

3167



RECEIVED
IRRC

2017 MAY 12 PM 11:15

May 12, 2017

Pennsylvania Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

Re: Pennsylvania State Civil Service Commission
Proposed Regulation #61-6
Implementation of Act 69 of 2016 and Act 167 of 2016
IRRC Identification Number 3167

Dear Commissioners:

On April 22, the Pennsylvania State Civil Service Commission (Commission) published in the Pennsylvania Bulletin proposed regulations implementing Act 69 of 2016 and Act 167 of 2016, which amended the Pennsylvania Civil Service Act (Act). Because the proposed regulations are inconsistent with the amendments to the Act made by Acts 69 and 167, and fail to address the mandates of the federal Americans with Disabilities Act (ADA) and Commonwealth goal of promoting accessibility in employment opportunity, the Department of Labor and Industry (L&I) opposes the promulgation of these regulations as drafted.

Last year, the General Assembly passed and Governor Wolf signed into law Acts 69 and 167 of 2016. These laws were intended to provide much-needed modernization to the Civil Service Act, recognizing that in order for the Commonwealth—which relies upon Civil Service Commission processes to fill approximately 70 percent of Commonwealth jobs—to compete in the 21st century workforce, the Commonwealth must adapt to the changing employment landscape. To that end, Acts 69 and 167 significantly reformed the Act to modernize the civil service job application and hiring process, making it easier for candidates to apply for positions, creating a larger pool of candidates from which agencies could choose, and giving agencies the ability to decide the method of examinations to be used in evaluating candidates for positions.

The current civil service process—one largely resuscitated by the Commission's proposed regulations—is archaic and unresponsive to the needs of Commonwealth agencies and employment seekers. Currently, civil service examination schedules are posted and applicants must travel to a civil service location to take an examination, presenting barriers to those with transportation issues arising from reduced mobility due to disabilities or to their economic circumstances. Additionally, a prospective employee applies for job classifications—not an actual open position—and is placed on a list. Agencies must use the applicant lists to determine availability and interest when a job becomes available, as opposed to posting the job and allowing applicants to apply for it. This wastes both an applicant's and the agency's time. It

Department of Labor & Industry
651 Boas Street, Room 1700 | Harrisburg, PA 17121-0750 | 717 705.2630 | F 717 787.8826 | www.dli.state.pa.us

*Auxiliary aids and services are available upon request to individuals with disabilities.
Equal Opportunity Employer/Program*

Independent Regulatory Review Commission – May 12, 2017
Page 2

does not respond to the needs of agencies to fill vacancies with qualified persons in a timely manner, and is nothing short of an outright deterrent to job-seekers in need of immediate employment who have access to hundreds of specific job postings online, or who can walk into a job fair and walk out with a job offer.

Accordingly, among the critical reforms made by Acts 69 and 167 is the allowance of “vacancy-based hiring,” which will permit the Civil Service Commission to post actual job vacancies, rather than a general list of job classifications. These reforms were intended to place the Commonwealth more in line with hiring practices of the private sector and many other civil service covered states, while maintaining the merit-based and non-political nature of the civil service hiring process. As noted below, in drafting its regulations, the Commission has resisted the very notion of empowering agencies to develop processes by which the agencies can respond more nimbly to fill vacancies with qualified applicants and better compete with the private labor market.

The reforms made to the Civil Service Act by Acts 69 and 167 are especially critical to the Department of Labor and Industry, the agency charged with promoting employment and workforce development and which itself has a workforce comprised of 90 percent civil-service-classified personnel. A core L&I mission is to develop and promote employment opportunities for Pennsylvanians with disabilities, including job opportunities within the Commonwealth. As described below, L&I vacancies, especially in its Office of Vocational Rehabilitation (OVR), are going unfilled not because of a lack of qualified applicants, but because those applicants are unable to participate in the examinations required by the Commission. Although L&I has advocated forcefully to the Commission to revise its regulations to offer the reasonable accommodations to disabled job applicants, the Commission has failed to do so. The Commission’s failure to develop alternative qualification regimes ignores federal legal mandates and the goal of the Commonwealth to promote and expand employment opportunities for people with disabilities. Failure to modernize civil service regulations to comply with accessibility requirements may have financial ramifications for L&I, which relies in large part upon federal funding for its programs, including workforce development (expressly including the disabled community) and unemployment compensation.

In short, the Commission has failed to implement the letter and purpose of the reforms made to the Act by Acts 69 and 167, instead reverting to and perpetuating the very antiquated methods that the General Assembly directed the Commission to change. The Commission also has failed to modernize its regulations to comply with accessibility goals and mandates.

The Department of Labor and Industry offers the following more specific points to highlight the failures of the Commission and supporting L&I’s request that the IRRC reject the Commission’s proposed regulations unless the Commission re-drafts the proposed regulations to comport with the amendments that Acts 69 and 167 made to the Civil Service Act.

Section 95.1. Application requirements.

Act 167 amended Section 212 (d) of the Act to provide: “The commission shall enter into an agreement to utilize the form and method of an employment application that is standard across departments and agencies that are under the Governor's jurisdiction for the purpose of entrance to, or promotion in, the classified service.” 71 P.S. §741.212(d).

This change to the law was made to make it easier for people to apply for state jobs by having a single site for both non-Civil Service and Civil Service positions. Since L&I has both Civil Service and non-Civil Service positions, having a single site will allow L&I to showcase the variety of work opportunities available for both types of employment, thereby increasing its potential candidate pool.

Section 95.20. Authority to Select Method of Examination.

Act 167 amended Section 502 of the Act to allow the appointing authority (the agency)—not the Commission—to determine the method of the “examinations.” The Commission currently uses written tests or experience and training to evaluate candidates for positions. However, L&I is in a better position than the Commission to determine how best to evaluate candidates for L&I's specific positions.

In addition, with written tests, candidates must take time off work and drive to one of the six Commission test sites for written exams. Allowing for experience and training evaluations, where determined to be appropriate by the Agency, also will grant the necessary flexibility to the candidate, which is customary in most employment practices today. That is, candidates can relay their experience and training at a time and location that is convenient to them, without having to disrupt their daily life by taking time off work or making other personal arrangements.

Section 97.11. Appointment Process – Use of Alternative to Rule-of-Three.

Act 69 amended Section 601 to allow expansion of hiring eligible lists other than the standard “Rule-of-Three.” With the standard Rule-of-Three, L&I has regularly had difficulty filling certain positions.

Compounding that difficulty, the proposed regulations contain onerous requirements that were not in the Act 69 amendment to Section 601 and which are, instead, contrary to the reforms directed by Act 69.

First, the regulation requires specification of the job classification or classification series to which the alternative rule will apply. This language ignores the concept of “vacancy-based” hiring. Act 69 amended Section 602 of the Act to permit vacancy-based postings. This regulatory requirement would effectively preclude L&I from seeking an alternative to the Rule-of-Three for vacancy-based postings.

Second, if L&I were to adopt an alternative to the Rule-of-Three, the proposed regulation would force L&I to keep the alternative to the Rule-of-Three in place for at least 12 months, even if

experience shows that the alternative does not work as anticipated. Given that the effect of a new alternative Rule for a position will not be evident until it is implemented, the proposed regulation would unnecessarily bind L&I to the use of that alternative Rule for at least one year, even if it proves not to be effective. The likely result would be that L&I would continue using the Rule-of-Three for most or all positions instead of taking a chance on how the alternative Rule may work out for filling positions. The proposed regulation thus impedes rather than facilitates the use of the more flexible method appropriate to a specific job posting authorized by the General Assembly in its amendments to the Act.

Section 98.1 and 98.2. Vacancy-Based Hiring.

Act 69 was intended to allow agencies to fill vacant positions as they occur through “vacancy-based” job postings. L&I is in a better position than the Commission to determine which jobs should be filled through vacancy-based posting. This is how jobs are posted in the private sector and how L&I wants to post most of its job openings, but L&I perceives the proposed regulation as an impediment to doing so.

Commission’s Failure to Propose Accessibility/Alternative Paths Provisions.

In the proposed regulations, the Commission has failed to implement the requirements of the ADA and goal of Executive Order 2016-03, *Establishing “Employment First” Policy and Increasing Competitive Integrated Employment for Pennsylvanians with a Disability* to increase the employment opportunities for people with disabilities within the Commonwealth. The Department of Labor and Industry has urged the Commission—and offered its support and expertise to the Commission—to develop an alternative hiring path for people with disabilities who may not be able to benefit from traditional testing and interview processes, but are otherwise qualified for positions. Similar programs have been implemented at companies like Walgreens, Microsoft, and SAP. These programs allow for the creation of a diverse workforce and ensure that people with disabilities are given the opportunity to demonstrate their skills during an internship opportunity instead of being screened out by antiquated testing and interview processes. L&I has also met with the Commission on numerous occasions to discuss the development of a program that would replicate the Federal Schedule A hiring program adopted by Federal agencies to tap into a diverse talent pool without having to use the often lengthy traditional hiring process. Schedule A allows applicants to apply for a Federal position through a noncompetitive hiring process. For years Schedule A has led successfully to the employment of people with disabilities.

According to the U.S. Census Bureau, 19 percent of the national population has a disability. About 66 percent of the population is working age (typically defined as ages 16-64), which means that in Pennsylvania there are approximately 1.6 million working-age people with a disability. This is a massive amount of human capital being excluded from access to Commonwealth employment by virtue of the Commission’s outdated, inflexible and inaccessible testing and hiring regimes. L&I offers two examples in which it was unable to hire two highly-qualified individuals with disabilities solely because of the impediments created by the civil service testing and hiring process. These examples illustrate the critical need for the

Independent Regulatory Review Commission – May 12, 2017
Page 5

Commission to modernize its regulations to eliminate such barriers to participation in the Commonwealth work force.

In 2014, Alycia B. applied to take the Business Analyst 2 civil service exam and requested accommodation. The Commission explained that the exam contains many charts and graphs which cannot be transcribed into braille and could not be described by a reader without giving away the answers. We asked if the Commission could remove the charts and graphs from the exam and weight the score appropriately; however, the Commission did not want to remove them, as it could be construed as unfair for the rest of the applicants since they had to take that portion of the exam. Also, the Commission felt the charts and graphs had to remain because the employees likely would be using them during the course of their employment in that classification and that it should be represented in the exam. Therefore, no accommodation was ever extended to this individual and she was unable to take the exam. Vacancy-based hiring and alternative examination would have afforded this candidate the opportunity to be considered by L&I.

In August 2016, Chris Z. sought to fill an Employment Facilitator job in L&I's Office of Vocational Rehabilitation. Employment Facilitators would focus on providing assistive technology (AT) services to OVR's customers. Chris requested an accommodation from the Commission to take the exam due to his visual disability. The Commission generally allows an applicant to take an exam and then determines eligibility. In this case, however, the Commission reviewed Chris' application, pre-determined that he did not meet the minimum experience and training (MET) requirements and, therefore, declined to provide an accommodation for him to take the exam. Although Chris did not have 24 behavioral science credits as required by the METs, this was easily offset by his extensive AT background and practical experience as a user of AT devices. Because the Commonwealth did not have vacancy-based hiring and alternative examinations, this qualified candidate did not even have the opportunity to be considered for the position.

The Commission needs to ensure that its policies and practices align with the federal ADA and goals outlined by the "Employment First" policy, and implement strategies through its regulations that allow for the full participation of people with disabilities in the civil service process. For example, by the simple expedient of adding the word "accessible" before the words "testing" or "technology" used in the civil service regulations, the regulations would ensure that people with disabilities are able to access and participate in the testing, information, and functions that non-disabled persons can.

The "Employment First" policy reflects the Commonwealth's goal of making the Commonwealth of Pennsylvania a model state when it comes to creating a climate hospitable to workers with a disability. Yet, as illustrated by the examples above, current Commission regulations and practices inhibit even L&I's OVR from fillings its vacancies with qualified applicants with disabilities. It is incredible that qualified applicants who have overcome many

Independent Regulatory Review Commission – May 12, 2017

Page 6

other impediments have been unable to overcome civil service barriers to Commonwealth employment.

Contrary to L&I's urging, the Commission has willfully forgone its opportunity to amend its badly outdated regulations to eliminate barriers to recruiting and hiring of people with a disability. The Commission must implement an application process that is accessible and provides alternative formats to attract qualified applicants with varying disabilities.

The Department of Labor and Industry appreciates the IRRC's review of our comments to the proposed regulations and the IRRC's consideration of the adverse effects of the proposed regulations on this agency if they are adopted as written. Please contact me if you need any additional information on the matters addressed in this letter.

Very truly yours,



Kathy M. Manderino
Secretary

cc: Bryan Lentz, Chairman, State Civil Service Commission