

**IN THE  
COMMONWEALTH COURT OF PENNSYLVANIA**

RACHEL L. CARR,  
Petitioner,

vs.

NO. 380 MD 2017

COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT  
OF TRANSPORTATION, and

BRIEF FOR PETITIONER

COMMONWEALTH OF  
PENNSYLVANIA, STATE CIVIL  
SERVICE COMMISSION,  
Respondents.

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**APPEAL FROM ADJUDICATION OF  
STATE CIVIL SERVICE COMMISSION**

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1. 1 Pa.C.S.A. § 1921.
2. 1 Pa.C.S.A. § 1922
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8. 71 P.S. § 741.905a.
9. 71 P.S. § 741.2
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11. Act 1941, Aug 5., P.L. 752
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13. *Baker v. Dept. of Public Welfare*, 588 A.2d 1337 (Pa. Commw. 1991)
14. *Bieluch v. Sullivan*, 999 F.2d 666 (2d. Cir. 1993)
15. *Com. v. Turner*, 80 A.3d 754 (2013).
16. *Connick v. Meyers*, 461 U.S. 138 (1983)
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18. *In re Columbia Borough*, 354 A.2d 277 (Pa. Commw. 1976)

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21. *Mandell v. County of Suffolk*, 316 F.3d 368 (2d Cir.2003)
22. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)
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25. *Palmer v. Bartosh*, 959 A.2d 508 (Pa. Commw. 2008)
26. Pa. Const. art. 1, §7
27. Pa. Const. art. 1, §11
28. Pa. Const. art. 1, §26
29. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)
30. *Rankin v. McPherson*, 483 U.S. 378 (1987)
31. U.S. Const. amend. I
32. U.S. Const. amend. IV

**I. Jurisdiction**

This Honorable Court has jurisdiction over this Petition for Review under both 42 Pa.C.S.A. §763(a)(1)<sup>1</sup> and 42 Pa.C.S.A. §761(a)(1)<sup>2</sup>.

**II. Determination in question<sup>3</sup>**

The following is the verbatim text of the State Civil Service Commission's ("the Commission") Order, which Petitioner has asked this Court to review:

AND NOW, the State Civil Service Commission, by agreement of two of its members<sup>4</sup>, dismisses the appeal of Rachel L. Carr challenging her removal from probationary Roadway Programs Technician I employment with the Pennsylvania Department of Transportation and sustains the action of the Pennsylvania Department of Transportation in the removal of Rachel L. Carr from probationary Roadway Technician 1 employment, effective June 17, 2016.<sup>5</sup>

Additionally, pursuant to Pa.R.A.P. No. 2115(b), Petitioner asks this Court to review the Commission's failure to render a timely decision as required by 71 P.S. § 741.952(a).

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1 Relating to direct appeals from government agencies

2 Relating to original jurisdiction for civil actions against the Commonwealth

3 Full opinion attached as Appendix B.

4 The Commission supplemented the record with this Court on October, 30, 2017, indicating that the three commissioners agreed unanimously.

5 Comm'n Adjudication, p. 20-21 (Aug. 1, 2017); (Attached as Appendix A)

### III. Scope and standard of review

The standard of review for this Petition for Review is governed by 2 Pa.C.S.A. §704. This Court should reverse<sup>6</sup> the adjudication if it finds one of the following:

1. the adjudication violated a constitutional right of the appellant;
2. the adjudication is not in accordance with the law;
3. the procedure before the agency is contrary to statute<sup>7</sup>; or
4. any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.

Additionally, Pa.R.A.P. No. 1551 provides additional guidance for the scope of review:

**(a) Appellate jurisdiction petitions for review.** Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:

- (1) Questions involving the validity of a statute.
- (2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.

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<sup>6</sup> This Court may also affirm, modify, vacate, set aside, or remand any order brought before it. 42 Pa.C.S.A. §706.

<sup>7</sup> See, 2 Pa.C.S.A. §§501-08.

(3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit. If, upon hearing before the court, the court is satisfied that any such additional question within the scope of this paragraph should be so raised, it shall remand the record to the government unit for further consideration of the additional question.

The court may in any case remand the record to the government unit for further proceedings if the court deems them necessary.

**(b) Original jurisdiction petitions for review.** The court shall hear and decide original jurisdiction petitions for review in accordance with law. This chapter is not intended to modify, enlarge or abridge the rights of any party to an original jurisdiction petition for review.

#### **IV. Statement of questions involved**

1. Should this Court grant the Commission's Application for Summary Relief, dismissing through demurrer the Petition for Review insofar as it relates to this Court's original jurisdiction?

A. In its Application for Summary Relief,<sup>8</sup> the Commission argued that the Petition for Review does not properly trigger this Court's original jurisdiction.

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<sup>8</sup> Attached as Appendix C

B. The Pennsylvania Department of Transportation (“the Department”) has not addressed the question.

2. Did the Commission violate Petitioner’s constitutional right to due process by failing to render a decision within ninety (90) days of the appeal hearing as required by 71 P.S. § 741.952(a)?

A. In its Application for Summary Relief, the Commission disagreed that it violated Petitioner’s procedural due process rights.

B. The Department has not addressed the question.

3. Did the Commission’s adjudication of the Petitioner’s appeal hearing adhere to the Civil Service Act?

A. Though the Commission did not address the question directly, it argued in its Application for Summary Relief that the language of 71 P.S. § 741.952(a) is directory, resulting in adherence to the Civil Service Act.

B. The Department has not addressed the question.

4. Did the Department’s suspension and subsequent removal of Petitioner violate her constitutional right to free speech?

- A. The Commission found that the Department's removal of Petitioner from employment was not a violation of her constitutional right to free speech.
- B. The Department has not directly addressed the question in front of this Court. The Department, during the appeal hearing, denied that it violated the Petitioner's free speech rights.

**V. Statement of the case**

1. Form of action

This case is before the Court on a Petition to Review filed by Petitioner, Rachel L. Carr. The following is a chronological procedural history of the case:

- A. May 24, 2016      --Petitioner posts to Facebook
- B. May 26, 2016      --Department receives complaint in Central Press Office
- C. May 26, 2016      --Central Press Office forwards complaint and Facebook comments to Human Resource Director
- D. May 27, 2016      --Pre-disciplinary conference held
- E. May 27, 2016      --Department suspends Petitioner
- F. June 17, 2016     --Department removes Petitioner from

employment

- G. July 1, 2016 –Petitioner requests appeal hearing with the Commission
- H. Nov. 17, 2016 –Appeal Hearing held at Commission’s Western Regional Office
- I. Aug. 1, 2017 –Commission reports its findings and conclusions to the parties
- J. Aug. 31, 2017 –Petitioner files Petition to Review with Commonwealth Court
- K. Sept. 29, 2017 –Commission files Application for Summary Relief
- L. Oct. 11, 2017 –Commission files record
- M. Oct. 23, 2017 –Court orders parties to address Commission’s Application for Summary Relief in principal briefs
- N. Oct. 30, 2017 –Commission supplements record<sup>9</sup>

**2. Prior determination**

The Commission unanimously sustained the Department’s suspension and removal of Petitioner in its August 1, 2017, opinion, attached to this Brief as Appendix A.

**3. Commissioners whose determination is to be reviewed**

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<sup>9</sup> The Commission supplemented the record to indicate a unanimous decision by the commissioners on adjudication.

A. Bryan R. Lentz, Chairman of the Commission

B. Odelfa Smith Preston, Commissioner

C. Gregory M. Lane, Commissioner

4. Narrative statement of necessary facts

The Department employed the Petitioner in a non-permanent position for three winters prior to her promotion to a permanent position, probationary status Roadway Programs Technician I, on March 5, 2016.<sup>10</sup> This position had a number of duties, which were outlined in the job posting.<sup>11</sup> At no time during Petitioner's seasonal employment or permanent status did the Department ever discipline or find reason to discipline Petitioner—other than the issue presently before the Court.<sup>12</sup>

The Department provided Petitioner with training after it promoted her to permanent status, including the working rules,<sup>13</sup> employee orientation,<sup>14</sup> and additional policies and procedures.<sup>15</sup> This training touched upon a number of issues including at-work behavior and off-duty

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10 Tr. p. 42 at 12-21, p. 81 at 8-18; AA Ex. 2; (Repr. Rec. at 12a)

11 AA Ex. 1. (Repr. Rec. at 1a)

12 Tr. at p. 17, 7-24, p. 81, 20 – p. 82, 7.;

13 AA Ex. 3. (Repr. Rec. at 3a)

14 AA Ex. 4. (Repr. Rec. at 5a)

15 AA Ex. 6. (Repr. Rec. at 6a)

conduct.<sup>16</sup> Social media usage was not addressed during this training.<sup>17</sup>

On May 24, 2017, Petitioner, while off duty and in her home, posted sporadically on Facebook over the course of approximately five (5) hours.<sup>18</sup> At all times during these posts, Petitioner's profile page, identifying her by the name Rachel Carr,<sup>19</sup> contained a statement that she was employed by the Department.<sup>20</sup> Petitioner's posts contained: 1) a request to discuss the quality of school bus drivers in the area and an abrasive comment regarding her possible actions if these drivers continue to run her off the road;<sup>21</sup> 2) Petitioner's questions to others in the group regarding how they would handle such a situation regarding the lack of proper roadway safety;<sup>22</sup> 3) Petitioner's responses to the group that highlighted the reasons she felt the bus driver was driving inappropriately;<sup>23</sup> 4) a comment by an unidentified commenter that Petitioner's employer would soon know of her comments;<sup>24</sup> 5) comments from Petitioner that indicated she was concerned about her own safety

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<sup>16</sup> Tr. p. 50, 8 – p. 51, 8.

<sup>17</sup> Tr. p. 36, 1-22.

<sup>18</sup> Tr. at p. 37, 24 – p. 38 at 4. *See also*, AA Ex. 7. (Repr. Rec. at 7a)

<sup>19</sup> A Facebook profile page is not viewable within a comment board or group.

Accessing profile information of another requires an individual to navigate to the profile page.

<sup>20</sup> AA Ex. 7. (Repr. Rec. at 7a)

<sup>21</sup> *Id.* *See also*, Comm'n Adjud. at p. 5, ¶14

<sup>22</sup> *Id.* *See also*, Comm'n Adjud. at p. 5, ¶¶15-17

<sup>23</sup> *Id.* *See also*, Comm'n Adjud. at p. 5, ¶16-17, p. 7, ¶22

<sup>24</sup> *Id.* *See also*, Comm'n Adjud. at p. 6, ¶18

and that the safety of children should rest with the parents and municipalities,<sup>25</sup> and 6) Petitioner's comments regarding why the others in the group should care about her experience with school bus drivers.<sup>26</sup> The Reproduced Record contains screenshots of the messages.<sup>27</sup> In addition to her off-duty Facebook posts, the Petitioner also contacted the bus company in question.<sup>28</sup> The Department did not agree with most of the Petitioner's comments. The Department's representatives testified that the Petitioner's comments disparaged their image and were contrary to its mission of safety.<sup>29</sup>

In response to three complaints from these posts, the Department held a pre-disciplinary hearing with Petitioner on May 27, 2016.<sup>30</sup> At the conclusion of the pre-disciplinary hearing, the Department suspended the Petitioner.<sup>31</sup> After determining that the speech had a nexus to the workplace<sup>32</sup> and using that nexus to determine that Petitioner had engaged in inappropriate behavior, the Department removed the

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25 *Id.* See also, Comm'n Adjud. at p. 6, ¶¶19, 21.

26 *Id.* See also, Comm'n Adjud. at p. 6, ¶19, p. 7, ¶22.

27 Repr. Rec. at 7a.

28 Tr. p. 59, 23-25.

29 Comm'n Adjudication at p. 20.

30 Comm'n Adjud. at p. 8, ¶28.

31 Tr. p. 62, 17-19.

32 *Id.* at p. 63, 3-5.

Petitioner from employment effective June 17, 2016.<sup>33</sup>

The Department was unaware of any effect that Petitioner's Facebook posts had on the ability of the Department to provide services to the Commonwealth.<sup>34</sup> The Department was unaware of any effect Petitioner's Facebook posts had on her working relationships.<sup>35</sup> The Department was unaware of any declination of the Petitioner's job performance or competency in the three days after the Facebook posts.<sup>36</sup> In completing her job duties, Petitioner had minimal contact with the public, but the possibility of contact did exist.<sup>37</sup> The Department believed that Petitioner's Facebook posts were contrary to the Department's mission of safety.<sup>38</sup>

Petitioner's appeal hearing occurred on November 17, 2016.<sup>39</sup> The Commission reported its findings and conclusions to the parties by mail on August 1, 2017.<sup>40</sup> The language of the Civil Service Act states that "[w]ithin ninety days after the conclusion of the hearing described in Section 951, the commission shall report its findings and conclusions to

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33 Comm'n Adjud. at p. 2, ¶1.

34 Tr. p. 71, 15-18, p. 136, 21 – p.137, 5.

35 Id. at p. 22, 16 – p. 23, 11.

36 Id. at p. 38, 24 – p. 39, 3.

37 Id. at p. 29, 8-21, p. 91, 9-20.

38 Id. at p. 65, 24 - p. 66, 1.

39 Comm'n Adjud. at p. 1.

40 Id. at p. 21.

those parties directly involved in the action.”<sup>41</sup> The Commission reported its findings and conclusions to the parties 257 days after the Petitioner’s appeal hearing. Thirty three (33) of thirty four (34) of the Commission’s adjudications that were reported between June 5, 2017, and November 14, 2017, failed to adhere to the 90-day time period proscribed by the Civil Service Act.<sup>42</sup> Petitioner asserts this is violation of her constitutional right to due process.<sup>43</sup> The Commission asserts that the language of Section 741.952(a) of the Civil Service Act is directory only; thus, the Commission’s delay in reporting results in no violation of the Petitioner’s due process rights.<sup>44</sup>

## **VI. Summary of Petitioner’s arguments**

A. Demurrer should not be sustained because the requisite clarity is not present

The Commission, through an Application for Summary Relief, has asked this Court to dismiss the Petitioner’s Petition for Review insofar as it

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<sup>41</sup> 71 P.S. § 741.952(a)

<sup>42</sup> Pet. for Rev., Ex. B (August 31, 2017). (Attached herein Appendix B). *See also*, Adjudications, Pennsylvania State Civil Service Commission, <http://webcontent.spsc.state.pa.us/legal/adjview.aspx> (last visited Nov. 19, 2017).

<sup>43</sup> *Id.*

<sup>44</sup> Comm’n Appl. for Summ. Relief, p. 5, ¶20 – p. 6, ¶23. (Sept. 29, 2017)(Attached herein Appendix C)

fails to set forth grounds for original jurisdiction. The Commission requests such relief in the form of a demurrer. Drawing from the Commission's Application for Summary Relief, a "demurrer should be sustained only if it is clear and free from doubt that the law will not recognize Petitioner's right to the relief she has requested under the facts alleged."<sup>45</sup>

Though this Court has previously held that the language of Section 741.952(a) of the Civil Service Act is directory only, the provisions of the Commonwealth's statutes regarding statutory interpretation provide guidance that such language may not be directory; rather, it is mandatory. Statutory interpretation coupled with the clear and unambiguous language of the Civil Service Act wipe away the clarity that is necessary for this Court to sustain a demurrer to Count III, dismissing the Petition.

#### B. The Commission violated Petitioner's due process rights

The Petitioner has a liberty interest to remain free from discriminatory practices during employment with the Commonwealth—in this respect all employees in the civil service are treated equally.<sup>46</sup> The legislature has extended discriminatory practices to include personnel

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<sup>45</sup> *Id.* at p. 4, ¶17. (Citing, Palmer v. Bartosh, 959 A.2d 508 (Pa. Commw. 2008).

<sup>46</sup> 71 P.S. § 741.905a.

actions based on non-merit factors.<sup>47</sup>

The question then becomes did the process afforded to the Petitioner satisfy the requirements of due process. It did not. By not adhering to the language of Section 741.952(a) of the Civil Service Act, the Commission deprived the Petitioner of the legislatively enacted process.

C. The Commission's adjudication process was contrary to the Civil Service Act

Section 741.952(a) of the Civil Service Act explains that the Commission "shall report its findings and conclusions" within ninety (90) days of the appeal hearing. The Commission reported its findings to the parties 257 days after the hearing.<sup>48</sup>

The language of Section 741.952(a) of the Civil Service Act is not directory. Legislative intent is best discerned through the plain language of the statute.<sup>49</sup> Allstate also points out that "[w]hen the words of a statute are free and clear from all ambiguity, they are presumed to be the best indication of legislative intent."<sup>50</sup> Additionally, a determination that Section 741.952(a) is directory only is contrary to the presumptions that the Civil

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<sup>47</sup> Id.

<sup>48</sup> Comm'n Adjud., *supra* at p. 21.

<sup>49</sup> *Allstate Life Ins. Co. v. Com.*, 52 A.3d 1077, 1080 (2012)

<sup>50</sup> Id.

Service Act should be read as a whole.<sup>51</sup> A directory interpretation of Section 741.952(a) would neuter the legislature's purpose for the Civil Service Act, which is to primarily promote the "[g]reater efficiency and economy in the administration of the government of this Commonwealth . . . ."<sup>52</sup> This Court's previous finding that the language of the Section 741.952(a) is directory has created the current situation where the Commission entirely flouts the so-called "directive." Thirty-three (33) of the past thirty-four (34) adjudications by the Commission have been reported beyond the 90-day time period. The average reporting time of these adjudications is 242 days.<sup>53</sup>

Even if the Court continues its interpretation of Section 741.952(a) as directory, the length of time, 257 days, for the Petitioner to receive the Commission's determination as to her claims of discrimination is contrary to the intent of the legislature.

D. The Department violated the Petitioner's federal and state constitutionally protected right to free speech

The Department's proffered reason for removing the Petitioner from

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<sup>51</sup> See, 1 Pa.C.S.A. § 1922(2).

<sup>52</sup> 71 P.S. § 741.2

<sup>53</sup> This data is taken directly from the Commission's website. For a full citation to the website, see *supra* note 42.

employment was due to her “inappropriate behavior.”<sup>54</sup> However, her removal for inappropriate behavior was a pretext for her termination, which was based solely on the content of her speech.<sup>55</sup>

An analysis of Pickering<sup>56</sup> and its progeny reveals that the Department’s removal of the Petitioner was improper. Plaintiff’s speech was protected; it did not affect her work relationships; it did not affect the ability of the Department to provide services; it did not affect her competency; the public did not view the Petitioner’s speech as expressing the views of the Department; her speech regarded a function of her local government; her speech was not obscene; her speech was of a public nature; and her speech had only a tangential relationship to her job duties. Though Plaintiff’s speech could likely be considered abrasive, the 1<sup>st</sup> Amendment of the United States Constitution and Article 1, Section 7 of the Constitution of the Commonwealth of Pennsylvania protects such speech.

## **VII. Argument**

### **1. The Court should deny the Commission’s Application for Summary Relief**

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<sup>54</sup> AA Ex. 11.; (Repr. Rec. at 11a)

<sup>55</sup> Tr. p. 138, 20-23.

<sup>56</sup> Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

Rule:

The Commission presented its Application for Summary Relief in the form of a demurrer. In its application, the Commission properly states the standard for sustaining a demurrer: a “[d]emurrer should be sustained only if it is clear and free from doubt that the law will not recognize Petitioner’s right to the relief she has requested under the facts alleged.”<sup>57</sup>

Explanation:

The crux of this demurrer lies in statutory interpretation. The primary inquiry regarding statutory interpretation is legislative intent.<sup>58</sup> To determine legislative intent, this Court should construe the statute to give effect to all its provisions<sup>59</sup> and not disregard the clarity of the statute in pursuing its spirit.<sup>60</sup>

The statute at issue is 71 P.S. § 741.952(a). The language of the statute (referenced fully on page x of this Brief) explains that the Commission “shall” report its findings within ninety (90) days of the appeal hearing. This Court has previously held that the 90-day provision must be

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<sup>57</sup> Comm’n Appl. for Summ. Relief, *supra* at note 5.

<sup>58</sup> 1 Pa.C.S.A. § 1921.

<sup>59</sup> § 1921

<sup>60</sup> § 1921(b).

read as directory.<sup>61</sup> The Court explains that such a reading is compelled because “. . . otherwise the parties would bear the consequences for the adjudicating body’s tardiness.”<sup>62</sup> This Court adds that such a result would abrogate the merit-based criteria for personnel actions, which is the “cornerstone of civil service law.”<sup>63</sup> However, this Court has also held that the word “shall” is generally regarded as imperative.<sup>64</sup>

## Discussion

The Petitioner disagrees with this Court’s reading of Section 741.952(a) as directory. Reading the ninety-day provision through the lens of the rules of statutory construction, this Court should consider it mandatory.

The Civil Service Act’s purpose is clear:

**Greater efficiency and economy in the administration of the government of this Commonwealth is the primary purpose of this act. The establishment of conditions of service which will attract to the service of the Commonwealth qualified persons of character and ability and their appointment and promotion on the basis of merit and fitness are means to this end.**<sup>65</sup>

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<sup>61</sup> *Baker v. Dept. of Public Welfare*, 588 A.2d 1337 (Pa. Commw. 1991).

<sup>62</sup> *Id.* at 1340.

<sup>63</sup> *Id.* at 1340-41.

<sup>64</sup> *In re Columbia Borough*, 354 A.2d 277, 279 (Pa. Commw. 1976).

<sup>65</sup> 71 P.S. § 741.2. (Emphasis added).

Section 1921 of statutory interpretation rules direct this Court to read the ninety-day reporting provision in conjunction with the purpose of the Civil Service Act as directed. The 90-day provision promotes the efficiency and economy of government operations only if it is mandatory. Allowing the Commission to flout their legislatively appointed duty to maintain an appropriate schedule for review of personnel decisions neuters the purpose of the Civil Service Act. To witness the danger and effect of interpreting the reporting period as directory, this Court need only look to a recent history of the Commission's decisions. Thirty-three (33) of the past thirty-four (34) adjudications by the Commission have been reported beyond the 90-day time period.<sup>66</sup> Not only is this a clear example of government inefficiency, but it stands to reason that it would also dissuade qualified applicants to the Civil Service. Waiting 242 days<sup>67</sup> for a decision on whether an employer acted discriminatorily is not a major selling point to enter the civil service.

The clarity of Section 741.952(a) also supports a mandatory interpretation. Again, the verbatim language of the statute is that "[w]ithin ninety days after the conclusion of the hearing described in section

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<sup>66</sup> Pet. for Rev. and Comm'n website, *supra* at note 42.

<sup>67</sup> This is the average wait for a determination for the past thirty-five appellants having hearings in front of the Commission. Petitioner waited 257 days for the Commission's decision, *supra* at note 42.

951, the commission shall report its findings and conclusions to those parties directly involved in the action.”<sup>68</sup> Reading the previous statutory language through the lens of Section 1921(b)<sup>69</sup> begs the question: where is the ambiguity? The legislature has appointed the Commission with the responsibility of determining certain employment actions of the Commonwealth, and the legislature has provided a timeframe in which the Commission must accomplish those duties. Any further analysis is an attempt to glean intent by ignoring clarity, which is contrary to the rules of statutory interpretation.<sup>70</sup>

Assuming this Court continues its interpretation of the 90-day reporting period, the Commission has still not met its burden of summary relief through demurrer. The recent data from the Commission is clear. Average wait times for determinations are more than double (nearly triple) what the statute directs and more than 97 percent of Commission determinations since June 5, 2017, occurred after the directed time period.<sup>71</sup> “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>72</sup> It can reasonably be argued that the recent history of the Commission does not

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<sup>68</sup> 71 P.S. § 741.952(a)

<sup>69</sup> 1 Pa.C.S.A. § 1921

<sup>70</sup> § 1921(b)

<sup>71</sup> Pet. for Rev., Ex. B, *Supra* at note 42.

<sup>72</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

offer a meaningful time or manner for the Petitioner to be heard. The Commission consistently ignores the legislature's directive to determine issues within a reasonable time period. The Commission's Application for Summary Relief asks this Court to accept as reasonable that the Commission will continue to take 2.5 times longer to make a decision regarding important liberty and property interests than it has been directed to take. The question becomes: is there ever a time period too long that would satisfy a violation of an appellant's due process? How much further beyond a 242-day average should this Court extend the appropriateness of the reporting requirement?

Following the rules of statutory construction should lead this Court to reverse its opinion in Baker. Reading the Civil Service Act as a whole, construing Section 741.952(a) in conjunction with the purpose of the act found in Section 741.2, and accepting the clarity of the ninety-day provision, creates an environment where there is not the requisite legal clarity necessary to sustain a demurrer.

Even if this Court maintains its directive interpretation, the Commission has demonstrated through its consistent disregard for that directive that the Commission is unwilling to follow the process for adjudication's set forth by the legislature. In light of the Commission's unwillingness to follow

such directive, the Commission has not met its burden for this Court to sustain its demurrer.

2. The Commission violated the Petitioner's procedural due process rights

Petitioner addressed this issue in the above argument. It would be redundant to repeat the foundation of the argument here. The Petitioner respectfully requests this Court to refer to Argument 1 in Section VII of this brief for the substance of this argument as well.<sup>73</sup>

It is worth noting that the initial inquiry to questions regarding procedural due process involves two questions. The first is whether the Commission's action interfered with a life, liberty or property interest.<sup>74</sup> The second is whether the procedures enacted and followed to protect such interference are constitutionally sufficient.<sup>75</sup>

Petitioner has a liberty interest to remain free from discriminatory practices during employment<sup>76</sup> with the Commission—in this respect all employees in the civil service are treated equally.<sup>77</sup> The Commonwealth's legislature has extended discriminatory practices to include personnel

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<sup>73</sup> The substance of this argument begins on Page 16 of this Brief.

<sup>74</sup> *Com. v. Turner*, 80 A.3d 754, 764 (2013).

<sup>75</sup> *Id.*

<sup>76</sup> *See*, Const. Art. 1, § 26.

<sup>77</sup> 71 P.S. § 741.905a.

actions based on non-merit factors.<sup>78</sup> The combination of the right to freedom from discriminatory practices and the Commonwealth's expansion of discriminatory practices to include personnel actions based on non-merit factors satisfies the first inquiry that a life, liberty, or property interest is involved. The second inquiry is whether the procedures followed were constitutionally sufficient. For this inquiry, the Petitioner refers the Court back to its argument that a 257-day wait for a decision<sup>79</sup> is a violation of Article 1, Section 11 of the Constitution of the Commonwealth of Pennsylvania, which states that justice should be administered without delay.<sup>80</sup> Petitioner sets forth her argument in detail in Section 1 of this part.<sup>81</sup>

3. The Commission's determination was contrary to the Civil Service Act

Petitioner respectfully requests this Court to refer to Sections 1 and 2 of this Part for a detailed argument relevant to this section.

4. The Department's removal of the Petitioner violated her constitutional right to free speech

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<sup>78</sup> *Id.*

<sup>79</sup> The substance of this argument is found in Section 1 of Part VII of this Brief, beginning on page 16.

<sup>80</sup> Const. Art. 1, § 11.

<sup>81</sup> Petitioner's discussion begins on Page xx of this Brief.

Rule:

The first inquiry into a public employee's right to speak as a citizen hinges on whether the speech was a matter of public concern.<sup>82</sup> To be a matter of public concern, Connick explains that the speech should "fairly be considered as relating to any matter of political, social, or other concern to the community."<sup>83</sup> To determine whether the speech is private or public, this Court should examine "the content, form, and context of a given statement, as revealed by the whole record."<sup>84</sup> In addition to relating to a matter of public concern, an employee should speak as a citizen and not pursuant to their official duties.<sup>85</sup> The Supreme Court clarified this inquiry in Lane.<sup>86</sup> The Court held that "[t]he critical question is . . . whether the speech at issue is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."<sup>87</sup>

If a public employee can demonstrate that his speech was made as a citizen and it related to a matter of public concern then the court should turn to the balancing test outlined in Pickering.<sup>88</sup> On one side of the scale

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82 *Connick v. Meyers*, 461 U.S. 138, 147 (1983)

83 *Id.* at 146.

84 *Id.* at 147-48.

85 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)

86 *Lane v. Franks*, 134 S. Ct. 2369 (2014)

87 *Id.* at 2379.

88 *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)

is the interest of the government employer in the efficiency of the public services it provides. On the other are the First Amendment interests of the employee. The Pickering balance includes whether the speech at issue “impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . , or impedes the performance of the speaker’s duties or interferes with the regular operation of the [public employer’s] enterprise.”<sup>89</sup>

When weighing First Amendment rights of a public employee the U.S. Supreme Court has held that speech regarding the functions of government rest on the “highest rung of the hierarchy of First Amendment values” and should receive the greatest protection.<sup>90</sup> The 2nd Circuit U.S. Court of Appeals has also indicated held that “. . . if the employee's speech substantially involved matters of public concern, the government must make a stronger showing of interference with operations . . . .”<sup>91</sup>

The 2nd Circuit has also succinctly combined Pickering and its progeny, providing guidance to this Court in determining if the Department’s removal of the Petitioner violated her right to free speech. To demonstrate that the government improperly retaliated based on protected

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<sup>89</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

<sup>90</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)

<sup>91</sup> *Bieluch v. Sullivan*, 999 F.2d 666, 671 (2d. Cir. 1993)

speech, the Petitioner must show that “(1) [her] speech addressed a matter of public concern, (2) [she] suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action, so that it can be said that [her] speech was a motivating factor in the determination.”<sup>92</sup> Once a Petitioner satisfies the previous burden, the government may nonetheless defeat the claim of improper retaliation by showing either 1) the government would have taken the same action regardless of the speech or 2) the petitioner’s speech was likely to disrupt the government’s activities and that disruption outweighed the value of the petitioner’s speech.<sup>93</sup>

Discussion:

Here, the Petitioner has established that she spoke as a private citizen on a matter of public concern. Petitioner was off duty at all times during the Facebook comments.<sup>94</sup> Also, the Petitioner’s comments were in reference to a local school bus and the quality of that driver’s driving. None of Plaintiff’s job duties pertained to licensing or monitoring of school bus drivers.<sup>95</sup> Under Lane, this Court should find that commenting about

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<sup>92</sup> *Mandell v. County of Suffolk*, 316 F.3d 368, 382 (2d Cir.2003)

<sup>93</sup> *Id.* at 382-83.

<sup>94</sup> Tr. at p. 19, 16-20. (Repr. Rec. at 12a).

<sup>95</sup> AA Ex. 1 (Repr. Rec. at 1a)

the poor driving of school bus drivers was certainly not an ordinary function of the Petitioner's job duties; thus, Petitioner's speech was made as a citizen, satisfying Garcetti.

On speaking on a matter of public concern, this Court must examine the form, content, and context of her speech.<sup>96</sup> First, the form of the Petitioner's speech was comments on a Facebook group with more than 1,300 members.<sup>97</sup> The content of her speech, admittedly, included some abrasive statements regarding the quality of the local school bus drivers.<sup>98</sup> But, the First Amendment protects abrasive speech. This protection is afforded through the speech being of a public concern. The Petitioner's speech, viewed in its entirety as required under Connick, provides this Court with an appropriate context to determine that she was commenting about the appropriateness and quality of local bus drivers, which is an important function of her local government. Speech regarding government function is provided the highest level of protection under Claiborne.<sup>99</sup> Petitioner's very first comment started off with "can we acknowledge the horrible school bus drivers"?<sup>100</sup> She followed that immediately with a contextual statement regarding her location then added "[d]aily I get ran off

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<sup>96</sup> Connick, *supra* at note 82.

<sup>97</sup> Tr. at p. 101, 2

<sup>98</sup> AA Ex. 7 (Repr. Rec at 7a)

<sup>99</sup> *supra* at note 90

<sup>100</sup> AA Ex. 7 (Repr. Rec. at 7a)

the berm of our completely wide enough road and today one asked me to t-bone it.”<sup>101</sup> During the Petitioner’s appeal hearing, the Department focused almost exclusively on the final portion of her initial statement. Petitioner’s initial comment ended with: “I end this rant saying I don’t give a flying sh\*t about those babies and I will gladly smash into a school bus.”<sup>102</sup> Once again, the Petitioner does not deny that the comment was abrasive; however, the context of that statement and the comments as a whole are what control the public-concern analysis. The Petitioner began her comments talking about school bus drivers. The Petitioner pointed out that the group should care about the safety of their children with school bus drivers.<sup>103</sup> Petitioner said that it was not her responsibility to worry about children unknown to her.<sup>104</sup> This language may be harsh and the Department disagreed with it, but those determinations do not remove her speech from the realm of public concern. Additionally, the Petitioner asked questions of the group to determine their opinion about road safety.<sup>105</sup> When read as a whole and in its entire context, Petitioner’s comments are a matter of public concern.

The next determination under Mandell is whether the Petitioner

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101 Id.

102 Id.

103 Id. See also, Comm’n Adjudication, *supra* at p. 6, ¶19, p. 7, ¶22.

104 Id. See also, Comm’n Adjudication, *supra* at p. 5, ¶17, p. 6, ¶19.

105 Id. See also, Comm’n Adjudication, *supra* at p. 5, ¶¶15, 16.

suffered an adverse employment action. The Court should easily dispose of this inquiry as it forms the foundation of this appeal. The Department removed Petitioner from her employment.<sup>106</sup>

The final determination involved in the initial inquiry for an improper retaliation to protected speech is: was there “a causal connection [that] existed between the speech and the adverse employment action, so that it can be said that [her] speech was a motivating factor in the determination.”<sup>107</sup> A review of the hearing transcripts indicates that not only was the Petitioner’s speech a motivating factor in her removal, it was the only reason for her removal. Anthony Reda, Labor Relations Analyst for the Department, testified that “[t]he suspension and the removal were because she made the comments, and those comments are related to the workplace.”<sup>108</sup> In fact, the Department was unable to provide any evidence that the Petitioner was anything other than a model employee.<sup>109</sup>

Under Mandell the Department could defeat an otherwise proper claim of a violation of First Amendment rights by showing that the Department would have taken the same personnel action even without the speech. Mr. Reda’s testimony that the decision was based entirely on the

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106 AA Ex. 11. (Repr. Rec. at 11a)

107 Mandell, *supra* at note 92

108 Tr. p. 139, 20-23.

109 Id. at p. 17, 7-25

speech<sup>110</sup> and Mr. Chiapelli's testimony that the Department had no record that Petitioner had ever received any other discipline<sup>111</sup> would negate any such showing.

The final inquiry, under Mandell, into whether the Department can defeat the Petitioner's violation of her right to free speech is whether the petitioner's speech was likely to disrupt the government's activities and that disruption outweighed the value of the petitioner's speech. Other than three contacts with the Department's Central Office (which all occurred on a single day) the Department has failed to show at the appeal hearing how its ability to provide services was affected at all. To the contrary, the testimony showed that, to the knowledge of the witnesses, no disruption in services occurred at all as a result of the Petitioner's speech.<sup>112</sup> Because the Petitioner's comments pertained to an essential function of government, specifically the quality of school bus drivers, under Bieluch,<sup>113</sup> this Court should afford the Petitioner's comments the greatest level of protection. Without a showing of the likely disruption of services and its importance beyond the interest of the Petitioner's right to speak as a citizen, this Court should find that Department's removal of the Petitioner

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110 Id. at p. 139, 20-23.

111 Id. at p. 17, 7-25

112 Id. at p. 71, 15-18, p. 136, 21 – p.137, 5.

113 *Supra* at note 89

was improper and in violation of her First Amendment rights.

The Department claimed it was concerned that its mission of safety may be thwarted by the Petitioner's comments.<sup>114</sup> The Department also claimed in the appeal hearing that it had concern the public would feel that the Petitioner's speech would be mistaken for the Department's viewpoints.<sup>115</sup> Though it is a relevant inquiry, the conclusions of both the Department and the Commission are not supported by the record. To the contrary, one of the group members posted that he would soon inform the Petitioner's employer that the Petitioner is making such comments.<sup>116</sup> This response seems to indicate that the group member could certainly discern the Petitioner's speech as being separate and distinct from the Department's viewpoints. Additionally, Mr. Chiapelli testified that the individuals who complained "wanted to see something done."<sup>117</sup> This is additional evidence that the complainers were fully aware that Petitioner's comments did not represent the views of the Department in that the complaining group members expected her to be punished.

The Department and the Commission's determination that Petitioner's removal from employment did not violate her First Amendment

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114 *Id.* at p. 66, 2-6

115 *Id.* at p. 68, 12-18.

116 AA Ex. 7, *See also*, Comm'n Adjudication, *supra* at p. 6, ¶18.

117 *Id.* at p. 60, 5-6

rights is based on a faulty analysis. Mr. Chiapelli and Mr. Reda consistently claimed in their testimony that any speech that has a nexus to the workplace and is contrary to the views of the Department is punishable.<sup>118</sup> The Commission also found that her removal was proper because she was treated no differently “than any other probationary employee who made disparaging remarks bring disrepute to the appointing authority and its mission.”<sup>119</sup> Withstanding the fact that the record does not indicate that those who complained confused the Petitioner’s speech with the Department’s view points, the analysis is not whether she brought disrepute to the Department. The proper analysis is under Pickering: 1) did the Petitioner’s speech affect close working relationships—the record indicates it did not<sup>120</sup>—2) did it impair the Petitioner’s ability to perform her job—the record indicates it did not<sup>121</sup>—or 3) did the Petitioner’s speech hinder the ability of Department to provide services—the record indicates it did not.<sup>122</sup>

Based on Pickering and its progeny—further synthesized by the 2<sup>nd</sup> Circuit—the analysis and conclusion of law of the Commission was

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118 Id. at p. 63, 3-5, p. 123, 22-23.

119 Comm’n Adjudication, *supra* at p. 20.

120 *See* Hr’g Tr. at p. 23, 1-4.

121 Id. at p. 125, 9-11.

122 Id. at p. 71, 15-18, p. 136, 21 – p.137, 5.

contrary to the record and was an error of law.

### **VIII. Statement of Relief**

The Petitioner respectfully requests that this Court deny the Commission's Application for Summary relief, and grant any other relief the Court deems just and proper.

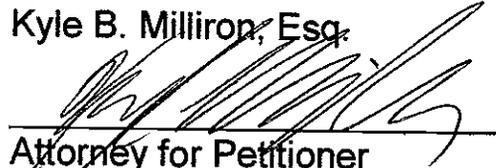
Second, the Petitioner respectfully requests that this Court reverse the decision of the Commission for violating the Petitioner's procedural due process rights, reinstate the Petitioner, award back pay to the Petitioner, and grant any other relief the Court deems just and proper. In addition or in the alternative, Plaintiff respectfully requests declaratory relief in the form of an order indicating that the Commission has violated the Petitioner's due process rights and issue an injunction against the Commission that requires them to adhere to the statutory language of 71 Pa.C.S.A. §741.952(a) and grant any other relief the Court deems just and proper.

Third, the Petitioner respectfully requests this Court reverse the decision of the Commission for failing to adhere to the Civil Service Act during its adjudication of the Petitioner, reinstate the Petitioner, award back pay to the Petitioner, and grant any other relief the Court deems just and proper.

Finally, due to the Department's violation of the Petitioner's right to free speech, the Petitioner respectfully requests that this Court reverse the decision of the Commission, reinstate the Petitioner, award back pay to the Petitioner, and grant any and all other relief the Court deems just and proper.

**Respectfully Submitted,**

Kyle B. Milliron, Esq.



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**IN THE  
COMMONWEALTH COURT OF PENNSYLVANIA**

RACHEL L. CARR,  
PETITIONER,

vs.

NO. 380 MD 2017

COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT  
OF TRANSPORTATION, and

COMMONWEALTH OF  
PENNSYLVANIA, STATE CIVIL  
SERVICE COMMISSION,  
RESPONDENTS.

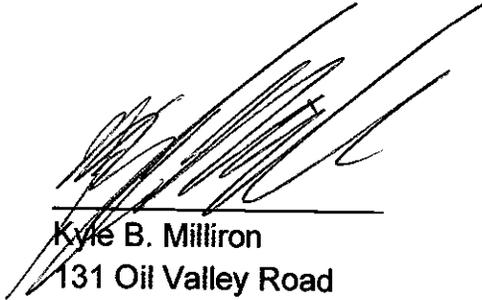
**CERTIFICATE OF SERVICE**

I, Kyle B. Milliron, hereby certify that I am this day, November 20, 2017, serving the foregoing documents (Petitioner's Brief with appended documents and Reproduced Record) upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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CERTIFICATE OF COMPLIANCE

I hereby certify, this 20<sup>th</sup> day of November, 2017, that Petitioner's principal brief does not exceed the word limit established by Pa.R.A.P. No. 2135.



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## APPENDIX A

COMMONWEALTH OF PENNSYLVANIA

Rachel L. Carr	:	State Civil Service Commission
	:	
v.	:	
	:	
Pennsylvania Department of Transportation	:	Appeal No. 29058
	:	
Kyle B. Milliron Attorney for Appellant		Denise H. Farkas Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Rachel L. Carr challenging her removal from probationary Roadway Programs Technician 1 employment with the Pennsylvania Department of Transportation. A hearing was held November 17, 2016, at the Western Regional Office in Pittsburgh, Pennsylvania before Chairman Odelfa Smith Preston.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether the appointing authority discriminated against appellant when it removed her from her position.

FINDINGS OF FACT

1. By letter dated June 14, 2016, appellant was removed from her position as Roadway Programs Technician 1, probationary status, effective June 17, 2016. The appointing authority charged:

The reason you are removed is inappropriate behavior. Specifically, on May 24, 2016, you posted inappropriate comments to a Facebook page called "Creeps of Peeps" and you identified your employer as the Department of Transportation (PennDOT) to your Facebook profile which created a nexus to the workplace.

Comm. Exs. A, E; AA Ex. 11.

2. This appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended.
3. Appellant was employed as a seasonal/non-permanent Clerk 1 by the McKean County Maintenance Organization. N.T. pp. 41-42; Comm. Ex. E.

4. On October 19, 2015, appellant signed an acknowledgment that she had received a copy of the appointing authority's Working Rules. N.T. p. 45; AA Ex. 3.
5. The appointing authority's Working Rules are developed to explain inappropriate conduct. During new employee orientation, Human Resource Director Robert Chiappelli explained that the Working Rules are not an all-inclusive list of inappropriate conduct. N.T. p. 36.
6. Also on October 19, 2015, appellant signed a Policy Acknowledgment Summary indicating that she had received training in, among other policies, "Conduct expectations." N.T. p. 48; AA Ex. 5.
7. On March 5, 2016, appellant was promoted and began employment as a Roadway Programs Technician 1 with the McKean County Maintenance Organization. N.T. pp. 41-42; AA Exs. 1, 2; Comm. Ex. E.
8. The Roadway Programs Technician 1 position required a 180 calendar day probationary period. Comm. Ex. E.

9. On March 29 and 30, 2016, appellant attended new employee orientation where Chiappelli reviewed the appointing authority's Working Rules, Governor's Code of Conduct, and after hour behavior. N.T. p. 50; AA Ex. 6A.
10. During new employee orientation, Chiappelli discussed off-duty activities and the potential for those actions to have an adverse effect on employment. N.T. pp. 63, 50-51.
11. Appellant's job duties require travel on behalf of the appointing authority. N.T. p. 20; AA Ex. 1.
12. On or about May 25, 2016, appellant made a series of Facebook Posts. Comm. Ex. E.
13. In the Facebook posts, appellant's profile is identified by her name, "Rachel Carr," and as a "Roadway Programs Technician at Pennsylvania Department of Transportation (PennDOT)" employee. AA Ex. 7.

14. Appellant posted in a Facebook group called “Creeps Of Peeps” and made the following statement:

Rant: can we acknowledge the horrible school bus drivers? I’m in PA almost on the NY boarder [by] Erie and they are hella scary. Daily I get ran off the berm of our completely wide enough road and today one asked me to t-bone it. I end this rant saying I don’t give a flying sh\*t about those babies and I will gladly smash into a school bus.

AA Ex. 7.

15. She also wrote, “If you see a vehicle coming perpendicular to you with no turn signal on, do you pull out from your stop sign anyways? Lmk when you’re done googling perpendicular.” AA Ex. 7.
16. She wrote, “Good then, you don’t? Then they shouldn’t either.” AA Ex. 7.
17. She wrote
- And that’s my problem? They broke traffic law[s], which I’m abiding and I’m in the wrong? Get f\*\*ked. What

world do you live in that I'd deliberate[ly] injure myself instead of somebody else. Didn't call myself a hero.

AA Ex. 7.

18. When another person stated that her employer "will know soon enough" about her comments, appellant replied, "Transportation...road laws. Right." AA Ex. 7.
19. When a person asked if she would feel differently about the situation if she had her own children, appellant replied, "No I'm saying you don't care about the random f\*\*ks that drive your kids and are you serious? Haha." She then commented, "I care about me." AA Ex. 7.
20. In response, somebody stated that yes, they were serious, and appellant replied, "0 f\*\*ks."
21. She stated, "Department of transportation...that means road laws. Not worrying about your kids that are probably your cities [sic] issue." AA Ex. 7.

22. An additional comment stated

Your children and your decision to chance them with a driver you've never been a passenger with is your problem. A vehicle pulls out in front of me or crosses the yellow line, that's their problem. A sedan, school bus or water truck. You're [sic] kids your problem. Not mine.

AA Ex. 7.

23. On or about May 26, 2016, the Central Press Office received complaints that an appointing authority employee had posted inappropriate remarks on Facebook. The Central Press Office does not have authority or expertise to take any action based upon those complaints. N.T. p. 57.
24. On May 26, 2016, management personnel with the appointing authority were made aware of correspondence appellant made through a Facebook page called "Creeps Of Peeps." Comm. Ex. E.
25. On May 26, 2016, the Central Press Office sent the complaints about the Facebook comments to the Human Resource Office. N.T. p. 57.

26. Human Resource Director Robert Chiappelli reviewed the Facebook comments. N.T. pp. 57-58.
27. After he completed his review of the Facebook comments, he contacted Central Office and scheduled a Pre-Disciplinary Conference for the following day. N.T. pp. 57-58.
28. On May 27, 2016, appellant attended a Pre-Disciplinary Conference (hereinafter "PDC"). N.T. pp. 58-63, 73-74; Comm. Ex. E; AA Exs. 8, 9.
29. After the PDC, Labor Relations Analyst Anthony Reda reviewed the PDC minutes and advised Chiappelli to suspend appellant pending the results of further investigation (hereinafter "SPI"). N.T. p. 119.
30. Chiappelli considered appellant's PDC responses, the information received from the people who complained, appellant's probationary status, her character, and the nexus between her conduct and the appointing authority. N.T. p. 64.

31. Chiappelli also spoke with the Central Office for additional guidance. N.T. p. 64.
32. After his investigation, Chiappelli made a disciplinary recommendation to Central Office. N.T. p. 65.
33. Reda reviewed information from the Press Office, then advised Chiappelli to prepare a dismissal packet. N.T. p. 119.
34. When Reda received the dismissal packet, he reviewed it and a Human Resource Analyst wrote the justification for removing appellant. N.T. p. 120.
35. Reda signed the justification for removal and sent the information to the Division Chief, who also signed off on it. The Division Chief sent it to the Human Resources Director who signed it and forwarded it to the Deputy for Administration. N.T. p. 120.
36. After the Deputy for Administration signed, the removal request was returned to Human Resources and a removal letter was drafted. N.T. p. 120.

37. Central Office made a final decision to remove appellant. N.T. pp. 65.

### DISCUSSION

At issue before the Commission is whether the appointing authority discriminated against appellant when it removed her from her Roadway Technician 1, probationary, position. Appellant alleges she was discriminated against based upon her ethnic background (Mexican American) and because her behavior occurred off state property, during her off-duty hours, and did not include any other appointing authority employee.

In support of her assertions, appellant testified on her own behalf and presented the testimony of Human Resource Officer Robert Chiappelli. The appointing authority presented the testimony of Labor Relations Supervisor Anthony Reda.

The Civil Service Act addresses both “traditional” and “procedural”<sup>1</sup> discrimination. “Traditional discrimination” encompasses claims based upon race, disability, or other non-merit factors. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v.*

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<sup>1</sup> “Procedural discrimination” involves a violation of procedures required pursuant to the Act or related Rules. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988). Appellant does not allege any procedural discrimination.

*Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988); 71 P.S. §905a. In claims of “traditional discrimination” the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. *Henderson v. Office of Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate that the proffered merit reason is merely a pretext for discrimination. *Id.* In particular, an employee claiming disparate treatment must demonstrate that he or she was treated differently than others who were similarly situated. *Nwogwugwu*, at 141 Pa. Commw. at 40, 594 A.2d at 851 (1991).

Appellant’s primary argument is that her Facebook posts were made while she was at home, off duty, and are protected by the First Amendment to the United States Constitution. She argues that the appointing authority has overstepped its bounds by “policing” her off-duty, protected free speech. Appellant argues that the balancing test established by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), applies. N.T. pp. 146-147.

In *Pickering*, a public school teacher was removed after publishing a letter in the local newspaper criticizing the school board’s allocation of funds. The local school board determined that publication of the letter was “detrimental

to the efficient operation and administration” of the schools. The appellate courts upheld appellant’s removal. The United States Supreme Court noted that many of the comments in the teacher’s letter were false and critical of his employer, but which were “neither shown nor can be presumed to have in any way either impeded the teacher’s proper performance of his daily duties...or to have interfered with the regular operation of the schools generally.” 391 U.S. 563 at 572-573. The United States Supreme Court established a balancing test to “balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees.” 391 U.S. 563 at 568. In *Pickering*, the teacher’s actions were held to be protected speech. 391 U.S. 563 at

More recently, in *Munroe v. Central Bucks School District*, 805 F.3d 454 (3<sup>rd</sup> Cir, 2015) the Third Circuit applied *Pickering* to a case involving a teacher’s use of a blog to make derogatory comments about her own students and the teaching process. In determining that her remarks did not rise to the level of constitutionally protected free speech and upholding her removal, the Third Circuit applied the *Pickering* balancing test. The Court related:

On the employee’s side of the scale, we must consider the interests of both [Munroe] and the public in the speech at issue...On the other side of the *Pickering* balancing test, the Court must address ‘the government’s legitimate and countervailing interest, as an employer, in promoting workplace efficiency and avoiding workplace disruption....’ The government need not show the existence of actual disruption if it establishes that disruption is likely to occur because of the speech.... While the inquiry varies...courts typically consider whether the speech...has a detrimental

- impact on close working relationships requiring personal loyalty and confidence, impedes the performance of the speaker's duties, or interferes with the enterprise's regular operations.

*Id.* (Citations omitted). The Court held that the employee's speech was likely to cause a disruption and the School District's interest outweighed the teacher's interest, as well as the interest of the public, in her speech.

In this instance, appellant asserts that a non-merit factor relates to an employee not performing her job duties properly or committing an act that hampers or frustrates the execution of her job duties. According to appellant, a remark made while off duty is clearly a non-merit factor. N.T. p. 143. Appellant testified that her Facebook posts did not affect her essential job duties in any manner. N.T. pp. 84-88; AA Ex. 1. In addition, it was never her intent to "careen into a bus" that was following the laws of the road. N.T. pp. 89, 91. As to the appointing authority's indication that her Facebook posts spanned a period of five hours, she explained it was not five straight hours of typing or ranting; she clarified that she was not sitting at the computer, waiting for somebody to reply, "so I could rip into them about it." Her posts were "a few minutes here, another few there" over the course of a five hour time frame. N.T. p. 89. For the two days between her Facebook posts and her PDC, she did not receive any complaints from the public relating to her Facebook posts. N.T. p. 91. She also did not receive any complaints from the appointing authority about the quality of her work product. N.T. pp. 93-94.

Appellant acknowledged that she attended new employee training; she testified that off-duty conduct was “somewhat” explained, but nothing about Facebook remarks was ever discussed. N.T. p. 97. Appellant also acknowledged that her Facebook profile indicates she is employed with the appointing authority. N.T. p. 97. However, she contends, “Transportation” means road laws and regulating motor vehicles and driver licensing. N.T. p. 105. She explained that at the time of posting her comments, she was not aware that her remarks could be seen because the group is “closed.” N.T. pp. 100-101; AA Ex. 7. She testified, “It [the group] was closed to so many people. I didn’t know it was going to blow up and go public.” However, many people did see the posts, “It went everywhere else. Only it shouldn’t have.” N.T. pp. 99-100. Appellant explained that she realizes somebody reading her posts could interpret them as intending to cause harm. N.T. p. 103. Appellant explained that she was not offered the opportunity to “rehabilitate” from her conduct. N.T. p. 110.<sup>2</sup>

Having established a *prima facie* case of discrimination based upon the assertion of the First Amendment, the burden of production shifts to the appointing authority to advance a legitimate, non-discriminatory reason for its employment action through the introduction of admissible evidence. *Nwogwugwu*, 594 A.2d at 850.

The appointing authority counters that although appellant has a freedom to speak, the appointing authority has an interest in regulating the speech when it is in the appointing authority’s interest to promote the efficiency of the

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<sup>2</sup> At the conclusion of appellant’s testimony and evidence, the appointing authority made a Motion to Dismiss for failure to establish a *prima facie* case of discrimination. The appointing authority’s Motion is denied.

public service it performs. Chiappelli explained the nexus between appellant's job duties and her behavior. Specifically, one of her essential job duties requires travel. Thus, to infer in posts that she intentionally or willingly wanted to crash into a bus with no regard to the babies or the bus driver establishes nexus between her essential job duties and her actions even though posted off duty hours. N.T. pp. 19-20. He further clarified that "It is totally against what the [appointing authority] stands for. It is not part of our mission. Everything the [appointing authority] does...deals with safety, whether it's the roads, the bridges, the maintenance, the road laws. We are...number one is safety." N.T. pp. 65-66. He further explained, "As far as specific to her central functions and her job descriptions, a lot of things that she can do...deals with involvement in traffic...driving to look at sites, be looking at inventories on the roadway systems, inspecting work to be done. Having the willingness or at least to talk about the behavior of intentionally running into something and hurting somebody really has an effect on her character along with the [appointing authority's] character if we continue with her employment." N.T. p. 66. He explained there could possibly be an impact on her interpretation of what needs to be ordered because her posts indicate she is not safety-oriented and her interpretation of facts about the types of guardrails to order, and other safety items, could be affected; she may take a shortcut instead of doing the right thing. N.T. pp. 21-22. Many other essential job duties were not affected. N.T. pp. 22-23, 27-29

Chiappelli explained that the appointing authority has an obligation to provide safe highways and bridges. N.T. p. 76. In addition, the appointing authority has an obligation to hire trustworthy employees that do not violate the rules or regulations. N.T. p. 76. Chiappelli testified, "Our employees are basically

the representative of the [appointing authority]. And without good character and hard work, the [appointing authority] would be looked at in a different light.” N.T. p. 76. Chiappelli, explained the nexus between the appointing authority’s safety goals and an employee’s behavior, “here is the representative of the Department through her opening profile and then through several posts. She mentions Transportation. Transportation again. Again, we look at a lot of character of our employees. It’s not just necessarily that they do a satisfactory job. We talk about suitability, too. And in this problem period of time, the conduct that was something that had a lot of liability for the Department of Transportation.” N.T. p. 30. He further explained that the atmosphere created by her posts was one that does not support the safety views promoted by the appointing authority. N.T. p. 31. The appointing authority conducts school bus training, driver training, affects the traveling public, and improves the roads and highways and bridges – all of which are based on a safety sensitive nature. These posts “were something that was trying to crumble our mission in all of that.” N.T. p. 31. Her rant lasted over a period of five hours, which provided her with ample time to retract or explain what she meant if she really had not meant she would t-bone a bus and did not care about the babies on the bus. N.T. pp. 31-32.

Chiappelli explained that appellant attended New Employee Orientation where he explained the appointing authority’s Working Rules and Policies, including the fact that they do not provide an all-inclusive list of inappropriate conduct. N.T. p. 36. During orientation, he also explained the Governor’s Code of conduct and discussed out off-duty behavior could affect the

appointing authority. N.T. p. 36. As clarification, Chiappelli testified that while there is no Work Rule specifically stating it is wrong to run into a school bus, "The common sense rules is what we apply to the inappropriate behavior." N.T. pp. 33-34; AA Ex. 3.

Further, Chiappelli explained that appellant was not treated differently than any other employee. N.T. p. 67. The disciplinary process is the same whether the employee is probationary or regular status. N.T. p. 67. He believes all employees should have the same emphasis on safety and to make sure safety is paramount when making decisions or performing inspections. N.T. p. 71. He explained that her First Amendment right to free speech was not infringed upon because the appointing authority has the authority to regulate off duty remarks. N.T. pp. 69-70. In addition, "there's no way we [the appointing authority] want to be in any line of thinking that our department employees don't care about traffic laws and that they would hurt somebody intentionally." N.T. p. 69.

In concurrence with Chiappelli, Reda testified that the appointing authority is "very involved" in traffic safety and the safety of the public. N.T. p. 123. When appellant posted her "rant" saying she did not care about safety and would ram into a school bus without a care for the children on board, "That's serious. There is a nexus to the workplace in that she is required to travel to various sites." N.T. p. 123. In this instance, if she had followed through with her statements, the appointing authority would have a "huge liability." N.T. p. 124.

He explained that, "...we [the appointing authority] are in the public eye. The rant...she said that it was a closed group. A closed group of 1,300 people isn't a very closed group. But that gave the [appointing authority] a black eye." N.T. p. 124. As a result of her posts, people were angry and asked the appointing authority to take action. N.T. p. 124. Reda further testified that although appellant was off duty, she identified herself in her profile as an appointing authority employee and did so again during her rant. Thus, she brought the appointing authority into the scenario and made the entire incident work related. N.T. pp. 125-126.

Appellant contends that her Facebook remarks did not incite violence, were not obscene, and did not put motorists at stake. The Commission is in complete disagreement. Appellant blatantly states that she would not hesitate to ram into a bus with children on board – clearly indicating that she herself is capable of violent behavior and clearly putting the bus driver and any other nearby motorists at risk. Moreover, the Commission is at a complete loss to find any reasonable public interest in a rant about harming children or a bus driver. Appellant's remarks do not provide any educational information to the public or serve to inform them about any public matter. See, *Munroe*. Furthermore, even if the Facebook rant contains an inkling of public interest, we find Chiappelli and Reda credible that appellant presented herself as an appointing authority employee and her rant completely disregards the basic safety mission put forth in its mission statement. Appellant's Facebook rant caused disruption to the appointing

authority's reputation and mission that outweighed appellant's interest in her free speech. *Munroe*, supra. Thus, appellant's Facebook rants do not constitute protected free speech.

In response to appellant's assertion of disparate treatment, Reda testified that appellant was "absolutely not" treated differently than other employees. N.T. p. 127. He later clarified to explain probationary employees are treated differently than regular status employees because probationary employees are afforded less protection. N.T. p. 130. Reda testified that other probationary employees have been removed for inappropriate behavior or activities conducted outside of work, but with a nexus to the work place. N.T. p. 127. He explained that posting the rant saying she was willing to t-bone a bus regardless of the consequences to the children or bus driver is "a pretty serious offense in our view." N.T. pp 127-128. He testified that the "normal thing is that, something like this, we would discharge a probationary employee." N.T. p. 133. He explained every incident of inappropriate conduct is investigated and if the appointing authority's reputation is at stake, a disciplinary decision would be made based upon the results of the investigation. N.T. p. 137. He explained, "The suspension and removal were because she made comments, and those comments related to the workplace." N.T. p. 138.

Additionally, it is important to note the appointing authority is not disciplining appellant because of her decision to speak; the appointing authority is disciplining appellant because of the consequences – the disrepute and negative image she portrays of the appointing authority and the concerns about her ability to adhere to the mission of safety. Reda testified, "...an employee may very well

perform their job well, but if they misbehave in other areas, if they violate policies, if they violate [the appointing authority's] idea on...safety or anything else, then that is something else. We would take action on that behavior." N.T. p. 125.

Upon review of the record, the Commission finds appellant has not presented sufficient evidence to support her claim of discrimination or a violation of her First Amendment free speech. Appellant has not presented any evidence to establish she was treated differently than any other probationary employee who made disparaging remarks bringing disrepute to the appointing authority and its mission. The Commission finds the testimony of Chiappelli and Reda credible that appellant's Facebook remarks brought disrepute to the appointing authority and raised issues of trust. Accordingly, we enter the following:

#### CONCLUSION OF LAW

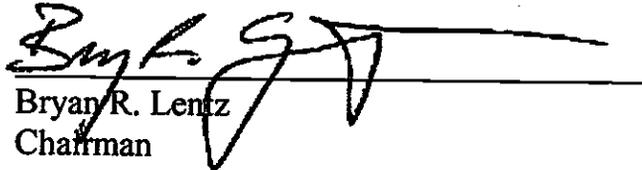
Appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

#### ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members, dismisses the appeal of Rachel L. Carr challenging her removal from probationary Roadway Programs Technician 1 employment with the

Pennsylvania Department of Transportation and sustains the action of the Pennsylvania Department of Transportation in the removal of Rachel L. Carr from probationary Roadway Technician 1 employment, effective June 17, 2016.

State Civil Service Commission

  
Bryan R. Lentz  
Chairman

  
Odelfa Smith Preston  
Commissioner

  
Gregory M. Lane  
Commissioner

Mailed: August 1, 2017

## APPENDIX B

**IN THE  
COMMONWEALTH COURT OF PENNSYLVANIA**

RACHEL L. CARR,  
Petitioner,

vs.

NO. \_\_\_\_\_ C.D. 2017

COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT  
OF TRANSPORTATION, and

PETITION FOR REVIEW

COMMONWEALTH OF  
PENNSYLVANIA, STATE CIVIL  
SERVICE COMMISSION,  
Respondents.

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**RACHEL L. CARR'S PETITION FOR REVIEW**

**NOW COMES** Rachel L. Carr ("Petitioner"), by and through her undersigned counsel, Kyle B. Milliron, Esq., to file this Petition for Review of an adjudication order entered by the State Civil Service Commission.

***INTRODUCTION***

The Pennsylvania Department of Transportation suspended and subsequently removed Petitioner from her probationary Roadway Programs Technician I employment on May 27, 2016, and June 17, 2016, respectively. Petitioner timely filed an appeal to the State Civil Service

Commission and the Commission held a hearing on November 17, 2016, at its Western Regional Office in Pittsburgh, Pa. In its order mailed on August 1, 2017, the Commission dismissed the appeal.

Petitioner seeks judicial review of the Commission's decision, and in support thereof, avers as follows:

I. **Error of Law**

***JURISDICTION***

1. This Honorable Court has jurisdiction pursuant to 42 Pa.C.S.A. §763(a)(1).

***PARTIES***

2. The Petitioner seeking review of the order referenced in Paragraph 5 of this Petition is Rachel L. Carr, a previous employee of the Pennsylvania Department of Transportation.
3. The Respondent is the Commonwealth of Pennsylvania, Department of Transportation ("the Department"), the appointing authority that removed the Petitioner from her employment and that participated in Petitioner's removal appeal hearing in front of the State Civil Service Commission.
4. The Respondent is the Commonwealth of Pennsylvania, State Civil Service Commission ("the Commission"), the administrative

body that conducted the appeal hearing under Section 951(b) of the Civil Service Act and upheld the Department's removal of the Petitioner.

### **ORDER REFERENCE**

5. The Petitioner seeks review of the Commission's Adjudication Order dated August 1, 2017, attached to this Petition as Exhibit A.

### **STATEMENT OF OBJECTIONS**

6. The Commission's conclusions of law are not supported by the findings of fact, specifically:

- A. the Commission's characterization that Petitioner's off-duty speech indicated she was "capable of violent behavior and clearly put[ ] the bus driver and any other nearby motorists at risk."<sup>1</sup>;

- B. the Commission's determination that Petitioner's off-duty speech "completely disregards the basic safety mission" of the Department<sup>2</sup>;

- C. the Commission's determination that Petitioner's off-duty

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<sup>1</sup> Comm'n. Adjud. Order, Carr v. Pa. Dept. Transp., p. 18, Aug. 1, 2017. (Attached as Exhibit A).

<sup>2</sup> Id.

speech fails to inform the public about “any public matter”<sup>3</sup>;

D. the Commission’s determination that Petitioner’s off-duty speech caused disruption to the appointing authority’s reputation and mission.”<sup>4</sup>

7. The Commission’s analysis under Pickering<sup>5</sup> and its progeny is flawed.
8. Petitioner’s off-duty speech should have been and remains protected under the 1<sup>st</sup> Amendment of the United States Constitution and Article 1, Section 7 of the Constitution of the Commonwealth of Pennsylvania.
9. The Department’s removal of Petitioner based upon her protected speech is discrimination due to a non-merit factor, which is prohibited under 71 Pa.C.S.A. §741.905a.

**WHEREFORE**, the Petitioner prays that this Honorable Court reverse the decision of the Commission, reinstate Petitioner to her position with the Department of Transportation, award back pay and any other monetary compensation as authorized by 71 Pa.C.S.A. §741.952(c), and order any other relief that may be just and proper.

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3 Id.

4 Id. at 18-19.

5 Pickering v. Board of Education, 391 U.S. 563 (1968).

**II. The Department's Violation of Petitioner's Constitutional Right to Free Speech**

***JURISDICTION***

10. This Honorable Court has jurisdiction pursuant to 42 Pa.C.S.A. § 761(a).

***PARTIES and ORDER REFERENCE***

11. Paragraphs 2 through 5 of this Petition are incorporated as if fully set forth herein.

***BASIS FOR THE ACTION***

12. Petitioner participated in off-duty speech through a series of Facebook posts that occurred on May 24, 2016.
13. The Department suspended the Petitioner without pay on May 27, 2016, from her position as a result of that speech.
14. The Department permanently removed her from her position on June 17, 2016.
15. Petitioner's off-duty speech should have been and remains protected under the 1<sup>st</sup> Amendment of the United States Constitution and Article 1, Section 7 of the Constitution of the Commonwealth of Pennsylvania.
16. The Department's violation of her constitutional right to free

speech caused substantial economic and physical harm to the Petitioner.

**WHEREFORE**, the Petitioner prays that this Honorable Court reverse the decision of the Commission, reinstate Petitioner to her position with the Department of Transportation, award back pay and any other monetary compensation as authorized by 71 Pa.C.S.A. §741.952(c), and/or order any other relief that may be just and proper.

**III. The Commission's Violation of Petitioner's Constitutional Right to Due Process**

***JURISDICTION, PARTIES, and ORDER REFERENCE***

17. Paragraphs 2 through 5 and 10 of this Petition are incorporated as if fully set forth herein.

***BASIS FOR THE ACTION***

18. Section 11 of Article I of the Constitution of the Commonwealth of Pennsylvania states:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and

in such cases as the Legislature may by law direct.<sup>6</sup>

19. The Civil Service Act specifically states that “[w]ithin ninety days after the conclusion of the hearing described in section 951, the commission **shall** report its findings and conclusions to those parties directly involved in the action.”<sup>7</sup>
20. The Petitioner’s adjudication hearing pursuant to 71 Pa.C.S.A. § 741.951(b) concluded on November 17, 2016.
21. The Commission did not report its findings and conclusions until August 1, 2017, precisely 257 days after the conclusion of the 951 hearing (almost three times longer than required under the law).
22. None of the past twenty-six appeal decisions from the Commission has occurred within the statutorily proscribed ninety-day time limit.<sup>8</sup>
23. This is a systemic denial of due process by the Commission that this Honorable Court can and should remedy.

**WHEREFORE**, the Petitioner prays that this Honorable Court reverse

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6. Pa. Const. Art. 1, § 11.

7. 71 Pa.C.S.A. § 741.952(a), (emphasis added).

8. This statement is accurate as of August 30, 2017. See Exhibit B attached to this Petition.

the decision of the Commission, reinstate Petitioner to her position with the Department of Transportation, award back pay and any other monetary compensation as authorized by 71 Pa.C.S.A. §741.952(c), and order any other relief that may be just and proper.

In addition or in the alternative, Petitioner prays that this Honorable Court issue declaratory relief in the form of an order indicating that the Respondent State Civil Service Commission has violated the due process rights of the Petitioner and issue an injunction against the Commission that requires them to adhere to the statutorily proscribed 90-day time limit under 71 Pa.C.S.A. § 741.952(a).

**Respectfully Submitted,**

Kyle B. Milliron, Esq.



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Attorney for Petitioner  
Attorney ID No. 320309  
131 Oil Valley Road  
Duke Center, PA 16729  
Tel: 904-652-3246

# EXHIBIT A

## EXHIBIT B

## Systemic Due Process Failure with Civil Service Appeals

Appeal No.	Hrn'g Date	Order Mailing Date	Days in Between
29162	December 20, 2016	August 24, 2017	247
29151	December 8, 2016	August 23, 2017	258
29173	February 1, 2017	August 17, 2017	197
29219	February 14, 2017	August 15, 2017	182
29086	December 7, 2016	August 14, 2017	250
29206	February 17, 2017	August 14, 2017	178
29087	*	August 9, 2017	*
29203	January 31, 2017	August 3, 2017	184
29038	October 18, 2016	August 1, 2017	287
29058	November 17, 2016	August 1, 2017	257
28790	December 18, 2015	July 25, 2017	585
28970	October 20, 2016	July 21, 2017	274
29135	January 5, 2017	July 20, 2017	196
29195	January 5, 2017	July 20, 2017	196
29010	October 5, 2016	July 18, 2017	286
29130	December 6, 2016	June 30, 2017	206
29025	October 31, 2016	June 26, 2017	238
29026	October 31, 2016	June 26, 2017	238
29027	October 31, 2016	June 26, 2017	238
29028	October 31, 2016	June 26, 2017	238
29029	October 31, 2016	June 26, 2017	238
29030	October 31, 2016	June 26, 2017	238
29060	January 30, 2017	June 20, 2017	141
29065	November 4, 2016	June 29, 2017	237
29122	December 13, 2016	June 6, 2017	175
29050	September 22, 2016	June 5, 2017	256

\* Information regarding Appeal 29087 not accessible through website link

\*\*Information Taken from Pennsylvania State Civil Service Commission Website,  
<http://webcontent.scsc.state.pa.us/legal/adjview.aspx>,  
 accessed on August 30, 2017

## APPENDIX C

488 6474  
COMMONWEALTH COURT OF PENNSYLVANIA

Rachel Carr, :  
Petitioner :  
v. : No. 380 MD 2017  
Commonwealth of Pennsylvania :  
Department of Transportation and :  
Commonwealth of Pennsylvania :  
State Civil Service Commission, :  
Respondents :

**APPLICATION FOR SUMMARY RELIEF**

Pursuant to Pa.R.A.P. 1532(b), Frederick C. Smith, Jr., Chief Counsel for Respondent State Civil Service Commission (Commission), hereby requests that this Honorable Court grant Summary Relief in this case. In support thereof, the Respondent avers as follows:

Statement of Facts:

- 1) On August 31, 2017, Petitioner filed in the Commonwealth Court a Petition for Review which was addressed to both the appellate and original jurisdiction of this court.
- 2) A copy of Petitioner's Petition for Review was received in the mail by Respondent on September 5, 2017.
- 3) Petitioner is seeking an order from the Commonwealth Court reversing an adjudication of her appeal to the Commission mailed to Petitioner on

August 1, 2017, which dismissed her appeal challenging her removal from probationary Roadway Programs Technician 1 employment with the Pennsylvania Department of Transportation.

- 4) Petitioner's appeal to the Commission was docketed at SCSC Appeal No. 29058 and a copy of the Respondent's adjudication and order is attached to Petitioner's Petition for Review as Petitioner's Exhibit A.
- 5) The Petition for Review is divided into three separate and distinct Counts.
- 6) Count I (paragraphs 1-9) invokes the Court's appellate jurisdiction only; no responses are required for the averments in Count I. Pa.R.A.P. 1516(a).
- 7) Count II (which incorporates by reference paragraphs 2-5 of Count I and continues with paragraphs 10 through 16) is captioned as "The Department's Violation of Petitioner's Constitutional Right to Free Speech."
- 8) Count II exclusively is directed at the other Respondent to this Petition for Review, which is the Commonwealth of Pennsylvania Department of Transportation, and asserts no responsibility or liability for the alleged free speech violation against Respondent State Civil Service Commission.
- 9) Count III (which also incorporates by reference paragraphs 2-5 of Count I, and then continues with paragraphs 17-23) is captioned as "The Commission's Violation of Petitioner's Constitutional Right to Due Process."

- 10) Count III avers a violation of Petitioner's Right to Due Process due to the Commission's alleged failure to issue its adjudication dismissing her appeal within the ninety day time period specified in section 952 of the Civil Service Act,<sup>1</sup> 71 P.S. § 741.952(a).
- 11) Count III further avers that the Commission has failed to conform to the ninety day time period for each of the last 26 appeals for which it has issued an adjudication, which allegedly constitutes "a systemic denial of due process by the Commission."
- 12) Count III requests as a remedy that this Court, "reverse the decision of the Commission and reinstate [Petitioner] to her position with the Department of Transportation" or "in addition or in the alternative" asks this Court to "issue declaratory relief in the form of an order indicating that the Commission has violated the due process rights of the Petitioner and issue an injunction against the Commission that requires them to adhere to the statutorily proscribed 90-day time limit under 71 Pa. C.S. § 741.952(a)."

Demurrer:

- 13) This Summary Relief Application is equivalent to, and can alternatively be regarded by this Court as, a preliminary objection in the form of a demurrer pursuant to Pa. R.C.P. No. 1028(a)(4).

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<sup>1</sup> Act 1941, Aug. 5, P.L. 752

- 14) A demurrer is an assertion that the complaint does not set forth a cause of action upon which relief can be granted; it admits, for the sole purpose of testing the sufficiency of the civil complaint, all properly pleaded facts, but not the conclusions of law stated therein. *Balsbaugh v. Rowland*, 447 Pa 423, 290 A.2d 85 (1972); *Christ the King Manor v. Commonwealth, Department of Public Welfare*, 911 A.2d 624 (Pa. Commw. 2006), *affirmed* 597 Pa. 217, 951 A.2d 255 (2006).
- 15) Should this Application for Summary Relief be denied by this Court, which would have the same effect as overruling Respondent's preliminary objections to this complaint, Respondent reserves the right to plead over to Petitioner's complaint as permitted by Pa. R.C.P. No. 1028(d).
- 16) For purposes of this Application for Summary Relief only, Respondent concedes that there are no material facts in dispute.
- 17) This demurrer should be sustained only if it is clear and free from doubt that the law will not recognize Petitioner's right to the relief she has requested under the facts alleged. *Palmer v. Bartosh*, 959 A.2d 508 (Pa. Commw. 2008); *Warminster Fiberglass Company, Inc. v. Upper Southampton Township*, 939 A.2d 441 (Pa. Commw. 2007).
- 18) The Demurrer should be sustained as to Count I of Petitioner's Complaint against the State Civil Service Commission because Count I invokes only

this Court's appellate jurisdiction and no answer is required from the Commission in response to the averments in Count I (paragraphs 1-9).

- 19) The demurrer should be sustained as to Count II of Petitioner's complaint against the State Civil Service Commission because Count II alleges that it was exclusively the Department of Transportation which violated Petitioner's Constitutional Right of Free Speech and, therefore, as a matter of law, Count II fails to state a claim against the Commission for which relief can be granted by this Court.
- 20) The demurrer should be sustained as to Count III of Petitioner's complaint against the State Civil Service Commission because it is settled law in Pennsylvania that the provision in the Civil Service Act requiring the Civil Service Commission to report its findings and conclusions within 90 days after the conclusion of the hearing is directory only and not mandatory. *Baker v. Department of Public Welfare*, 588 A.2d 1337 (Pa. Commw. 1991).
- 21) In deciding Baker, this Court rejected Baker's request to reverse the Commission's adjudication and rule in his favor because the Commission allegedly did not comply with the 90 day rule, holding that this would amount to a "deemed decision" with complete disregard for the merit concept which forms the cornerstone of Civil Service law. Baker, 588 A.2d 1337, 1340 (Pa. Commw. 1991).

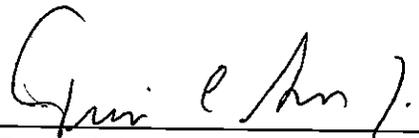
- 22) This Court has also previously held that statutes which seek to impose time limits on adjudicating tribunals are directory only. *West Penn Power Company v. Pennsylvania Public Utility Commission*, 521 A.2d 75 (Pa. Commw. 1987).
- 23) Under the facts alleged in Count III, appellant is neither entitled as a matter of law to a “deemed decision” in her favor, nor to a declaratory order that her due process rights have been violated, nor an injunction requiring the Commission to adhere to the statutory 90 day time limit to issue its adjudications. *See, Baker, supra.*

Conclusion:

- 24) Since the only relief requested by Petitioner in Count III is an order from this Court reversing the Commission’s adjudication and providing her with a “deemed decision” in her favor and awarding her the remedy provided by law or, in addition or alternatively, a declaratory judgment that the Commission has violated her right to due process by issuing its adjudication in non-compliance with the 90 day time period, or enjoining the Commission to comply with a statutory provision that is directory only, Respondent’s right to summary relief is clear.

**Relief Sought**

WHEREFORE, Frederick C. Smith Jr., Chief Counsel for the Commission, respectfully requests this Court to enter an Order granting this Application for Summary Relief and dismissing Petitioner's Petition for Review insofar as it attempts to set forth any original jurisdiction claims in this matter directed at Respondent, the Commonwealth of Pennsylvania State Civil Service Commission.



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Chief Counsel  
State Civil Service Commission  
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(717) 783-1444

Mailed: September 29, 2017

## APPENDIX D

## APPENDIX E

## APPENDIX F

## APPENDIX G

## APPENDIX H

## APPENDIX I

## APPENDIX J

## APPENDIX K

## APPENDIX L

## APPENDIX M

## APPENDIX N

## APPENDIX O

## APPENDIX P

## APPENDIX Q