

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda J. Lashinsky,	:	
Petitioner	:	
	:	
v.	:	No. 610 C.D. 2008
	:	
State Civil Service Commission	:	Submitted: September 5, 2008
(Bedford-Somerset Mental	:	
Health/Mental Retardation Unit),	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: November 20, 2008

Linda J. Lashinsky (Petitioner) petitions for review of an order of the State Civil Service Commission (Commission) that dismissed her appeal challenging her furlough from employment as a County Casework Supervisor with the Bedford-Somerset County Mental Health/Mental Retardation (MH/MR) Unit (Appointing Authority). The Commission held Appointing Authority established a lack of work sufficient to justify a furlough under Section 802 of the Civil Service Act.¹ Petitioner asserts the record does not support the Commission's conclusion that Appointing Authority furloughed her for lack of work as a result of a reorganization effort. Discerning no error, we affirm.

¹ Act of August 15, 1941, P.L. 752, as amended, 71 P.S. §741.802

The Commission found the following facts. Petitioner worked for Appointing Authority for approximately 30 years prior to her July 2007 furlough. Since September 1, 2004, Petitioner served as a County Casework Supervisor in Appointing Authority's Early Intervention (EI) Program. The EI Program is a service program for infants and children up to three years of age who either are at-risk² or have disabilities.³

Prior to Petitioner's furlough, Appointing Authority structured its EI Program as follows. An Administrator and Deputy Administrator 2 directed the EI Program in both Bedford and Somerset counties. Below that level, separate EI staff performed functions in each county. In Bedford County, a Deputy Administrator 1 supervised Petitioner in her position as County Casework Supervisor. Petitioner supervised four County Caseworker 2 positions, a Speech, Language and Hearing Specialist 1, and a Clerk Typist 2. Two of the County Caseworker 2 positions worked as service providers. Somerset County operated under a similar structure.

² See 55 Pa. Code §4226.5 ("at-risk child" defined).

³ Prior to October 2006, Appointing Authority's EI Program performed four functions: it implemented Multi-Disciplinary Evaluations; provided direct services to clients; monitored the services provided; and performed an oversight function to ensure monetary allocation. An MDE consisted of identifying a child in need of EI services and performing an evaluation or assessment of the services required by the child. Direct services provided to clients and their families included speech therapy, occupational therapy and physical therapy. Although Appointing Authority contracted with a provider to perform physical therapy, Appointing Authority's employees provided the other direct services. Monitoring the program consisted of case management. Service coordinators ensured that children and their families actually received the services they needed. Oversight consisted of ensuring proper allocation of money and availability of needed services.

EI Programs are monitored by Department of Public Welfare Office of Child Development (OCD), which annually reviews each county's program. Regulations governing EI evaluation and assessment require that each county's program ensure the "initial MDE [Multi-Disciplinary Evaluation] is conducted by personnel independent of service provision." 55 Pa. Code §4226.61(a)(2). In previous years, Appointing Authority obtained an annual waiver of this requirement due to a lack of available resources of qualified personnel with experience serving young children with disabilities.

In June 2006, OCD personnel met with Appointing Authority and encouraged it to secure an independent evaluator and to contract with community service providers instead of using agency employees as service providers. As of July 2006, Appointing Authority remained the only EI Program in the state using its employees to provide direct services to clients. On July 1, 2006, Appointing Authority applied for a waiver of 55 Pa. Code §4226.61(a)(2) for the 2007 fiscal year. OCD granted the waiver contingent on Appointing Authority's efforts to secure the services of an independent evaluator to conduct the initial MDEs. In approving the waiver, OCD required Appointing Authority to submit documentation of its efforts. Appointing Authority also met with OCD, which explained how other counties structured their EI Programs.

Thereafter, Appointing Authority decided to reorganize its EI Program to become more efficient and more closely resemble EI Programs in other counties. The reorganization reduced the number of positions in the program. Appointing Authority decided to contract out two components of the EI Program: the provision of direct services and the performance of MDEs. However, it would

continue to perform the service management, monitoring, and case management functions with its own staff.

Appointing Authority also merged the separate Bedford and Somerset programs into a single program with an EI Coordinator, a “County Casework Manager 1” who supervises the service coordinators and case managers. The EI Coordinator reports to Appointing Authority’s Administrator and Deputy Administrator.

Appointing Authority’s reorganization resulted in the elimination of 12 positions, including Petitioner’s County Casework Supervisor position. The EI Coordinator would perform some administrative duties Petitioner previously performed such as collecting EI data and reporting it to DPW.

In October 2006, Appointing Authority’s Human Resources Director advised the EI Program staff that the new structure would be in place by July 2007 at which time there would be furloughs. Petitioner met the minimum qualifications for a County Caseworker position. Between October 2006 and July 2007, Appointing Authority posted 17 County Caseworker vacancies. Initially, consideration of candidates was limited to current EI Program staff in Bedford and Somerset counties. If no EI Program staff bid for a vacancy, Appointing Authority reposted the vacancy and opened bidding to all qualified employees.

Petitioner did not apply for any of the County Caseworker vacancies. Rather, Petitioner applied for the EI Coordinator position, but she did not get it. Appointing Authority ultimately selected an individual who was not an EI Program employee at the time of hire. Appointing Authority began operating under the new

structure in July 2007. It ultimately furloughed four employees. Petitioner challenged her furlough in an appeal to the Commission.

Following an evidentiary hearing, the Commission sustained the furlough on the basis Appointing Authority established a valid lack of work. More particularly, the Commission determined Appointing Authority met the three-part test established in Department of State v. Stecher, 506 Pa. 203, 484 A.2d 755 (1984), for justifying a furlough based on lack of work. An appointing authority demonstrates a lack of work by showing (1) it eliminated the employee's position; (2) reorganizational streamlining occurred; and (3) it held a good faith belief that its work could be accomplished more efficiently in the absence of the eliminated position. Id.

Here, the Commission found Appointing Authority presented credible evidence that it reorganized the structure of its EI Program to improve the delivery and choice of services available to clients, to bring its EI Program in line with those of other counties, and to bring Appointing Authority into compliance with DPW regulations requiring MDEs to be performed by an independent evaluator. The Commission further concluded that although the EI Coordinator performed some of the duties Petitioner previously performed, the EI Coordinator position is not the same as Petitioner's County Casework Supervisor position. Instead, the EI Coordinator is responsible for programs in both Bedford and Somerset counties, does not directly supervise service providers, and has a range of other duties not previously performed by a County Casework Supervisor.

Consequently, the Commission held Appointing Authority established a lack of work justifying Petitioner's furlough under Section 802 of the Civil Service Act. Petitioner appeals.⁴

I. Arguments

Petitioner asserts Appointing Authority failed to establish it furloughed her due to lack of work. She maintains Appointing Authority's position is not supported by the record. Petitioner further asserts Appointing Authority presented no evidence showing it could no longer obtain waivers of the regulatory requirement that initial MDEs must be performed by an independent evaluator. In addition, Petitioner asserts Appointing Authority failed to justify her furlough because the new EI Coordinator position performed substantially the same duties as Petitioner's County Casework Supervisor position.

Appointing Authority counters the record contains substantial evidence supporting the Commission's decision that it furloughed Petitioner for lack of work as part of a good faith reorganization intended to enhance efficiency and comply with EI Program regulations. Additionally, Appointing Authority raises a legal challenge to Petitioner's contention regarding the substantial similarity between duties performed by the current EI Coordinator and those she performed previously. Appointing Authority asserts this contention is essentially a collateral attack on this Court's decision in Lashinsky v. State Civil Serv. Comm'n (Lashinsky I) (Pa. Cmwlth., No. 1572 C.D. 2007, filed March 7, 2008). In

⁴ Our review of a Commission adjudication is limited to determining whether the Commission's findings of fact were supported by substantial evidence or whether it erred as a matter of law, or violated an appellant's constitutional rights. Woods v. State Civil Serv. Comm., 590 Pa. 337, 912 A.2d 803 (2006).

Lashinsky I, we rejected Petitioner’s claim that Appointing Authority, in not selecting her for the EI Coordinator position, discriminated against her on the basis of non-merit factors.

III. Discussion

Section 3(s) of the Civil Service Act, defines “furlough” as “the termination of employment because of lack of funds or of work.” 71 P.S. §741.3(s). Where the validity of a furlough is challenged, the appointing authority bears the burden of justifying the furlough. 4 Pa. Code §105.15; Haskins v. Dep’t of Env’tl. Res., 636 A.2d 1228 (Pa. Cmwlth. 1994). An appointing authority meets this burden by showing it eliminated the employee’s position; a reorganizational streamlining occurred; and management in good faith believed the work could be accomplished more efficiently in the absence of the eliminated position. Id.

“An agency can create a valid ‘lack of work’ furlough by either contracting out services previously performed by the furloughed employee or by eliminating the duties performed in order to enhance operational efficiency and secure cost savings under the [Civil Service] Act.” Id. at 1229. “[W]hen an agency determines that necessary work can be performed adequately with fewer employees, thus saving Commonwealth funds, that agency is obliged to ‘tighten up’ its work force by eliminating excess positions.” Id.

Here, Petitioner asserts the record does not support the Commission’s findings that Appointing Authority’s reorganization of its EI Program improved efficiency. She further asserts Appointing Authority did not provide any evidence indicating the EI Program operated in an inefficient manner and did not provide any examples of how the program could be run more efficiently.

Petitioner further asserts Appointing Authority presented no evidence that it could not continue to obtain an annual waiver of regulation, and nothing in OCD's correspondence required a reorganization of the EI program. Also, Petitioner asserts she provided uncontested testimony indicating the EI Coordinator performed substantially the same duties as her County Casework Supervisor position. Thus, Petitioner contends there is no evidence supporting the Commission's finding that there were differences between the two positions. Petitioner therefore maintains the Commission erred in concluding a lack of work existed. We disagree.

As the sole fact-finder in civil service cases, the Commission has exclusive authority to assess witness credibility and to resolve evidentiary conflicts. Hetman v. State Civil Serv. Comm'n (Berks County Children & Youth), 714 A.2d 532 (Pa. Cmwlth. 1998). However, the Commission's findings must be supported by substantial evidence. Haskins. "Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion reached." 636 A.2d at 1230.

In addition, we examine the evidence, and all reasonable inferences arising therefrom, in a light most favorable to the prevailing party. Hetman; Martin v. State Civil Serv. Comm'n (Dep't of Cmty. & Econ. Dev.), 741 A.2d 226 (Pa. Cmwlth. 1999). With these principles in mind, we review the record.

Appointing Authority presented testimony from its Deputy Administrator 2, Mary Piatt-Bruner (Deputy Administrator) and its Human Resources Director, Pam Humbert (HR Director).

Deputy Administrator testified as follows. The EI Program is a local intervention program for infants and toddlers up to three years of age who are at-risk or have disabilities. Notes of Testimony, 11/20/07, (N.T.) at 11-12. Prior to October 2006, Appointing Authority's employees performed all four primary EI functions. Id. at 12. Inherent conflicts sometimes arose when Appointing Authority employees performed the evaluations and directly provided services. Id. at 14. In addition, by performing both functions, Appointing Authority failed to comply with the regulation requiring the initial MDE be conducted by independent personnel. Id.

Also, administrative oversight and monitoring were fragmented. Id. Appointing Authority's program supervisors, fiscal officers, county managers and deputy administrators each performed some of the oversight and monitoring duties. Id. at 14-15.

Moreover, families had a lack of choice in service providers. Id. at 14. OCD encouraged Appointing Authority to look for community service providers. Id. As part of an annual review, Appointing Authority's staff met with OCD staff in June 2006. Id. at 19. OCD informed Appointing Authority that they were the only county where MH/MR employees directly provided EI services to clients. Id. In October 2006, Appointing Authority decided to restructure its program so it would be similar to programs in other counties. Id. at 20. It met with its EI staff on or about October 13, 2006 to inform them the decision was made. Id.

Appointing Authority ultimately decided to contract out the provision of direct services and the performance of evaluations. Id. at 24. It opted to include an EI Coordinator, a position included in most other counties' programs. Id. at 26. Appointing Authority believed its restructuring would eliminate fragmentation of duties and its EI program would be more organized and efficient. Id. This reorganization would bring Appointing Authority's EI Program in line with those in other counties and provide clients with a choice of service providers. Id. at 27, 32-33.

Because Appointing Authority contracted out the provision of direct services, Petitioner, a County Casework Supervisor, no longer supervised the actual service providers. Id. at 28. This constituted the bulk of Petitioner's duties. Id.

Deputy Administrator also testified as to several differences between the EI Coordinator position and Petitioner's County Casework Supervisor position. The EI Coordinator is classified differently; it is considered an administrative position. Id. at 28-29. The EI Coordinator monitors contract compliance in both counties and answers directly to the Deputy Administrator. Id. In contrast, Petitioner worked only in Bedford County and supervised caseworkers providing speech and hearing services. Id. at 29. Those services are now contracted out; the EI Coordinator does not directly supervise care providers. Id.

Nevertheless, Deputy Administrator testified the EI Coordinator did perform some of Petitioner's former duties, including supervision of case management duties and reporting duties. Id. at 30.

Deputy Administrator further testified as to the success of the reorganization. Appointing Authority secured an independent evaluator and several service providers. Id. at 32. Also, Appointing Authority received positive feedback from the state level. Id.

HR Director also testified concerning the reorganization and furlough procedures. In October 2006, she met with both the Bedford and Somerset staff and advised them of potential furloughs in July 2007; Appointing Authority identified 12 positions for furlough. Id. at 73-76. It eliminated the two County Casework Supervisor positions and the Speech, Language and Hearing Specialist positions. Id. at 84. Appointing Authority ultimately furloughed four individuals, including Petitioner. Id. at 82-83. In the nine-month period from October 2006 to Petitioner's furlough in July 2007, Appointing Authority posted 17 vacancies for County Caseworker positions and, for each position, initially limited consideration to EI staff members in order to retain them. Id. at 76. Petitioner did not apply for any of these positions. Id. at 78. Rather, Petitioner applied for the EI Coordinator position, but was not selected. Id. at 78.

The above testimony supports the Commission's findings that Appointing Authority's management, in good faith, eliminated Petitioner's County Casework Supervisor position as part of a streamlined reorganization. The record clearly indicates Appointing Authority's EI program, as formerly structured, failed to comply with regulations requiring initial MDEs be performed by independent evaluators, not EI staff. See 55 Pa. Code §4226.61(a)(2). Although Appointing Authority obtained waivers of this requirement in past years, the 2007 waiver was conditioned on Appointing Authority's documented efforts at compliance. See N.T., Ex AA-3. As part of its reorganization, Appointing Authority obtained the

services of an independent evaluator and is now in compliance with 55 Pa. Code §4226.61(a)(2).

The record also indicates Appointing Authority's reorganization of its EI program did in fact eliminate administrative and operational inefficiencies. The EI Program's administrative oversight function is no longer fragmented among numerous employees. "An appointing agency of the Commonwealth ... has the responsibility to determine what work, in its judgment, is necessary to be performed and how that work can be performed most efficiently." Haskins, at 1230. See also Stecher (it is a managerial prerogative to reallocate work to enhance operational efficiency).

In addition, as part of Appointing Authority's reorganization, it contracted out the service provision component of its EI Program, which resulted in a greater choice of service providers for its clients. Prior to its reorganization, Appointing Authority's EI Program was the only one in the state in which EI staff directly provided instructional, speech and hearing services to clients. As a result, Appointing Authority eliminated one of Petitioner's primary duties, supervision of its service providers. This constituted the bulk of Petitioner's duties.

Appointing Authority also established that the EI Coordinator position is not the same as Petitioner's County Casework Supervisor position. The EI Coordinator is classified differently; it is an administrative, not a supervisory position, and answers directly to the Deputy Administrator. The EI Coordinator monitors contract compliance and performs administrative oversight functions not performed by a County Casework Supervisor. For the most part, Petitioner

supervised service providers in Bedford County. Because Appointing Authority contracted out the service provision component, these duties are completely gone.

Therefore, although the EI Coordinator does perform some duties Petitioner performed, including supervising case management reporting information to DPW, the Commission did not err in concluding that the EI Coordinator is not the same position as Petitioner's County Casework Supervisor position. The mere fact that some duties performed by a furloughed employee were reassigned to other personnel is not indicative that sufficient work exists for the furloughed employee to perform. Stecher.

Moreover, Appointing Authority made a good faith effort to retain Petitioner. Nevertheless, an appointing authority is not required to fill a vacancy by promoting a furloughed employee. Snyder v. Dep't of Transp., 441 A.2d 494 (Pa. Cmwlth. 1982).

In sum, the Commission's findings are supported by the record. Matters of witness credibility, evidentiary conflict and evidentiary weight are with the province of the Commission, not this Court. Hetman; Martin; Haskins. Thus, we discern no error in the Commission's determination that Appointing Authority established a lack of work justifying Petitioner's furlough. Stecher; Haskins. Accordingly, we affirm the Commission's order.

ROBERT SIMPSON, Judge

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 : Petitioner :
 :
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 :
 : State Civil Service Commission :
 : (Bedford-Somerset Mental :
 : Health/Mental Retardation Unit), :
 : Respondent :

ORDER

AND NOW, this 20th day of November, 2008, the order of the State Civil Service Commission is **AFFIRMED**.

ROBERT SIMPSON, Judge