pa. 19, 747 A.2d 887 (2000).

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.

“The term ‘non-merit factor’ is not defined by the Civil Service Act but in Balas v. Department of Public Welfare, 128 Pa. Commonwealth Ct. 205, 214, 563 A.2d 219, 223 (1989), this court announced that merit criteria relevant to the proper execution of the employee’s duties, are job related, and touch in some logical and rational manner upon competency and ability.” State Correctional Institution at Pittsburgh, Department of Corrections v. Weaver, 606 A.2d 547, 549 (Pa. Cmwltth.), petition for allowance of appeal denied, 531 Pa. 648, 612 A.2d 986 (1992).

Here, Farr maintains that the Commission erred in refusing to give collateral estoppel effect to a prior determination of a Workers’ Compensation Judge (WCJ) concerning one of his absences while employed by SCI-Chester. Specifically, a hearing was conducted before a WCJ “to determine if Farr injured his left wrist while performing work duties on February 26, 2002.” (R.R. at 217a.) The WCJ concluded that Farr did suffer a work-related injury. Moreover, although Farr was terminated from SCI-Chester because he failed to report his absence on March 29, 2002, the WCJ determined that medication prescribed to Farr for his injury prevented him from calling off of work that day. In effect, the WCJ concluded that Farr’s absence of March 29, 2002 was caused by the work injury.

Farr argues that his March 29, 2002 absence was determined by the WCJ to be related to his work injury inasmuch as the medicine he took for his work injury prevented him from working or reporting his absence on March 29, 2002. Because the WCJ determined that Farr’s absence on March 29, 2002 was

excusable, Farr argues that penalizing him for his failure to do that which he was incapable of doing, i.e., report off work on March 29, 2002, constitutes discrimination based on a non-merit factor.

The Commission responds that a judgment in a prior action operates as an estoppel in a subsequent action if the matters at issue are identical, were actually litigated, were essential to the judgment and were material to the litigation. Morrison v. Department of Corrections, 659 A.2d 620 (Pa. Cmwlth. 1995). Here, the issues before the WCJ and Commission are not identical. Specifically, the WCJ observed that “the central issue at bar concerns whether Abraham A. Farr injured his left wrist while performing work duties on February 26, 2002. If so, the Court will address the relationship of post May 10, 2002, wage loss to the work injury and extent/severity of all resulting disability.” (R.R. at 217a.) In contrast, the issue before the Commission was “whether appellant has established that the appointing authority deactivated his name from the Corrections Officer Trainee eligible list for reasons motivated by discrimination.” (R.R. at 186a.) We agree with the Commission that the issues were not identical.

Moreover, even if the March 29 absence was excused, such does not affect Farr’s other absences which are substantial evidence that supports the findings.² Prior to his discharge, Farr had been suspended on other occasions due to his absences. Paul Horvath, a member of the Panel which concluded that Farr should be removed from the List, testified that the most important factor he considered in his recommendation to remove Farr from the List was the fact that Farr was not dependable. (R.R. at 99a.) Furthermore, even if Farr’s absence of March 29, 2002 was excused, Horvath testified that such would not have an impact

² As noted by the Commission, there was no appeal filed by Farr challenging his removal.

on his recommendation inasmuch as Farr had been suspended numerous other times for his absences. (R.R. at 113a.)

Farr also maintains that it was error to consider his 1999 arrest for recklessly endangering and possessing an instrument of crime. Although Farr was prosecuted for the charges, Farr maintains that such charges occurred while he was employed at SCI-Chester and that in a pre-disciplinary conference concerning the charges, it was decided that “[d]ue to the time frame involved, no discipline is being issued.” (R.R. at 225a.) Because the incident had been fully investigated by SCI-Chester and determined to be unworthy of imposing any discipline, Farr argues that consideration of the same charges is akin to double jeopardy and constitutes discrimination on non-merit factors. We disagree.

“[T]he Commonwealth does not abuse its discretion when it investigates an applicant’s criminal background and evaluates that background for circumstances that might weigh against qualification. A record of one or more arrests may not be considered a merit factor disqualifying a candidate for most civil service positions, but it may be a disqualifying factor for the position of corrections officer.” Commonwealth v. Krempowsky, 698 A.2d 144, 146 (Pa. Cmwlth. 1997). In Krempowsky, this court determined that the Commonwealth properly considered Krempowsky’s arrest record, which was expunged, and the circumstances surrounding the arrest. We concluded that the Commonwealth did not discriminate against Krempowsky with respect to his application and retention on the eligibility list because of a non-merit factor.

Moreover, contrary to Farr’s argument, SCI-Chester did not conclude that no discipline was warranted. Rather, SCI-Chester stated that because of the time frame involved, no discipline was being issued.

Finally, Farr maintains that the Commission erred in admitting and relying upon evidence which was beyond the scope of the originally articulated reasons for deactivating Farr's name from the List. Specifically, Farr points to the following testimony from Horvath, who was questioned as to why he voted to remove Farr's name from the List. Horvath testified as follows:

Because I felt it wasn't – his credibility was already – he was already given a chance at SCI-Chester. He proved that he was undependable. And with the facilities running it the way they do run, 7/24, 365 days a year, we need officers to be there.

We need officers to be on time. We need officers to have to be there. By someone not showing up, it causes more conflict in our facilities, it causes more hardship on the other officers there,

Also one thing that played into it as well, like I said, is dependability, but the anger management with the crime that he was convicted – that he pled guilty of, the discharging of a firearm, shows that his anger management was in question.

Something that we feel considering how we place inmates and staff are placed in our officers' hands and their lives, as well as the public, and –

(R.R. at 87a, 88a.) Counsel for Farr then responded “Objection. Move to strike the testimony regarding anger management as not being one of the reasons for disqualification.” (R.R. at 88a.) Counsel for the Department responded “I'm fine with the motion to strike.” (Id.) The Commission Chairman overruled the objection and stated “[w]e're going to take it in as part of the record noting your objection.” (Id.)

Because Counsel for the Department did not object to the motion to strike, Farr argues that it was error for the Commission to consider the testimony. We agree with the Commission that the question posed i.e., the reason he

recommended Farr's removal from the List and Horvath's response thereto including his belief that discharge of a firearm showed that Farr had anger management issues, was within the discretion of the Commission to admit and consider. Evidentiary matters and determinations as to witness credibility are within the exclusive province of the Commission. Masneri v. State Civil Service Commission (Western Center, Department of Public Welfare), 712 A.2d 821 (Pa. Cmwlth. 1998).

In accordance with the above, the decision of the Commission is affirmed.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Abraham A. Farr, | : | |
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| Petitioner | : | |
| | : | |
| v. | : | No. 1504 C.D. 2007 |
| | : | |
| State Civil Service Commission | : | |
| (Department of Corrections), | : | |
| Respondent | : | |

ORDER

Now, April 24, 2008, the Order of the State Civil Service Commission, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge