

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Arlene Dabrow,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1722 C.D. 2007
	:	SUBMITTED: March 7, 2008
State Civil Service Commission	:	
(Lehigh County Area Agency on	:	
Aging),	:	
	:	
Respondent	:	

OPINION NOT REPORTED

**MEMORANDUM OPINION
PER CURIAM**

FILED: May 29, 2008

Arlene Dabrow (Dabrow), acting *pro se*, petitions for review from the August 9, 2007 order of the State Civil Service Commission (Commission) that dismissed her appeal challenging her removal from employment as an Aging Care Manager 2 with the Lehigh County Area Agency on Aging (County) and sustained the County’s action in removing her from that position. We affirm.

The pertinent facts as found by the Commission are as follows. After interviewing Dabrow for the position of Aging Care Manager 2, the County initially declined to hire her because the Aging Care Manager Supervisor did not believe that she was qualified for the position. The duties of the position were to visit elderly people in their homes, assess their needs and devise treatment plans. After Dabrow complained to the Commission, the County hired her and she began working in probationary status in November 2005. At that time, Dabrow was sixty-five years old.

By letter dated August 30, 2006, the County advised Dabrow that, effective July 19, 2006, it removed her from the Aging Care Manager 2 position. The reasons enumerated were a failure to follow policies and procedure set forth in the Pennsylvania Department of Aging Waiver Program Manual, failure to comply with and/or explain consumers' medical diagnosis thereby placing them at high risk, failure to follow office protocols on signing out/completing itinerary before leaving the office, failure to consult agency nurse appropriately on consumers' medical issues, inappropriately intervening in medical decision-making and failure to produce a minimally acceptable quantity and quality of work in the position at issue.

Dabrow filed an appeal with the Commission alleging that the County discriminated against her on the basis of age, disability and religious opinions/affiliations. She also alleged technical discrimination based on violations of the Civil Service Act (Act)¹ and its rules. In summary, Dabrow maintained that the County failed to afford her proper training or supervision and treated her differently from the other case managers.

The Commission held hearings on November 6, 2006 and January 19, 2007. Dabrow testified on her own behalf and the County presented the testimony of Aging Care Manager Supervisor Mawhinney and Registered Nurse Supervisor Stanczak. Based on evidence adduced at the hearings, the Commission determined that Dabrow failed to present evidence establishing discrimination violative of Section 905.1 of the Act,² which provides as follows:

¹ Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1-741.1005.

² This section was added by Section 25 of the Act of August 27, 1963, P.L. 1257.

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.

71 P.S. § 741.905a. Accordingly, the Commission dismissed her appeal and sustained the County's action in removing her from the Aging Care Manager 2 position. Dabrow's timely petition for review to this court followed.

The issues as set forth by Dabrow are as follows: 1) whether the Commission capriciously disregarded documentary evidence; 2) whether it abused its discretion in rendering credibility determinations; and 3) whether it violated Dabrow's constitutional rights by denying her request to retain another attorney to conduct proper cross-examination of certain witnesses.³

As an initial matter, we note that Section 603(a) of the Act, pertaining to probationary employees, provides in relevant part that "[a]t any time during the probationary period, the appointing authority may remove an employe if in the opinion of the appointing authority the probation indicates that such employe is unable or unwilling to perform the duties satisfactorily or that the employe's dependability does not merit continuance in the service." 71 P.S. § 741.603(a). "[A] probationary status employe 'does not enjoy the job security afforded persons on regular status, who may be removed only for just cause.'" *Department of Health v. Nwogwugwu*, 594 A.2d 847, 849 (Pa. Cmwlth. 1991) (citation omitted).

³ As we previously noted, Dabrow is pursuing her petition for review before this court in a *pro se* capacity. We note, however, that one attorney represented her at the two hearings before the Commission and that a second attorney submitted briefs to the Commission on her behalf.

Dabrow first argues that the Commission erred in capriciously disregarding documentary evidence by either ignoring or misconstruing the evidence submitted at the two hearings. In addition, Dabrow has appended documents to her brief that are not part of the certified record, arguing that they refute the County's "fallacious accusations." These additional documents, *inter alia*, include suggested cross examinations for her first attorney and documentary evidence that the first attorney allegedly agreed to introduce but did not.

In response, the County maintains that Dabrow has failed to cite evidence from the actual certified record in support of her allegations,⁴ instead making voluminous references in her brief to statements and allegations that are not part of the record. The County asserts that Dabrow's failure to properly cite the record makes it impossible to differentiate between the actual evidence of record and Dabrow's desired version of events. Accordingly, the County urges this court to disregard any new documentation that Dabrow has included in her brief in an attempt to introduce new evidence to support her theories.

Pennsylvania Rule of Appellate Procedure 2101 permits this court to suppress a brief that does not conform in all material respects to the requirements of the appellate rules. If the defects are substantial, this court is permitted even to dismiss a petitioner's appeal. This court is reluctant, however, either to suppress a brief or to dismiss an appeal if petitioner's efforts provide some basis for meaningful appellate review. Therefore, we will not suppress Dabrow's brief. To the extent, however, that she has appended documents to her brief that are not part of the certified record, e.g. suggested cross examinations for her first attorney and documentary evidence that the first attorney allegedly agreed to introduce but did

⁴ Pa. R.A.P. 2119(c).

not, we suppress those documents as being *de hors* the record. Pa. R.A.P. 1551(a) (“[r]eview of quasijudicial orders shall be conducted by the court on the record made before the government unit.”)

As for Dabrow’s argument that the Commission capriciously disregarded documentary evidence of record, we note that “[a]n agency capriciously disregards competent evidence when it arrives at a decision where the losing party has presented overwhelming evidence that could require the agency to arrive at a different outcome that the agency has not addressed by resolving critical conflicts in the evidence or [by] mak[ing] essential credibility determinations.” *Frog, Switch & Mfg. Co. v. Pennsylvania Human Relations Comm’n*, 885 A.2d 655, 667 (Pa. Cmwlth. 2005). After carefully reviewing the transcripts, exhibits and the Commission’s adjudication, we conclude that this is not one of those rare instances where an agency such as the Commission ignored critical overwhelming evidence or “palpably . . . failed to give a proper explanation of overwhelming critical evidence.” *Id.* at 667. To the contrary, we agree with the County that the Commission in this case issued a comprehensive adjudication. Accordingly, we decline to reweigh the documentary evidence of record and substitute our discretion for that of the Commission as the final arbiter of evidence. *Rocuzzo v. Workers’ Comp. Appeal Bd. (Sch. Dist. of Phila.)*, 721 A.2d 1171 (Pa. Cmwlth. 1998).

Dabrow next argues that the Commission abused its discretion in rendering its credibility determinations. Specifically, she maintains that it rested its decision on what she characterizes as the fabricated testimony of the County’s witnesses. In response, the County maintains that credibility determinations are for the Commission. In *Masneri v. State Civil Service Commission*, 712 A.2d 821,

823 (Pa. Cmwlth. 1998), this court noted that the Commission is the sole fact-finder in civil service cases and that, accordingly, the “resolution of evidentiary conflicts and determinations as to witness credibility are within the exclusive province of the commission.” It is not the role of this court on appeal to delve into the veracity of the witnesses’ testimony.

Finally, Dabrow contends that the Commission violated her constitutional rights by denying her request to retain another attorney to conduct proper cross-examination. As background for this argument, we note that the certified record contains a January 24, 2007 faxed message from Dabrow to the Commission requesting that it keep the record open in order for her to find an attorney to mount a vigorous defense. Specifically, Dabrow alleged in that message that she learned on January 19, 2007, that her then attorney had a conflict of interest in that he was simultaneously representing her and Mark Albright, the County’s Executive Director of Area Agency on Aging/Adult Services.

The Commission denied her request, pointing out that it had discretion as to whether to reopen a record or rehear an appeal.⁵ It observed that “[t]here were no obvious, observable deficiencies in the manner in which your attorney represented you at the hearing.” Commission’s February 28, 2007 Denial, Certified Record (C.R.) Tab 4. It noted that the record was created over two days and involved more than ten hours of transcribed testimony that amounted to 469 pages. In addition, the Commission pointed out that Dabrow failed to recite in her request any specific examples of how her first attorney’s alleged conflict of interest manifested itself into ineffective assistance of counsel. Finally, it advised her that

⁵ *Fritz v. Dep’t of Transp.*, 468 A.2d 538 (Pa. Cmwlth. 1983).

she would have three weeks in which to either obtain another attorney or file her brief.

From the certified record, it is apparent that Dabrow retained a second attorney to represent her. In June 2007, that second attorney submitted two briefs to the Commission on behalf of Dabrow: an initial brief of twenty-five pages and a subsequent six-page brief in response to the County's brief. C.R. Tabs 5 and 7. This court finds it highly significant that nowhere in those two briefs did the second attorney even allude to any alleged deficiency in the first attorney's cross-examination of the witnesses. Accordingly, even though Dabrow in her *pro se* petition for review to this court raised the failure of the first attorney to properly cross-examine the witnesses, we must conclude that she waived such issue on appeal for failure to preserve it throughout the litigation and by virtue of the fact that there is no indication that the issue could not have been preserved by the exercise of due diligence.⁶ *See* Pa. R.A.P. 1551(a)(3).

Accordingly, for the above reasons, we affirm the Commission's order.

⁶ Dabrow alleged that she learned of the first attorney's conflict of interest on January 19, 2007. The second attorney filed briefs on her behalf in June 2007.

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	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 29th day of May, 2008, the order of the State Civil Service Commission in the above captioned matter is hereby AFFIRMED.