

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda J. Lashinsky,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1572 C.D. 2007
	:	
State Civil Service Commission	:	Submitted: December 28, 2007
(Bedford-Somerset County Mental	:	
Health/Mental Retardation Unit),	:	
	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: March 7, 2008

In this Petition for Review, Linda J. Lashinsky (Petitioner) challenges the Order of the State Civil Service Commission (Commission) denying her a hearing on her appeal of her non-selection for promotion to County Casework Manager 1, regular status, with the Bedford-Somerset County Mental Health/Mental Retardation Unit (Employer), pursuant to 4 Pa. Code § 105.12(c). Petitioner argues that her appeal to the Commission contained sufficient averments which, if

proven, would show that Employer discriminated against her on the basis of non-merit factors. For the following reasons, we affirm the Commission's Order.

Petitioner worked for Employer as a County Casework Supervisor from September 1, 2004. In May 2007, Petitioner applied for a position with Employer as a County Casework Manager 1. Petitioner interviewed for the position on May 16, 2007. On May 18, 2007, Employer's Human Resource Director informed Petitioner that she was not selected for the County Casework Manager position. Petitioner filed an Appeal Request Form, dated May 24, 2007 (May Appeal Form), which the Commission received on June 4, 2007.¹ Under Part II of the May Appeal Form, Petitioner indicated that she had been furloughed. Petitioner left the space under Part II, asking for the reasons for the appeal of her furlough, blank.

Under Part III of the May Appeal Form, Petitioner indicated that she had not been appointed to the County Casework Manager 1 position. Under the section headed "Type of Discrimination Alleged," Petitioner checked the box for "Other Non-Merit Factors (Explain)." In the space provided for an explanation of the discrimination she was alleging, Petitioner incorporated a signed typewritten statement. In this statement, Petitioner described her duties as a County Casework Supervisor. Petitioner stated that, in October 2006, Employer told her that her employment would be terminated as of July 1, 2007 because Employer would be contracting out some of the duties of her position. Petitioner recounted the posting of the County Casework Manager 1 position, her application for this position, and

¹ The Commission designated this appeal as Appeal No. 25333.

her interview. Regarding the discrimination she alleged, Petitioner stated merely “I believe that I was not selected for this position for reasons other than [sic] merit and qualifications. I believe this decision was made due to personal based reasons. I believe that I was not selected due to personal reasons other than [sic] merit.” (Attachment to May Appeal Form.)

Petitioner filed a second Appeal Request Form with the Commission, dated July 5, 2007 (July Appeal Form).² In the July Appeal Form, Petitioner more specifically protested her furlough. In an attachment Petitioner stated that, on June 18, 2007, Employer officially notified her of her furlough, effective July 2, 2007. Petitioner gave the following reasons for her second appeal:

I do not believe that I am being furloughed due to a lack of work or a lack of funds. Bedford-Somerset MH/MR continues to have my job duties completed by the newly created County Casework Manager 1 position. This newly created position was recently filled by another employee of the agency. I have previously forwarded to the commission an appeal challenging my non-selection for this position.

Furthermore, I believe that fiscal data of the employer will establish the furlough of my position was not due to a lack of work or a lack of funds.

(Attachment to July Appeal Form.)

On July 18, 2007, the Commission entered an Order denying Petitioner’s request for a hearing regarding her non-selection to the County Casework Manager 1 position on the grounds that she had not sufficiently described acts by Employer

² The Commission designated this appeal as Appeal No. 25262.

which would constitute discrimination.³ On July 31, 2007, Petitioner filed a Petition for Reconsideration of the State Civil Service Commission Order of July 18, 2007 (Petition for Reconsideration).⁴ In this Petition for Reconsideration, Petitioner included more specific information regarding the basis for her appeal:

[Petitioner] believes and therefore avers that she was not selected for the position of County Casework Manager 1 for reasons other than merit criteria. Specifically, [Petitioner] believes and therefore avers that the individual chosen for this position was selected based on her personal relationships with the members of management who had decision making authority. In addition, [Petitioner] has significantly more experience than Billie Sujansky (the individual chosen) due to the fact that Ms. Sujansky had little or no prior experience with the oversight and administration of an Early Intervention Program and little or no knowledge of Act 212 or Federal and State guidelines, policies and procedures necessary to administer an Early Intervention Program for infants and toddlers with developmental disabilities. The aforementioned experience is part of the job description for County Casework Manager 1.

(Petition for Reconsideration ¶ 9.) The Commission denied the Petition for Reconsideration by letter dated August 16, 2007. Petitioner filed a timely petition for review of the Commission's Order of July 18, 2007, in which she argues that

³ This Order dealt only with Petitioner's May Appeal Form at Appeal No. 25333.

⁴ In this Petition for Reconsideration, Petitioner requested that her allegations of discrimination be incorporated into her July Appeal Form, at Appeal No. 25262. The record does not reveal what further action was taken by the Commission or by Petitioner on Appeal No. 25262, and Petitioner's Petition for Review deals only with her appeal of her non-promotion, Appeal No. 25333.

the Commission erred in not holding a hearing on her appeal because her appeal contained sufficient averments to state a claim for discrimination.⁵

On appeal, we must determine whether, based on the statements in the May Appeal Form, Petitioner alleged sufficient facts to indicate a violation of the Civil Service Act's (Act)⁶ prohibition against discrimination. The Commission's regulations require that requests for hearings on appeals alleging discrimination in violation of the Act state specific facts relating to the discrimination, including: "(1) The acts complained of. (2) How the treatment differs from the treatment of others similarly situated. (3) When the acts occurred. (4) When and how the appellant first became aware of the alleged discrimination." 4 Pa. Code § 105.12(c). The Commission may dismiss appeals which do not specifically allege facts which would constitute discrimination. Id.; see also Keim v. Department of Health, 543 A.2d 1261, 1264 (Pa. Cmwlth. 1988). Allegations which are unspecific and conclusory are insufficient to state a claim under the Act.⁷ Bellew v. State

⁵ In an appeal of a decision of the Commission, our "scope of review is limited to determining whether the Commission has violated constitutional provisions or committed an error of law, and whether findings of fact are supported by substantial evidence." Craig v. State Civil Service Commission (Department of Environmental Protection), 800 A.2d 364, 365 n.1 (Pa. Cmwlth. 2002).

⁶ Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §§ 741.1-741.1005.

⁷ The relevant section of the Act reads:

No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

Civil Service Commission, 543 A.2d 1266, 1268 (Pa. Cmwlth. 1988) (the Legislature did not intend “to permit appeals on the basis of generalized and conclusive allegations”); Pannacci v. State Civil Service Commission (Pannacci I), 516 A.2d 1327, 1330 & n.3 (Pa. Cmwlth. 1986) (statement in appeal that “[t]he guidelines promulgated for the selection process were not adhered to in choosing the chief pharmacist” was not sufficient to meet the requirements of Section 105.12(c)).

The Appeal Request Form provided by the Commission specifically prompts appellants to provide this information, stating:

M2. REASONS: ANSWER THE FOLLOWING QUESTIONS AS COMPLETELY AS POSSIBLE. FAILURE TO DO SO MAY RESULT IN DENIAL OF YOUR APPEAL. (Attach additional sheets if necessary.)

- A. What action(s) occurred which led you to believe you were discriminated against?
- B. Where and when did this action occur?
- C. Who discriminated against you? Provide name(s) and job title(s).
- D. Do you believe the Civil Service Act and/or Rules were violated? If so, what section(s)?
- E. Provide any other information which you believe is relevant.

(May Appeal Form.)

Section 905.1 of the Act, added by Section 25 of the Act of August 27, 1963, P.L. 1257, 71 P.S. § 741.905a.

Petitioner's May Appeal Form does not contain enough of the requested information to state a claim for discrimination pursuant to the Act. In the May Appeal Form, after Petitioner describes the duties of her position, she states:

On Friday 10/13/06, I was informed by our administrator Randy Hay that he planned to contract out the service provider piece of Early Intervention Services to a private contractor. During that meeting, I was informed that my employment with the agency would be terminated as of July 1st 2007. In January 2007, I was informed that the agency appointed an acting Early Intervention Coordinator. My responsibilities did not decrease, in reality they increased. I was instructed that I would be responsible to deliver direct special instruction to the children enrolled in our program. In April 2007 the agency posted the following position: County Casework Manager 1. Many of the job duties included in that posting mirrored my current job description. I contacted our Human Resources Department and expressed my interest in applying for the position. I was interviewed for the position on Wed. May 16th 2007. On Fri. May 18th, I was contacted by our Human Resources Director Pam Humbert and was informed that I was not selected for the position. I believe that I was not selected for this position for reasons other than [sic] merit and qualifications. I believe this decision was made due to personal based [sic] reasons. I believe that I was not selected due to personal reasons other than [sic] merit.

(Attachment to May Appeal Form.)

Examining this narrative through the lens of 4 Pa. Code § 105.12(c), we can infer that the act complained of was Petitioner's non-selection for promotion. However, Petitioner does not explain what actions, other than her non-selection for the County Casework Manager 1 position, led her to believe she was discriminated against. Additionally, Petitioner does not explain how she was treated differently from others similarly situated to her, nor does she explain how she became aware of the discrimination she alleges. See 4 Pa. Code § 105.12(c). Moreover, Petitioner failed to comply with the instructions provided on the Appeal Request

Form seeking factual information surrounding the alleged discrimination. For instance, Petitioner does not allege a particular section of the Act or Rules of the Civil Service Commission were violated. Additionally, while Petitioner states that Employer's Human Resources Director communicated the decision of her non-selection to her, Petitioner does not explain who made the decision or who she believes discriminated against her. Further, while Petitioner makes the bald and conclusory assertions that the decision regarding her non-selection was made for personal reasons not having to do with merit, she does not explain what she believes those personal reasons were or even *whose* personal reasons they were. Given this lack of information we cannot say that the Commission erred in determining that Petitioner had failed to allege sufficient facts to state a claim under the Act, as required by 4 Pa. Code § 105.12(c) and requested on the Appeal Request Form.

Petitioner argues that the averments in her Petition for Reconsideration were sufficient to meet the requirements of 4 Pa. Code § 105.12(c).⁸ However, none of the facts alleged in the Petition for Reconsideration were presented to the Commission when it made its determination regarding the merits of Petitioner's appeal of her non-selection to the County Casework Manager 1 position. "This Court will not consider facts which were not of record before the Commission in determining whether the Commission properly dismissed an appeal." Behm v.

⁸ In the reproduced record attached to her brief, Petitioner also includes job descriptions for herself and Billie Sujansky. As these documents are not part of the original record in this matter, we cannot consider them. See City of Chester v. Chester Redevelopment Authority, 686 A.2d 30, 32 n.2 (Pa. Cmwlth. 1996) (stating that documents which were not part of the original record "must be stricken from the reproduced record").

State Civil Service Commission, 494 A.2d 1166, 1168-69 (Pa. Cmwlth. 1985). Therefore, we may not consider whether those facts were sufficient to meet the requirements of 4 Pa. Code § 105.12(c).

The Commission denied the Petition for Reconsideration on August 16, 2007. The Commission's decision on a Petition for Reconsideration is a separate adjudication from an order disposing of a request for appeal. See Muehleisen v. State Civil Service Commission, 443 A.2d 867, 869 (Pa. Cmwlth. 1982) (determining that where a petitioner had timely appealed only the Commission's denial of reconsideration, and not the underlying dismissal of petitioner's appeal, only the denial of reconsideration was before this Court). When a denial of reconsideration is appealed to this Court, we apply a different, and very deferential, standard of review—abuse of discretion—than when we review the dismissal of an appeal on the merits. However, in her Petition for Review to this Court, Petitioner only seeks review of the Commission's Order of July 18, 2007; she does not ask us to review or reverse the Commission's denial of her Petition for Reconsideration, dated August 16, 2007. We are presented with the reverse situation as in Muehleisen; Petitioner has petitioned for review of the denial of her appeal, but not for review of the denial of her Petition for Reconsideration. Because Petitioner has not petitioned for review of the Commission's denial of reconsideration on August 16, 2007, we may not review whether the Commission abused its discretion in denying reconsideration.

For these reasons, we affirm the Order of the Commission.

RENÉE COHN JUBELIRER, Judge

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	:	
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ORDER

NOW, March 7, 2008, the Order of the State Civil Service Commission, dated July 18, 2007, in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge