

APPENDIX A
Supreme Court of Pennsylvania
Middle District
No. 419 MAL 2019

MING WEI, Petitioner,
v.
STATE CIVIL SERVICE COMMISSION
(PENNSYLVANIA DEPARTMENT OF HEALTH),
Respondent.
January 22, 2020

Ming Wei, for Petitioner, Pro Se.

Jonathan David Koltash, PA Department of
Health, for State Civil Service Commission
(Department of Health), Respondent.
Yvette Marie Kostelac, PA Department of Health,
for State Civil Service Commission (Department of
Health), Respondent.

Petition for Allowance of Appeal from the Order of
the Commonwealth Court.

ORDER
PER CURIAM.

AND NOW, this 22nd day of January, 2020, the
Petition for Allowance of Appeal is DENIED.

APPENDIX B
Commonwealth Court of Pennsylvania
No. 1321 C.D. 2018

Ming Wei, Petitioner,
v.
State Civil Service Commission (Pennsylvania
Department of Health), Respondent.

June 21, 2019

Ming Wei, for Petitioner, Pro Se.

Jonathan David Koltash, PA Department of
Health, for Respondent, Pennsylvania Department
of Health.

ORDER

NOW, June 21, 2019, upon consideration of
petitioner's application for reconsideration, the
application is denied.

APPENDIX C
Commonwealth Court of Pennsylvania.
No. 1321 C.D. 2018

Ming Wei, Petitioner,
v.
State Civil Service Commission (Pennsylvania
Department of Health), Respondent.

Submitted: March 1, 2019.
Filed: May 9, 2019.

Ming Wei, for Petitioner, Pro Se.

Jonathan David Koltash, PA Department of
Health, for Respondent, Pennsylvania Department
of Health.

OPINION NOT REPORTED
MEMORANDUM OPINION

PER CURIAM.

Ming Wei (Wei) petitions for review of the September 20, 2018 order of the Pennsylvania State Civil Service Commission (Commission) denying Wei's motion to reopen his case and determining that his alleged newly discovered evidence was available to him when he filed previous motions to reopen based upon alleged newly discovered evidence.

Background and Procedural History

This matter is one of now four related appeals filed by Wei, *pro se*, from orders of the Commission initially dismissing Wei's appeal challenging his termination and denying his three subsequent motions to reopen the case based on alleged newly discovered evidence. Wei appealed the Commission's first three orders to this Court and each time we affirmed. Wei now seeks review of the September 20, 2018 order of the Commission denying his third motion to reopen and determining that none of Wei's alleged newly discovered evidence was unavailable to him at the time he filed his prior motions to reopen.

This Court's decisions in those prior appeals, *Wei v. State Civil Service Commission (Department of Health)*, 961 A.2d 254 (Pa. Cmwlth. 2008) (*Wei I*), *Wei v. State Civil Service Commission (Department of Health)* (Pa. Cmwlth. No. 263 C.D. 2015, filed September 18, 2015) (*Wei II*), and *Wei v. State Civil Service Commission (Department of Health)* (Pa. Cmwlth. No. 1902 C.D. 2016, filed September 1, 2017) (*Wei III*), establish the following history of this dispute.

Wei worked as an epidemiologist and was the data manager for the Pennsylvania Department of Health's (Department) human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS) epidemiology team. Wei was responsible for transferring data to different formats. On May 16, 2007, Wei was given a direct order to complete the 2005 backlog data assignment within six weeks. By letter dated September 4, 2007, Wei was discharged from employment, effective

September 7, 2007, for insubordination and unsatisfactory work performance.¹ The termination letter stated that Wei failed to complete the backlog data format conversion assignment given to him by July 21, 2007. *Wei II*, slip op. at 2.

Wei appealed his discharge to the Commission which, following a hearing, dismissed the appeal by adjudication and order dated March 7, 2008. Specifically, the Commission stated as follows:

The [C]ommission finds that the appointing authority's evidence established that by failing to complete the HARS² HIV/AIDS data conversion assignment, [Wei] exhibited unsatisfactory work performance and insubordination. [Employer's Witnesses] credibly testified that this assignment was [Wei's] responsibility, and his alone. [Employer's witness'] credible testimony, and the evidence offered by the April 9, 2007 e-mails, shows that [Wei] was insubordinate in refusing for six months to accept this responsibility and complete the assignment. We are not persuaded by [Wei's] arguments that his failure to complete

¹ Wei had previously received written reprimands on April 4, 2007, for failing to attend a pre-scheduled team meeting without notifying his supervisor; May 23, 2007, for failing to complete his work on time; and July 2, 2007, for sending an inappropriate e-mail to his supervisor alleging an abusive work environment that caused him to have health problems. Wei had previously been suspended from July 23-27, 2007, for failure to complete the 2005 backlog data task, inappropriate behavior, and insubordination. *Wei II*, slip op. at 2.

² The HARS acronym appears to refer to the "HIV/AIDS Reporting System." (Reproduced Record (R.R.) at Doc. B, p. 14.)

his assignment was not his fault, but rather, the fault of the appointing authority. [Employer's witness] offered ample, credible, evidence that she helped [Wei] with the assignment by transferring some of his job duties to other staff members as he requested, thereby lightening his workload. We also accept as credible [Employer's witness'] testimony that she did not stop [Wei] from training other people to help him with his duties, nor did she deny [Wei] any training he may have needed to complete the assignment. The Commission is not persuaded by [Wei's] argument that he needed more time and more help to complete the assignment, especially in view of the fact that he did not show any significant progress on it for six months, and we accept [Employer's witness'] testimony that he did not show her the 424,498 records that he claimed he converted. The picture that emerges from the testimony is one of consistent insubordination and unsatisfactory work performance in that despite the appointing authority's help, and a written reprimand and a suspension, [Wei] neither completed nor made any substantial progress toward completing the assignment by the July 31, 2007 deadline.

[Wei's] insubordination and unsatisfactory work performance provided just cause for his removal because it had a direct impact on his job performance, and directly involves his competence and ability as an Epidemiologist.

Wei II, slip op. at 2-3 (quoting Commission's adjudication and order at 24-25).

In *Wei I*, this Court affirmed the Commission's denial of Wei's appeal challenging his termination. Specifically, we held that the Commission did not err in: determining that Wei was not entitled to an interpreter at the Commission's hearing pursuant to 28 U.S.C. §1827; limiting the testimony to only questions and responses concerning the data conversion process to be used by Wei during the time period that he was assigned his tasks that he did not successfully complete; crediting the testimony of the Department's witnesses; determining that Wei was given ample time and resources to complete his tasks; determining that Wei's removal was not discriminatory; and concluding that the Department's witnesses offered consistent testimony during the Commission's hearing and the hearing before the Unemployment Compensation Board of Review. *Wei I*, 961 A.2d at 255-61.

On December 17, 2014,³ Wei filed a motion with the Commission to reopen the case based on

³ Wei filed suit in United States District Court for the Middle District of Pennsylvania on April 13, 2011, alleging violations of Title VII for retaliation and national origin/racial harassment and discrimination; the Civil Rights Act of 1964, 42 U.S.C. §§1983, 1985, for defamation and intentional infliction of emotional distress; the Pennsylvania Human Relations Act (PHRA), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951-963, based on discipline during his employment and termination; and the United States Constitution for deprivation of property/due process. On June 6, 2012, the district court dismissed his counts under 42 U.S.C. §1983 for intentional infliction of emotional distress, discipline, and termination; his PHRA counts; and his deprivation of property/due process claim. *Wei v. Pennsylvania Department of Health*, No. 1:11-CV-688, 2012

alleged newly discovered evidence. By order dated January 21, 2015, the Commission denied the motion. Citing *Fritz v. Department of Transportation*, 468 A.2d 538 (Pa. 1983), the Commission found that Wei's alleged newly discovered evidence, *inter alia*, internal e-mail conversations that both included and did not include Wei, meeting minutes, and Department policies and reports, was neither concealed by fraud nor otherwise unavailable to be discovered by Wei at the time of his original administrative hearing. Accordingly, the Commission determined that the alleged newly discovered evidence did not meet the standard necessary to grant Wei's motion to reopen the case. On February 10, 2015, Wei filed an application for reconsideration, which the Commission denied by letter dated March 12, 2015. Wei filed a petition for review with this Court as well as a separate motion for sanctions. *Wei II*, slip op. at 4.

In *Wei II*, we affirmed the Commission's denial of Wei's application to reopen the case. In doing so,

WL 2049488 (M.D. Pa. June 6, 2012). The status of this case is unclear from the record.

Wei also filed a complaint against the Department and various Department employees in the Dauphin County Court of Common Pleas on July 22, 2011, challenging his dismissal. By order dated August 25, 2014, the common pleas court dismissed Wei's complaint for lack of jurisdiction based on Wei's failure to effectuate proper service of the complaint. Wei appealed to this Court, and, on June 18, 2015, we affirmed the order of the common pleas court. *Wei v. Department of Health*, (Pa. Cmwlth., No. 1500 C.D. 2014, filed June 18, 2015).

we reasoned that Wei filed his motion to reopen after an adjudication had been issued and that the Commission did not abuse its discretion in determining that his alleged newly discovered evidence was not fraudulently concealed or otherwise unavailable at the time of his original administrative hearing. The Court also denied Wei's motion for sanctions in an order dated September 22, 2015. Wei then filed a motion for reconsideration and a petition for allowance of appeal,⁴ both of which were denied.

On September 21, 2016, Wei filed a second motion to reopen the case, arguing that newly discovered evidence contradicted key testimony of the Department which supported the just cause to terminate him. On November 18, 2016, the Commission again dismissed Wei's appeal, stating the following:

This is [Wei's] second request for the Commission to Reopen and reconsider its original adjudication of this 2007 appeal based on alleged "newly discovered evidence." The Commission has carefully reviewed [Wei's] current motion and finds therein no evidence that was not also available to [Wei] when his previous motion to reopen this appeal based on newly discovered evidence was filed by him on December 17, 2014. That motion was denied by the Commission by Order dated February 6, 2015. . . . In the absence of any additional evidence which was not

⁴ *Wei v. State Civil Service Commission (Department of Health)*, 134 A.3d 58 (Pa. 2016) (unpublished table decision).

already available to [Wei] for inclusion in his December 17, 2014 Motion to Reopen, this second Motion to Reopen is found to be frivolous and is accordingly denied on that basis.

The appointing authority has asked the Commission to bar [Wei] from filing another future Motion to Reopen, but has cited no legal authority which would empower the Commission to issue such an order; nor is the Commission aware of any statute conferring upon it such power. Accordingly, the appointing authority's request is denied. However, the Commission notes that this Motion to Reopen is frivolous and that it will also find similar Motions to Reopen filed in the future which are also not supported by actual new evidence, to be likewise. Should [Wei] take an appeal from this order to the Commonwealth Court, the Commission is of the belief that sanctions applicable to frivolous appeals, which the Commonwealth Court does have the power to impose, ought to be requested by the appointing authority, and considered by the Court. *See: Pa. R.A.P. 2744.*

(Commission's 2016 order at 1:2.)

Wei thereafter filed a petition for review with this Court as well as a separate motion for sanctions. In *Wei III*, we once again affirmed the Commission's denial of Wei's application to reopen the case. In doing so, we reasoned that Wei filed his motion to reopen after an adjudication had been issued and that the Commission did not abuse its discretion in determining that his alleged newly

discovered evidence, which consisted, *inter alia*, of various "admissions" and stipulations by the Department in the federal case, e-mails and meeting minutes from 2004 to 2007, and his position/job description, was not fraudulently concealed or otherwise unavailable at the time of his original administrative hearing. The Court also denied Wei's motion for sanctions in an order dated September 1, 2017. Wei then filed a motion for reconsideration and a petition for allowance of appeal,⁵ both of which were denied.

On September 4, 2018, Wei filed his third motion to reopen the case, again arguing that newly discovered evidence contradicted key testimony of the Department which supported the just cause to terminate him. Wei further alleged that such evidence establishes an ongoing fraud committed by the Department and a lack of just cause for his termination, which requires that the Commission's original decision upholding his termination be set aside.

By order mailed September 20, 2018, the Commission denied Wei's third motion to reopen, stating the following:

This is [Wei's] third request for the Commission to reopen and reconsider its original adjudication of this 2007 appeal based on alleged "newly discovered evidence." The Commission has carefully reviewed [Wei's] current motion and finds therein arguments that are substan-

⁵ *Wei v. State Civil Service Commission (Department of Health)*, 183 A.3d 340 (Pa. 2018) (unpublished table decision).

tially similar to those made in his second Motion to Reopen the Record. No new evidence that was not also available to [Wei] when he filed his previous motions to reopen this appeal based on newly discovered evidence was identified by him in this, his third Motion to Reopen. [Wei] appealed our Order denying his second Motion to Reopen to the Commonwealth Court. His appeal was docketed at 1902 C.D. 2016. In an unreported opinion filed on September 1, 2017, the Commission's decision denying his request to reopen the record was affirmed by the Commonwealth Court. In the absence of any additional evidence, which was not already available to [Wei] for inclusion in his September 21, 2016 second Motion to Reopen, this third Motion to Reopen is found to be entirely frivolous and is accordingly denied on that basis.

The Commission does not find in [Wei's] third motion any material change of fact or law, or any new evidence that was not discernable prior to the filing of his second Motion to Reopen; therefore this third motion is also properly denied by the Commission. *Shoemaker v. State Retirement Board*, 688 A.2d 751, 753 (Pa. Cmwlth. 1997). Moreover, it does not appear that the Commission has the legal authority to reopen the record of an already adjudicated appeal under applicable Pennsylvania law. See Commonwealth Department of Justice v. State Civil Service Commission, 319 A.2d 692, 693-694 (Pa. Cmwlth. 1974); 1 Pa. Code § 35.231(a).

(Commission's 2018 Order at 1-2.) Wei thereafter filed a petition for review with this Court.

Discussion

A. Wei's Motion to Reopen

On appeal,⁶ Wei continues to make many of the same arguments he made to this Court in *Wei I*, *II*, and *III*. Wei continues to assert that the Commission erred in ignoring material changes of fact from its initial decision, including that the Department falsified his job duties and his failure to complete the same. Similar to his prior motions, Wei also asserts that the Commission abused its discretion by ignoring the fact that his constitutional and due process rights were violated in the course of his termination from employment with the Department. In making these arguments, Wei again relies on purported "new" evidence obtained in his federal case.

⁶ "This Court's scope of review of a decision of the Commission is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, or whether substantial evidence supports the necessary findings of fact made by the Commission." *Webb v. State Civil Service Commission (Department of Transportation)*, 934 A.2d 178, 184 n.2 (Pa. Cmwlth. 2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion without weighing the evidence or substituting the judgment of the Commission. " *Quinn v. State Civil Service Commission*, 703 A.2d 565, 571 (Pa. Cmwlth. 1997).

As discussed in our prior opinions, "[a] decision to . . . reopen a record is within the discretion of an administrative agency, and the exercise of that discretion by the agency will not be reversed unless a clear abuse is shown." *Fritz*, 468 A.2d at 539. A petition to reopen is properly denied if there are no material changes of fact or law or new evidence that was not discoverable prior to the conclusion of the hearing. *Shoemaker v. State Employes' Retirement Board*, 688 A.2d 751, 753 (Pa. Cmwlth. 1997).

The General Rules of Administrative Practice and Procedure (GRAPP) provide for a petition to reopen a case as follows:

After the conclusion of a hearing in a proceeding or adjournment thereof sine die, a participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

1 Pa. Code §35.231(a). However, GRAPP does not provide for the reopening of a case after the adjudication has been issued. See *Department of Justice v. State Civil Service Commission*, 319 A.2d 692, 693-94 (Pa. Cmwlth. 1974) (holding that, in accordance with the Civil Service Act⁷ and

⁷ Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §§741.1-741.1005.

GRAPP, a case may be reopened prior to the issuance of an adjudication only where there is additional evidence to be presented).

We further note that, in this matter, an adjudication had been issued in 2008, twice upheld upon reconsideration, and affirmed three times by this Court. *See Wei I, II, and III*. Pursuant to 1 Pa. Code §35.231, a case may only be reopened for the purpose of taking additional evidence when there have been material changes of fact or law that have occurred since the conclusion of the hearing. Pursuant to 1 Pa. Code §35.241, "An application for rehearing or reconsideration may be filed by a party to a proceeding within 15 days . . . after the issuance of an adjudication or other final order by the agency."

Here, Wei is again requesting that the record be reopened for the introduction of alleged newly discovered evidence well past the time for him to make such a request. An adjudication has already been issued in this case, and, as stated earlier, GRA-PP, the Civil Service Act, and the Commission's rules do not provide for the reopening of a case once the decision has been rendered. 1 Pa. Code §35.231(a); *Department of Justice*.

Moreover, as in *Wei II* and *III*, Wei's arguments, even if timely made, are not persuasive. Wei again asserts that the Department admitted in the federal case that he was never assigned the task of converting HARS HIV/AIDS data files. We specifically rejected this argument in *Wei III* and we do so again here for the reasons articulated in *Wei*

III. Wei also relies on alleged newly discovered e-mails and Department business records that purportedly establish inconsistencies in the testimony of certain witnesses before the Commission, thereby perpetuating the fraud committed by the Department before the Commission and this Court. However, upon close review, Wei appears to be relying on new, or in some instances, his continued interpretation of the evidence that he had or should have had at the time of his initial hearing before the Commission in 2007. As we noted in *Wei II*,

[Wei] was aware of the Department's meeting and was a party to the majority of the e-mail correspondence. Thus, [Wei] has not presented any evidence, besides his bald assertions, that the Department fraudulently concealed any documents from him prior to his original administrative hearing or that these records were unavailable to him before his administrative hearing commenced. *Shoemaker; Fritz* . [Wei] merely seeks to relitigate issues decided by this Court in *Wei I*, and the appropriate remedy for such was to file a petition for rehearing within fifteen days after the issuance of an adjudication, which occurred in 2007 in this case.

Wei II, slip op. at 9. Similarly, here, Wei fails to explain how the Department's business records upon which he now relies were not available to him at the time of the original proceeding before the Commission.

Conclusion

The Commission issued its original decision in 2008 and neither GRAPP, the Civil Service Act, nor the Commission's rules provide for the reopening of a case once the decision has been rendered. Additionally, the Commission did not ignore material changes of fact from its initial decision, including alleged violations of Wei's constitutional and due process rights. Further, Wei failed to establish how the purported "new" evidence was unknown or unavailable to him at the time of the Commission's original hearing in 2007.

Accordingly, the Commission's order is affirmed.

ORDER

AND NOW, this 9th day of May, 2019, the order of the Pennsylvania State Civil Service Commission, mailed September 20, 2018, is hereby affirmed.

APPENDIX D

Pennsylvania State Civil Service Commission

Appeal No. 25485

Ming Wei, Applicant

v.

Department of Health, Appointing Authority

September 20, 2018

ORDER

AND NOW, the State Civil Service Commission has carefully reviewed the following documents: Appellant's Motion to Reverse and Reopen the Case dated September 4, 2018; the Appointing Authority's Answer to Appellant's Third Motion to Reopen the Above Captioned Case dated September 7, 2018; and Appellant's Reply Brief to [Appointing Authority's] Answer dated September 11, 2018. After careful consideration, Appellant's Motion to Reverse and Reopen the case is denied for the reasons that follow.

This is appellant's third request for the Commission to reopen and reconsider its original adjudication of this 2007 appeal based on alleged "newly discovered evidence." The Commission has carefully reviewed Appellant's current motion and finds therein arguments that are substantially similar to those made in his second Motion to Reopen the Record. No new evidence that was not also available to appellant when he filed his previous motions to reopen this appeal based on newly discovered evidence was identified by him in this, his third Motion to Reopen. The appellant appealed our Order denying his second Motion to Reopen to the Commonwealth Court. His appeal was docketed at 1902 C.D. 2016. In an unreported

APPENDIX E
Commonwealth Court of Pennsylvania
961 A.2d 254 (2008)
Ming Wei, Petitioner
v.
State Civil Service Commission (Pennsylvania
Department of Health), Respondent
No. 521 C.D. 2008.
Submitted on Briefs August 29, 2008.
Decided November 25, 2008.

Ming Wei, petitioner, *pro se*.

Audrey Feinman Miner, Sr. Counsel, Harrisburg,
for respondent.

BEFORE: LEADBETTER, President Judge, and
FRIEDMAN, Judge, and FLAHERTY, Senior
Judge.

OPINION BY Senior Judge FLAHERTY.

Ming Wei (Wei) petitions for review *pro se* from an order of the State Civil Service Commission (Commission) which dismissed his appeal wherein he challenged his removal from employment with the Department of Health (Department) and sustained the Department's action. We affirm.

Wei worked for the Department as an epidemiologist for approximately six and one-half years. In a letter dated September 4, 2007, the Department

notified Wei that he was being removed from his position because of insubordination and unsatisfactory work performance. Specifically, the Department maintained that Wei "failed to complete the 2005 backlog data work assignment as directed by July 31, 2007." (Commission Exhibit A.) Wei appealed his removal to the Commission, which conducted a hearing and made the following determinations.

While working for the Department, Wei was the human immunodeficiency virus, acquired immune deficiency syndrome (HIV/AIDS) data manager. The Pennsylvania National Electronic Disease Surveillance System (PANEDSS) is a communicable disease reporting system which is accessed via the internet. Medical professionals and hospitals transmit data about different communicable diseases to the Department using PANEDSS. The Department uses the data collected to investigate diseases and generate reports.

Prior to December 2005, HIV/AIDS was reported using a communicable report system called HARS which used various software formats.¹ In December 2006, Veronica Urdaneta (Urdaneta), Wei's supervisor, assigned Wei the task of converting the HARS HIV/AIDS data files into one software format, SAS.² The task was solely Wei's responsi-

¹ The full name of HARS is not provided in the record. However, HARS is described as the system which collected and maintained HIV/AIDS data. (Record at p. 40.)

² The full name of SAS is also not provided in the record. However, SAS is described as statistical software that permits you to write a code into the software and then bring

lity and Wei was instructed to convert the data from 2005 only. Urdaneta did not initially give Wei a deadline for completion.

Once the 2005 HARS HIV/AIDS data files were converted, the Department could then assess whether data was missing, duplicated or invalid. From that point, the Department could then assess whether it was worthwhile to input the data to PANEDSS and if so, whether an outside contractor should perform the task.

Wei asked for a template of the data he was to convert, which reflected that data that would later be captured by PANEDSS. The Bureau of Information Technology (BIT) provided Wei a draft layout in January 2007 and Wei was informed that because PANEDSS was in its early stages, the layout could change.³ Wei was repeatedly told not to test the draft layout and that the layout would probably change. Wei was re instructed that his assignment was to convert the HARS HIV/AIDS data files.

all of the different formats together and unify them into one single format. (Record at p. 42-43.)

³ Prior to being given the assignment in January of 2007, Wei's access to PANEDSS was suspended in February, 2006 because of his failure to comply with a request that he stop sending emails portraying PANEDSS as a system full of errors. In July of 2006, Urdaneta restored Wei's access to PANEDSS on the condition that any problems he had with PANEDSS be addressed to her or Wei's supervisor. Wei was not required to access PANEDSS to perform the data conversion assignment.

On February 6, 2007, Wei sent an email to Bob Giallo at BIT, wherein he sent a sample of 158 real potential cases which he wanted Giallo to test for consistency with the draft layout. In a response, Giallo informed Wei that he was getting too deep into the process and reminded him that the layout would probably change. Urdaneta also testified that she never instructed Wei to test the draft layout and, further that she instructed Wei to stop additional communications regarding the draft layout until she spoke with him.

In a letter dated April 4, 2007, Wei received a written reprimand for insubordination for failing to attend a monthly HIV/AIDS data management and analysis meeting as instructed.

On April 9, 2007, Urdaneta informed Wei that enough time had passed for completion of the project. She then told him to complete the project and that he was to attach a report with his findings by April 30, 2007. She also informed Wei that if he didn't know how to complete the project, he was to let Urdaneta know. Wei responded that it was a large project to complete and that he would need a clerk to help. Urdaneta responded that Wei was supposed to have been working on the HARS HIV/AIDS project when it was first assigned to him and that she would look into providing a clerk. Wei further responded that he should not be working on the project because it was BIT's responsibility. Urdaneta then informed Wei that it was his, not BIT's responsibility, and that he had a due date by which to complete it.

Wei did not complete the HARS HIV/AIDS assignment by April 30, 2007 and a predisciplinary conference was then conducted. At the hearing, Wei complained that the assignment was not part of his job duties but that of BIT, that it was a lot of work, that it was in draft, not final form, and that he was refusing to do it. On May 23, 2007, Wei received a written reprimand for unsatisfactory work performance, specifically noting his failure to complete the HARS HIV/AIDS project. Wei was then given an additional six weeks to complete the project.

In June 2007, Urdaneta transferred some of Wei's job responsibilities to other staff members so that he could give priority to the HARS HIV/AIDS data project. Wei informed Urdaneta that he had transferred many of the files into the SAS format.⁴ Urdaneta asked Wei several times to show her his progress on the data conversion assignment, but he never did. In June/July of 2007, Wei was asked to train other staff members to help gather information, but Wei scheduled only one training session. Urdaneta again transferred some of Wei's responsibilities to a colleague.

On July 2, 2007, Wei notified Urdaneta in an email that he was enclosing 424,598 records that he had transferred into SAS format.¹⁴ The records, however, were not enclosed. In a second email, Wei informed Urdaneta that the files were too large. Urdaneta then went to Wei's office to see the con-

⁴ Also, on July 2, 2007, Wei received a written reprimand for inappropriate behavior relating to a letter he sent his supervisor regarding sick leave.

verted file of records. Wei responded that he did not have the converted files and he could not print it out because it was too long. On July 3, 2007, Wei was given a direct order to complete the conversion by July 31, 2007.

On July 4, 2007, Wei asked Urdaneta for permission to take a SAS programming course. Urdaneta denied the request because the training was more for BIT personnel and was unrelated to Wei's data conversion assignment.

On July 10, 2007, Wei received a five-day suspension for unsatisfactory work performance for his failure to meet the six-week deadline previously imposed for completion of the conversion, for his inappropriate behavior and for his insubordination.

Wei never completed the assignment to convert the 2005 HARS HIV/AIDS data files into a single software format. On August 24, 2007, a disciplinary conference was held at which Wei admitted that he did not complete the conversion assignment by the July 31, 2007 deadline. Wei was thereafter discharged from his employment on September 4, 2007, due to insubordination and unsatisfactory work performance.

Based on the above, the Commission determined that the Department presented evidence sufficient to establish just cause for Wei's removal under Section 807 of the Civil Service Act (Act), Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. § 741.807 and, further that Wei failed to present evidence establishing discrimination under the Act. As such, the Commission dismissed Wei's

appeal challenging his removal from employment with the Department. This appeal followed.⁵

Initially, Wei claims that the Commission erred in failing to provide him a Chinese interpreter and that the Commission was obligated to provide him with one in accordance with the Court Interpreters' Act, 28 U.S.C. § 1827.⁶ The Court Interpreters' Act requires "the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States." 28 U.S.C. § 1827(a). The term judicial proceedings instituted by the United States refers to the "lawful authority and jurisdiction of United States district court." 28 U.S.C. § 1827(j). By its terms, 28 U.S.C. § 1827, does not apply to the Commission, as it is only applicable to United States district courts.

Wei also claims that the Commission erred in limiting testimony as to how HIV/AIDS data was processed prior to 2005. The Commission has the authority to rule on the admissibility of evidence and "shall otherwise control the reception of evidence so as to confine it to the issues in the pro-

⁵ This court's review is limited to determining whether constitutional rights have been violated, an error of law committed, and whether necessary findings are supported by substantial evidence. *Thompson v. State Civil Service Commission (Beaver County Area Agency on Aging)*, 863 A.2d 180 (Pa.Cmwlth. 2004), *petition for allowance of appeal denied*, 583 Pa. 685, 877 A.2d 463 (2005).

⁶ Wei does not inform this court of whether he asked the Commission for an interpreter and, if so, where in the Commission transcript such request was made.

ceeding." 1 Pa.Code § 35.162. Evidence is considered relevant and probative if it tends to establish a fact material to the case or tends to make facts at issue more or less probative. Commonwealth v. Gibson, 264 Pa.Super. 548, 400 A.2d 221, 223 (1978). We agree with the Commission that Wei was given an assignment in 2006 to convert the HARS HIV/AIDS 2005 data. How these files were previously processed was immaterial to the issue of whether Wei completed a prioritized assignment given to him by his supervisors. As such, we find no error in the Commission's decision to limit testimony.

Wei also takes issue with a number of the Commission's findings. Specifically, he claims that contrary to the Commission's findings, he was not the only one assigned to the HARS HIV/AIDS conversion project, that he did forward progress reports to Urdaneta, and that he did need special training to complete the project. According to the testimony of Urdaneta, which was credited by the Commission, she repeatedly informed Wei that it was his responsibility and no one else's to complete the project and that despite her requests, Wei did not provide her with progress reports. Based on Urdaneta's testimony, the Commission also concluded that Wei did not need additional training to complete the project as he already possessed all the skills necessary to complete the project. Although Wei's testimony differed from that of Urdaneta, it is the Commission which determines credibility. State Correctional Institution at Graterford v. Jordan, 95 Pa.Cmwlth. 475, 505 A.2d 339 (1986).

Next, Wei claims that the Department did not meet its burden of proving just cause for his removal under the Act. In Galant v. Department of Environmental Resources, 534 Pa. 17, 20 n. 2, 626 A.2d 496, 498, n. 2 (1993), the Court stated that just cause "must be merit-related and the criteria must touch upon [the employee's] competency and ability in some rational and logical manner." "What constitutes ample just cause for removal must necessarily be largely a matter of discretion on the part of the head of the department. To be sufficient, however, the cause, should be personal to the employ[ee] and such as to render him unfit for the position he occupies...." Woods v. State Civil Service Commission (New Castle Youth Development Center), 590 Pa. 337, 345, 912 A.2d 803, 809 (2006). The Commission is the sole fact finder and has exclusive authority to assess credibility and resolve evidentiary conflicts. Hetman v. State Civil Service Commission (Berks County Children and Youth), 714 A.2d 532 (Pa.Cmwlth.1998), *petition for allowance of appeal denied*, 558 Pa. 634, 737 A.2d 1227 (1999).

Here, Wei was terminated for not completing the HARS HIV/AIDS assignment by July 31, 2007. While the Department maintains that Wei was given ample resources and time within which to complete the assignment, and the Commission found as such, Wei claims that he did not receive help, training, or enough time to complete the project. Specifically, Wei claims that it was not his responsibility to convert the 2005 HARS HIV/AIDS data files. However, as found by the Commission, a series of emails sent to Wei by Urdaneta reveals

that Wei was repeatedly informed that he was to complete the assignment and that it was his responsibility and not the responsibility of PANE-DSS and BIT. The e-mails evidence that for six months Wei was insubordinate in refusing to accept responsibility for the assignment that was his to complete.

That Wei was given enough time and assistance to complete the assignment is also supported by the testimony of Urdaneta. Specifically, Urdaneta reassigned some of Wei's job duties in June of 2007, so that he could concentrate on the project. She also asked Wei to train other staff members to assist him, but Wei was uncooperative and only held one such training session. Wei was repeatedly given extensions within which to complete the assignment, yet failed to do so. Even when asked by Urdaneta whether he did not know how to complete the project, Wei never stated that he was incapable of completing it. Rather, his excuses for not completing the project centered on his contention that the project was not his responsibility and that it was large. Further, during the six month period in which Wei had the project, Wei did not show any significant progress on the assignment, even after disciplinary action was taken due to his lack of progress.

As stated by the Commission, Wei's insubordination and unsatisfactory work performance provided just cause for his removal inasmuch as it had a direct impact on his job performance. As the HIV/AIDS data manager, Wei was charged with collecting and reporting HIV/AIDS data accurately.

Since Wei failed to complete or make progress on the project given to him, even though he was capable of doing such project, was offered help on the project, was relieved of certain duties in order to complete the project and had been reprimanded for not having completed the project, the Commission properly found that the Department had just cause for Wei's removal.

Next, Wei claims that the Commission erred in rejecting his discrimination claim. In accordance with 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, "[n]o officer or employee of the Commonwealth shall discriminate against any person ... because of race, national origin or other non-merit factors." An employee claiming discrimination in a personnel action has the burden of presenting evidence to support such a charge. *State Correctional Institution at Pittsburgh, Department of Corrections v. Weaver*, 146 Pa.Cmwlth. 381, 606 A.2d 547, *petition for allowance of appeal denied*, 531 Pa. 648, 612 A.2d 986 (1992). In doing so, an employee claiming disparate treatment must demonstrate that he was treated differently than other employees similarly situated. *Bruggeman v. State Civil Service Commission*, 769 A.2d 549 (Pa. Cmwlth. 2001). When the initial burden of proof is met, the burden of production shifts to the employer to advance a legitimate non-discriminatory reason for removal. *Commonwealth of Pennsylvania, Department of Health v. Nwogwugwu*, 141 Pa.Cmwlth. 33, 594 A.2d 847 (1991). Then, the presumption of a prima facie case is rebutted and the employee must then demonstrate by a prepon-

derance of the evidence that the employer's articulated reason was merely a pretext for discrimination and not the actual motivation behind its decision. *Id.*

Here, Wei maintains that his removal was motivated by his national origin, his criticism of PANEDSS and his health condition. Wei argues that he was singled out to perform the HARS HIV/AIDS assignment and that no one else was given such a large task nor was anyone else fired for not completing the task. The Commission credited the testimony of Urdaneta that Wei was given the assignment because other employees in the HIV/AIDS section lacked the necessary expertise. Thus, Wei's claim that no one else was fired for not having completed the task is of no moment, as he was the only one assigned to the task.

Wei also claims that the suspension of his PANEDSS password was discriminatory. Removal of Wei's password did not affect Wei's employment status, nor did it prohibit his ability to complete the HARS HIV/AIDS assignment because he did not need the password to complete the assignment.

Wei's password was suspended because of his criticism of PANEDSS. Wei was informed by Urdaneta that his password would be restored once he confined his criticism of PANEDSS only to her. Wei likens his complaints about PANEDSS to that of a whistleblower complaint, implying that the Department retaliated against him because of his complaints. The Whistleblower Law, Act of December 12, 1986, P.L. 1559, 43 P.S. §§ 1421-1428, provides that an employer may not discharge an employee

wasn't able to show me that information.
(Commission hearing p. 61.)

Contrary to Wei's assertion, in both of the proceedings, Urdaneta consistently testified that she was not shown the 424,000 records.⁸

In the remainder of Wei's brief, he continues to complain that the HARS HIV/AIDS conversion was not his responsibility, that more individuals should have been assigned to the task, and that the finding that he did not show data regarding his progression on the assigned task, is false. These issues have been previously addressed and we again note that the Commission is the determiner of credibility.

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

ORDER

Now, November 25, 2008, the Order of the State Civil Service Commission, in the above-captioned matter, is affirmed.

⁸ Wei also takes issue with testimony presented by Ms. Burnhauser. A review of the testimony before the Board and Commission reveal that Ms. Burnhauser consistently testified that she never saw any tangible evidence that Wei had completed the assignment.



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COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

June 4, 2019

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RE: *Wei v. State Civil Service Commission (Department of Health); Docket No. 1321 C.D. 2018 (Pa. Cmwlth.)*

Dear Mr. Krimmel,

Pursuant to Pennsylvania Rule of Appellate Procedure 2545, Respondent Commonwealth of Pennsylvania, Department of Health (hereinafter "DOH") does not intend to file and answer to Petitioner Ming Wei's Application for Reconsideration (hereinafter "Application") in the above-referenced case. Notably, DOH contends that Petitioner Wei's Application is meritless. Notwithstanding this letter, pursuant to Pennsylvania Rule of Appellate Procedure 2545(a), DOH's decision not to file and Answer to Petitioner Wei's Application cannot be construed as a concurrence in Petitioner Wei's request. *See* Pa. R.A.P. 2545(a).

Respectfully submitted,

/s/Jonathan D. Koltash
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cc: Ming Wei (by First-Class Mail and Electronic Filing)
Elizabeth Lawson, Chief Counsel, State Civil Service Commission
(First-Class Mail only)