[J-26A-2023 and J-26B-2023]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

DEPARTMENT OF CORRECTIONS, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE	:	No. 95 MAP 2022
v.	:	Appeal from the Order of the Commonwealth Court dated February 14, 2022, Reconsideration denied March 31, 2022, at No. 1203 CD 2020 Affirming the Order of the State Civil Service Commission dated October 26, 2020 at No. 30245
RALPH E. LYNN (STATE CIVIL SERVICE COMMISSION)	:	
	:	ARGUED: May 23, 2023
APPEAL OF: GOVERNOR'S OFFICE OF ADMINISTRATION	:	
GOVERNOR'S OFFICE OF ADMINISTRATION,	:	No. 96 MAP 2022
Appellant	:	Appeal from the Order of the Commonwealth Court dated February 14, 2022, Reconsideration denied March 31, 2022, at No. 1286 CD 2020 Affirming the Order of the State Civil Service Commission dated November 25, 2020 at No. 30245
v.	:	
RALPH E. LYNN (STATE CIVIL SERVICE COMMISSION),	:	
	:	ARGUED: May 23, 2023
Appellee	:	

OPINION

JUSTICE WECHT **DECIDED: December 19, 2023**

This case involves an arcane and convoluted intersection of two statutes related to public employment. The Civil Service Reform Act ("CSRA") establishes and governs

the classified service, which is a merit-based system of public employment, and prohibits discrimination based upon non-merit factors.[1] Chapter 71 of the Military and Veterans Code, commonly known as the Veterans' Preference Act ("VPA"), provides veterans with certain advantages when seeking public employment.[2]

The CSRA divides employment by certain public entities into two categories of service: classified and unclassified.[3] The CSRA requires that employers use a merit system to fill classified service positions, but not unclassified service positions.[4] The merit system uses competitive examinations to determine the relative merit of candidates.[5] The Office of Administration ("OA")[6] administers the examinations and prepares an "eligible list" ranking each individual who has passed the examination.[7] Generally, the CSRA requires the public employer to select an individual whose ranking is among the three highest on the eligible list, colloquially known as the "Rule of Three."[8]

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1 71 Pa.C.S. §§ 2101-3304. Effective March 28, 2019, the Act of June 28, 2018, P.L. 460, No. 71 ("Act 71") repealed the Civil Service Act, Act of Aug. 5, 1941, P.L. 752, No. 286 *as amended*, 71 P.S. §§ 741.1-741.1005 ("CSA"). Act 71 replaced the CSA with the CSRA but specified that the CSRA is "a continuation" of the CSA. Act 71 § 3.

2 51 Pa.C.S. §§ 7101-7109.

3 71 Pa.C.S. § 2103 (defining "classified service" and "unclassified service"). Notwithstanding the CSRA's reference to "classified service," vestiges of the historical term "civil service" still permeate this area of law.

4 *See id.* §§ 2103, 2301(a), 2302, 2502.

5 *See id.* §§ 2103, 2301(a), 2302.

6 The CSRA transferred the State Civil Service Commission ("Commission")'s duties to administer Pennsylvania's merit system of employment to the OA. *See* 71 Pa.C.S. § 2201 (transferring the Commission's duties to the OA, except sections 950 and 951(a), (b), and (c) of the former CSA). Relevant to this appeal, the Commission retained the duty to adjudicate appeals of persons aggrieved by an alleged violation of the CSRA's anti-discrimination provision set forth in section 2704. 71 Pa.C.S. § 3003(7)(iii).

7 *Id.* §§ 2303, 2305-06.

8 *Id.* § 2402(b)(2).

Until it was amended in 2020,[9] the VPA mandated that public employers apply preferences to veterans[10] competing for an appointment or promotion to a classified service position.[11] Section 7103(a) directed the OA to add an additional ten points onto the score of a veteran who passed a classified service appointment or promotional examination.[12] Further, the OA had to use the total score to determine the veteran's standing on the eligible list of candidates certified to the employer.[13] Section 7104(b) required the public employer to select a veteran on the eligible list instead of a non-veteran candidate with a higher examination score.[14] In our *Hoffman*[15]and *Chester*[16] decisions, however, this Court held that the veterans' preference set forth in sections 7103(a) and 7104(b) was unconstitutional when applied to promotions. As a result, a

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9 The General Assembly amended the VPA after the events at issue in this litigation. 51 Pa.C.S. §§ 7101–7109 (amended, 10/29/2020, P.L. 1045, No. 102). For ease of reference, we refer to the amended statute that took effect on December 28, 2020, as the "2020 version," and the version applicable during this dispute in 2019, as the "1976 version."

10 The version of the VPA applicable to this litigation applied to a "soldier" as defined in Section 7101. 51 Pa.C.S. § 7101 (1976 version, as amended, 11/30/2004, P.L. 1552, No. 195, § 1). The caselaw refers to "veterans" and "soldiers" interchangeably, and we do the same here.

11 51 Pa.C.S. §§ 7103–04 (1976 version).

12 *Id.* § 7103 (1976 version).

13 *Id.*

14 *Id.* § 7104(b) (1976 version).

15 *Hoffman v. Twp. of Whitehall*, 677 A.2d 1200, 1203 (Pa. 1996).

16 *Hous. Auth. of Chester v. Pa. Civ. Serv. Comm'n*, 730 A.2d 935, 949 (Pa. 1999).

veteran seeking an appointment is entitled under the VPA to extra points and a mandatory selection preference, but a veteran seeking a promotion is not. [17]

The instant dispute concerns two veterans employed by the Department of Corrections ("DOC") at the same correctional institution in the same pay range. Ralph E. Lynn was employed as a Corrections Officer 1, which was a classified service position. Aaron Novotnak was employed as a Corrections Maintenance Foreman, which was an unclassified service position.

Lynn and Novotnak each took and passed an examination for the classified service position of Correctional Welding Trade Instructor ("CWTI"). The pay range assigned to the CWTI position had a higher maximum salary than Lynn and Novotnak's current pay range. Because Lynn sought to advance within the classified service, OA and DOC deemed the CWTI position a promotion for Lynn and did not apply veterans' preference. Novotnak, on the other hand, sought to enter the classified service for the first time. As such, notwithstanding the pay increase, OA and DOC deemed the CWTI position an appointment for Novotnak. After applying veterans' preference, DOC selected Novotnak for the position.

Lynn appealed his non-selection to the Commission. From the Commission's perspective, treating Lynn differently from Novotnak because of Lynn's classified service status constituted discrimination based upon a non-merit factor, which section 2704 of the CSRA prohibits. The Commission sustained Lynn's appeal, ruling that the OA and the DOC should have treated Lynn as a veteran who "qualified for veterans' preference for appointment to" the CWTI position.[18] The Commission ordered the DOC to return

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[17] The General Assembly did not amend the VPA to conform to *Hoffman* until 2020. The 2020 version deleted the references to promotions in Sections 7103 and 7104. 51 Pa.C.S. §§ 7103(a), 7104(b) (2020 version).

[18] Commission Adjudication at 38.

Novotnak to his prior position and to place Lynn in the CWTI position.[19] OA and DOC appealed, and the Commonwealth Court affirmed.[20]

We granted *allocatur* to determine whether the decisions of the Commission and the Commonwealth Court conflict with *Hoffman* and *Chester*. To make this determination, we must decide whether the ascension of an unclassified service employee to a classified service position with higher pay with the same public employer is a promotion under the CSRA and the VPA. We hold that it is not. Rather, such an ascension *via* the merit examination process is an appointment. Thus, it is not discriminatory under section 2704 of the CSRA to award a veterans' preference to an unclassified service employee seeking an appointment but not to a classified service employee seeking a promotion. We affirm the order of the Commonwealth Court in part and reverse in part.

I. Governing Law

Given the dense and overlapping legal landscape, we begin with an overview of the applicable law.

A. CSRA

The objective of the CSRA's merit-based system of public employment is to facilitate the hiring, retaining, and promoting of highly-qualified individuals to ensure the efficient and effective delivery of government services to the public.[21] To that end, "candidates for classified service positions are required to pass a competitive classified service examination which measures their aptitude for the classified service position at issue."[22] As this Court described long ago, the merit system was designed so that

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19 *Id.* at 38-39.

20 *Dep't of Corr. v. Lynn*, 1203 C.D. 2020, 1286 C.D. 2020, 2022 WL 433098, at *4 (Pa. Cmwlth. Feb. 14, 2022) (unreported memorandum opinion).

21 71 Pa.C.S. § 2102.

22 *Chester*, 730 A.2d at 945 (references to "civil" changed to "classified").

> employees in public service will be selected on the basis of their qualifications and fitness and whereby competent and faithful service will be rewarded by making the employees' tenure of office secure while they behave themselves well. It is intended that efficiency should be promoted by an assurance of continued employment, thereby serving the interests of employer and employee. Such relations are not to be imperiled by reason of the politics or religion of the parties concerned.[23]

The CSRA defines "classified service" as a "position filled under the merit system of employment" that is not a "position included in the unclassified service."[24] "Unclassified service" is defined by examples of types of jobs.[25] One type of unclassified service job is "unskilled labor," which is "[a]n individual occupying or assigned to a position for which the principal job function is manual labor or work requiring limited or no prior education or training."[26]

In general, to fill a classified service position, an appointing authority must select an individual from an "eligible list" certified by the OA using the classified service examination results.[27] With limited exception not applicable here, the CSRA requires an appointing authority to follow the Rule of Three by selecting an individual who is among the three highest-ranking individuals on the eligible list.[28]

One type of eligible list is an "employment list," which is a "list of individuals who have been found qualified by an entrance examination for appointment to a position in a

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23 *In re Geis*, 19 A.2d 368, 369 (Pa. 1941).

24 71 Pa.C.S. § 2103.

25 *Id.*

26 *Id.*

27 *Id.* §§ 2301(a), 2303, 2401(b). *See also id.* § 2103 (defining "eligible list" as an "employment list, promotion list or reemployment list").

28 *Id.* § 2402(b)(2).

particular class."[29] Another type of eligible list is a "promotion list," which is a "list of individuals determined to be qualified by a promotion examination for appointment to a position in a particular class."[30] A "promotion examination," in turn, is an "examination for a position in a particular class, admission to which is limited to an employee in the classified service who has held a position in another class."[31]

The CSRA defines "promotion" as the "movement of an employee to another class in a pay range with a higher maximum salary."[32] "Employee" and "class" are also defined terms: an "employee" is "an individual legally occupying a position *in the classified service*," and a "class" is a "group of positions *in the classified service* which are sufficiently similar in respect to the duties and responsibilities of the positions . . . ."[33] The CSRA specifies that "[a] transfer or reassignment of an employee from a position in one class to a position in a class for which a higher maximum salary is prescribed shall be deemed a promotion and may be accomplished only in the manner provided for in this part."[34] By comparison, "[n]o individual may be transferred or reassigned from a position *in the unclassified service* to a position *in the classified service unless appointed* to the

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29 *Id.* § 2103.

30 *Id.*

31 *Id.*

32 *Id.* The CSRA does not define "appointment," but refers to an appointment upon entry to the classified service as separate from a promotion. *See id.* § 2301(a) (providing that, except where otherwise provided, "the *appointment of an individual entering the classified service* or promoted in the classified service shall be from an eligible list" compiled by the OA from the result of classified service examinations) (emphasis added).

33 *Id*. § 2103 (emphasis added).

34 *Id.* § 2502(d). *Cf. id.* § 2502(b) (distinguishing a reassignment as movement between positions in the same or similar class at the same pay range).

classified service position after certification of the individual's name from an eligible list in accordance with the provisions of this part."[35]

The difference between classified and unclassified positions includes more than the manner of filling a position. The CSRA provides employees in the classified service with certain protections. For example, once a classified service employee completes a probationary period, the public employer may only remove the employee for just cause.[36] Especially pertinent to this case is section 2704, which protects classified service employees from discrimination: "An officer or employee of the Commonwealth may not discriminate against an individual in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of race, gender, religion, disability or political, partisan or labor union affiliation or other nonmerit factors."[37]

The Commonwealth Court has adopted a burden-shifting standard of proof in discrimination claims modeled after the framework that this Court applies to discrimination claims arising under section 5(a) of the Pennsylvania Human Relations Act.[38] In the absence of a statutory definition for "other non[-]merit factors," the Commonwealth Court has interpreted the term as requiring the employer to base personnel actions upon "merit criteria which are relevant to the proper execution of the employee's duties, are job

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35 *Id.* § 2502(e) (emphasis added).

36 *Id.* § 2607.

37 *Id.* § 2704.

38 *See Henderson v. Office of the Budget*, 560 A.2d 859, 862-63 (Pa. Cmwlth. 1989) (applying the framework in *Allegheny Hous. Rehab. Corp. v. Pa. Human Relations Comm'n*, 532 A.2d 315 (Pa. 1987) to claims under section 2704's predecessor, 71 P.S. § 741.905a (repealed 2019)). *Allegheny Housing*'s standard was, in turn, modeled after *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Allegheny Hous. Rehab. Corp.*, 532 A.2d at 317-18.

related, and which touch in some logical and rational manner upon competency and ability."[39] For example, the Commonwealth Court has declared that seniority is a merit factor because "[t]ime on the job increases the employe[e]'s skill, efficiency and production."[40]

B. VPA

At the time the DOC was filling the CWTI position, the VPA mandated that public employers provide certain preferences to veterans taking "any . . . appointment or promotional examination" for a classified service position.[41] Veterans are afforded these preferences "for the discipline and experience represented by [the veteran's] military training and for the loyalty and public spirit demonstrated by his service for the preservation of his country . . . ."[42]

As mentioned above, section 7103(a) required the OA to add ten bonus points to the score of a veteran who passed a classified service examination for an appointment or promotion:

> Whenever any solider shall successfully pass a civil service appointment or promotional examination for a public position under this Commonwealth, or under any political subdivision thereof, and shall thus establish that he possesses the qualifications required by law for appointment to or promotion in such public position, such soldier's examination shall be marked or graded an additional ten points above the mark or grade credited for the examination, and the total mark or grade thus obtained shall represent the final mark or grade of such soldier, and shall determine his

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39 *Balas v. Dept. of Pub*. *Welfare*, 563 A.2d 219, 223 (Pa. Cmwlth. 1989) (construing the term under the CSRA's predecessor).

40 *Scuoteguazza v. Dept. of Transp.*, 399 A.2d 1155, 1158 (Pa. Cmwlth. 1979) (holding that, under the CSRA's predecessor, a public employer did not discriminate against employees with less seniority by selecting them for layoffs based upon their seniority ranking).

41 51 Pa.C.S. § 7102(a) (1976 version).

42 *Id*. (1976 version).

> standing on any eligible or promotional list, certified or furnished to the appointing or promoting power.[43]

Section 7104(b) provided a mandatory selection preference for veterans appearing on an eligible list:

> Whenever any soldier possesses the requisite qualifications, and his name appears on any eligible or promotional list, certified or furnished as the result of any such civil service examination, the appointing or promoting power in making an appointment or promotion to a public position shall give preference to such soldier, notwithstanding that his name does not stand highest on the eligible or promotional list.[44]

Notably, in the event multiple veterans appear on an eligible list, the VPA does not address the manner in which the employer selects one over the other.

C. Intersection between the CSRA and VPA

Given the CSRA's emphasis on basing employment decisions on merit rather than favoritism, one would be forgiven for thinking that bonus points and mandatory selection preference are at odds with the CSRA. But as this Court explained long ago, the policy animating veterans' preference laws is to recognize the "discipline, experience and service represented by [a veteran's] military activity."[45] In other words, the law allows for partiality towards veterans because the General Assembly has signaled that military service is in part a proxy for merit.

Preferring veterans for public service positions serves a two-fold purpose benefitting both the public and the individual veteran. First, the public benefits through "the better performance of public duties, where discipline, loyalty, and public spirit are likewise essential."[46] Second, military service, particularly in "wars for the preservation

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43 *Id.* § 7103(a) (1976 version).

44 *Id.* § 7104(b) (1976 version).

45 *Com. ex rel. Graham v. Schmid*, 3 A.2d 701, 704 (Pa. 1938).

46 *Id*.

of [the] country," is "the greatest service a citizen can perform, and it comes with ill grace for those of us not in such wars to deny them just consideration."[47]

Nevertheless, as this Court first recognized in *Schmid*, the government does not have *carte blanche* to prefer veterans over other individuals. To administer public affairs in an efficient manner, the government must select public employees based upon their ability to perform the duties of the job.[48] Applying an "unrestrained preference" for veterans or a "preference credit based on factors not representative of their true value," this Court explained, would offend public policy and the Constitution.[49]

To be lawful, "there must be some reasonable relation between the basis of preference and the object to be obtained, the preference of veterans for the proper

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47 *Id.* *See also* 51 Pa.C.S. § 7102 (1976 version) ("When any soldier shall take any civil service appointment or promotional examination for a public position under the Commonwealth, or under any political subdivision thereof, he shall be given credit in the manner hereinafter provided; for the discipline and experience represented by his military training and for the loyalty and public spirit demonstrated by his service for the preservation of his country, as provided in this chapter.").

This Court has also mentioned a third rationale for veterans' preference: consideration for the "comparative disadvantage" that "veterans suffer . . . relative to non-veterans because of their exclusion from the labor market during their period of military service to the nation." *Blake v. Pa. Civ. Serv. Comm'n,* 166 A.3d 292, 303 (Pa. 2017) (quoting *Brickhouse v. Spring-Ford Area Sch. Dist.*, 656 A.2d 483, 490 (Pa. 1995) (Castille, J., dissenting)).

48 *See Schmid*, 3 A.2d at 704.

49 *Id.* The *Schmid* Court was not specific about the constitutional provisions it was invoking. This Court refined the constitutional analysis of veterans' preference statutes in subsequent cases. The Commonwealth may use statutory classifications to treat people differently, we stated, if such "classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation." *Blake*, 166 A.3d at 296 n.5 (*quoting Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000)). "[P]rinciples of due process and equal protection" under the United States and Pennsylvania Constitutions, including PA. CONST. art. 1, §§ 1, 26, "animate the 'reasonable relation standard.'" *Blake*, 166 A.3d at 296 n.5; *see also Chester*, 730 A.2d at 949-50.

performance of public duties."[50] A preference must "reasonably and fairly appraise" the advantage of military service, for if the preference appraises service "beyond the scope of the actual advantages gained in such service," the privilege is "unreasonable and arbitrary."[51] Using these principles, this Court struck down a statute providing fifteen percent automatic credit to veterans' civil service scores. The statute was overbroad because it applied to those who did not pass the civil service examination and who, therefore, did not possess the basic qualifications for the job.

In *O'Neill*, this Court drew a distinction between "original appointments" into the classified service and "successive promotions."[52] There, a non-veteran employee challenged the constitutionality of the Veterans' Preference Act of 1945 in a *quo warranto* complaint after the employee was passed over for a promotion to captain of Philadelphia's fire bureau in favor of his veteran co-workers. In considering the issue, this Court distinguished between "original appointments" and "successive promotions."[53] Examining the common and approved usage of "appointments" and "promotions," this Court held that a promotion is the act of advancing "from a given grade or class as qualified for one higher," whereas an appointment is "the designation of a person to hold an office."[54] This Court explained that we did not doubt

> that the military training received by veterans during the course of their service renders them superior candidates for public offices of the nature now under consideration. However, we are convinced that the legislature, in authorizing the addition of ten percentage points to the veterans' final examination marks in all competitive examinations for higher positions than

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50 *Id.*

51 *Id.*

52 *Com. ex rel. Maurer v. O'Neill*, 83 A.2d 382, 383-84 (Pa. 1951).

53 *Id.*

54 *Id.* at 384.

> the original appointments, has placed far too high a value on the benefit to the public service of the military training of veterans. In the case of an original appointment, the training a veteran has received in the armed forces will, no doubt, make him more amenable to the following of orders, the observance of regulations and, in other ways, tend toward making him a desirable employee.
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> But the advantages to the public of this training are not absolute and, as time passes, the proportional benefit accruing to the public from the employment in such a service of veterans in preference to non-veterans gradually diminishes as both become proficient in the performance of their duties. In determining who is to be awarded a promotion, the skill of the particular examinees in the performance of their tasks is the prime consideration and compared to it the training gained by veterans solely as a result of military service becomes of very little importance. To credit veteran examinees in examinations for successive promotions with the same total of gratuitous percentage points as in the instance of their original appointment to a public position is, therefore, a totally unjustified appraisal of the value of their military training and highly prejudicial to the public service.[55]

Based upon this reasoning, we held that "granting the same preference to veterans in examinations for promotions as is granted in their original appointments to a public office is unreasonable and class legislation and therefore unconstitutional."[56]

In *Hoffman*, a township police detective who sought a promotion to lieutenant sued the township and its civil service commission after the township refused to apply the VPA's veterans' preference. In the interim between *O'Neill* and *Hoffman*, the General Assembly replaced the Veterans' Preference Act of 1945 with the VPA and included the same ten-point bonus and mandatory selection preference for promotions that this Court struck down in *O'Neill*. This Court reaffirmed *O'Neill* and declared that sections 7103(a)

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55 *Id.* at 383 (paragraph break inserted).

56 *Id.* at 384. Three Justices dissented, declaring that the Majority had usurped the legislative function of determining the wisdom of how and when veterans' preference should be applied. *Id.* at 384-86 (Stearne, J., dissenting). From the Dissent's perspective, it was reasonable for the General Assembly to conclude that the "discipline, experience and military service of a veteran have the same potential value in promotions as they do in appointments." *Id.* at 385 (Stearne, J., dissenting).

and 7104(b) of the VPA, as applied to veterans seeking promotions in public employment, were unconstitutional under "principles . . . of due process and equal protection."[57] Accordingly, the detective was entitled to neither ten bonus points on his civil service promotion examination, nor the mandatory selection preference.[58]

In *Chester*, this Court again reaffirmed the constitutionality of providing veterans' preference to veterans seeking an appointment to a public position.[59] The Commission sued the Housing Authority of Chester after the Authority refused to appoint a veteran to the civil service position of Executive Director. This Court held that the Commission correctly determined that the Authority violated section 7104(b) of the VPA by not selecting the lone veteran in the final round of three candidates.[60] Although the issue in *Chester* concerned only whether the mandatory preference in section 7104(b) was

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[57] *Hoffman*, 677 A.2d at 1202-03.

[58] *Id.* at 1203. The *Hoffman* Court also based its reasoning upon Article 1, Section 17, "which provides that no law shall be passed 'making irrevocable any grant of special privileges or immunities.'" *Id.* at 1202. This Court later repudiated *Hoffman*'s analysis of Article I, Section 17 and declined to follow its reasoning. *Chester*, 730 A.2d at 949 n.20.

[59] *Chester*, 730 A.2d at 937, 948-50.

[60] This Court noted that "Section 7104 arguably conflicts with the 'rule-of-three . . . .'" *Id.* at 943 n.16. At the time we decided *Chester*, the Rule of Three was set forth at 71 P.S. § 741.602. It is now codified at 71 Pa.C.S. § 2402(b)(2). Recall that the Rule of Three requires the appointing authority to offer the appointment to one of the three highest ranking persons on the certified list. Section 7104(b), on the other hand, required that the appointing authority afford preference to a veteran whose "name appears on any eligible or promotional list" and required the appointing authority to "give preference to such solider, notwithstanding that his name does not stand highest on the eligible or promotional list." 51 Pa.C.S. § 7104(b) (1976 version). In *Hoffman*, this Court referred to section 7104(b) as applying a preference once the candidate reached the final three. *Hoffman*, 677 A.2d at 1201. *Chester* questioned this premise, observing that section 7104(b) "requires preference to be afforded to a veteran who appears on the certified list even if he is not among the three highest-ranked persons." *Chester*, 730 A.2d at 943 n.16. *Chester* did not resolve the potential conflict because the veteran at issue scored within the Rule of Three.

constitutional in the context of a non-entry level appointment, this Court addressed the distinction between appointments and promotions at length:

> [A] clear line can be discerned in our jurisprudence between mandatory veterans' preference in the context of appointment to a civil service position as opposed to the context of promotion to a civil service position from within the promoting agency or organization. The operation of the mandatory veterans' preference provisions in the former context is constitutional; in the latter context it is not.
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> The reason for this distinction is simple. In the promotions context, the competing candidates are seeking to move up from within the same organization. They will have had ample opportunity during their tenure in that agency or organization to hone the skills relative to the promotion which they seek. If, during the period in which they have had the opportunity to develop their skills in the exact same environment as the rival candidates, they have failed to progress to the same skill level as those rivals, then the fact that they had experience in the armed services is not probative and does not justify the candidate's shortcomings.
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> On the other hand, when candidates seek appointment to a position in an organization or agency in which none of them have any experience, the fact that one of the candidates has military experience may rationally be viewed as that which distinguishes him as the superior candidate for the position. *See Schmid*, 3 A.2d at 703 ("As a basis for *appointment* it is not unreasonable to select war veterans from candidates for office and to give them a certain credit in recognition of the discipline, experience, and service represented by their military activity") (emphasis added). In the appointments context, employers have not been able to compare the candidates' performance in the same workplace as they have in the promotions context. Thus, in the appointments context, it is not unreasonable for the legislature to use military experience as the factor which distinguishes candidates from different backgrounds who are within the top three on the Eligible List. The fact that the position at issue here is a non-entry-level position as opposed to an entry-level position simply does not alter the reasonableness of the distinction under the principles of *Schmid*.[61]

In sum, under *Hoffman* and *Chester*, sections 7103(a) and 7104(b) of the VPA in effect at the time DOC was filling the CWTI position were unconstitutional to the extent that the statute required a public employer to apply, in the context of a promotion, a ten-

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61 *Chester*, 730 A.2d at 949 (paragraph breaks inserted).

point bonus to a veteran's passing examination score and a mandatory selection preference for a veteran on an eligible list. If a veteran was seeking an appointment, on the other hand, the ten-point bonus and mandatory selection preference set forth in sections 7103(a) and 7104(b) were required, having survived all constitutional challenges to date.

II. History of the Case

After the DOC announced the vacancy for the CWTI position in February 2019, Lynn and Novotnak took and passed the classified service examination for the CWTI position. In March 2019, the OA certified an eligible list to the DOC for its use in filling the CWTI position. The list identified fourteen individuals who were eligible for appointment or promotion to the CWTI position. Lynn's name was included, along with his examination score of ninety-five. Consistent with the law as articulated in *Chester*, OA did not apply the ten veterans' preference points provided by section 7103(a), and Lynn retained a score of ninety-five. Lynn's score was the second highest, bringing him into the "Rule of Three."

Novotnak's name was not on the March 2019 eligible list. The OA initially deemed Novotnak ineligible for the CWTI position because he did not satisfy the Minimum Experience and Training Requirements ("METs"). Novotnak challenged his ineligibility, prompting the OA to change course and determine that Novotnak's qualifications did, in fact, satisfy the METs. On April 3, 2019, the OA certified an amended eligible list to DOC, including Novotnak's name, along with his examination score of ninety. Applying the ten veterans' preference points increased Novatnak's score to one hundred. At one hundred, Novatnak's score became the second highest and bumped Lynn's score to third place. Both Lynn and Novotnak were within the Rule of Three.

On April 25, 2019, the DOC extended a conditional offer of employment for the CWTI position to Lynn and provided a start date. Lynn accepted. Four days later, the DOC rescinded the offer, informing Lynn that DOC had extended the offer based upon the mistaken belief that Lynn was entitled to a veterans' preference for the position. The DOC informed Lynn that the CWTI position would be a promotion under the CSRA, which DOC believed would render him ineligible for the section 7104(b) selection preference. The DOC applied the section 7104(b) selection preference in favor of Novotnak instead, and he assumed the role in June 2019.

Lynn filed an appeal with the Commission challenging the DOC's failure to promote him to the CWTI position. After the DOC selected Novotnak for the position instead, Lynn amended his appeal. Lynn alleged that he was a qualified veteran, that he had received one of the top three test scores, and that he had accepted a conditional offer of employment from the DOC. Lynn averred that the DOC rescinded Lynn's offer in favor of Novotnak, who was not as qualified.

The Commission conducted a hearing on November 13, 2019.[62] On October 26, 2020, the Commission issued an adjudication sustaining Lynn's appeal, determining that he had established discrimination under section 2704 of the CSRA. The Commission ordered the DOC to promote Lynn to the CWTI position along with a retroactive pay increase commensurate with that position and to return Novotnak to his prior position of Labor Foreman.

The Commission provided two bases for this order. First, the Commission observed that the DOC rescinded Lynn's offer only after the OA amended the employment certification list to add Novotnak, causing the DOC to realize that Novotnak

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[62] Novotnak was added as an indispensable party but did not appear at the hearing. In addition to Lynn, three employees of the OA testified at the hearing.

and another veteran were entitled to the veterans' preference and Lynn was not.[63] According to the Commission, the DOC's rescission of Lynn's offer constituted "technical discrimination" under section 2307 of the CSRA,[64] which prohibits an employer from displacing an individual whom the DOC had appointed from the original eligibility list.[65]

Second, the Commission ruled that Lynn had established the existence of non-merit discrimination in violation of section 2704 of the CSRA because there was no merit-related reason for denying Lynn the veterans' preference while awarding it to Novotnak.[66] Both applicants were employed at the same agency, in the same institution, and in the same pay range, all of which gave both veterans the opportunity to hone their skills in the same organization and environment. The Commission did not believe that Lynn's status as a classified service employee and Novotnak's status as a non-classified service employee justified the disparate application of the veterans' preference. "Awarding preference to Novotnak because he is non-civil service and ejecting [Lynn] after he had accepted the position and [had] been given his start date," the Commission declared, "penalizes [Lynn] for already being in the classified service."[67] According to the Commission, treating "an individual *less* favorably solely because they are a member of

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63 Commission Adjudication at 29-35.

64 *See Pronko v. Dep't. of Rev.*, 539 A.2d 456, 462 (Pa. Cmwlth. 1988) (distinguishing between "traditional" discrimination based upon a statutorily protected category and "technical" discrimination involving a violation of legal procedures).

65 *Id.* at 31-32; *see also* 71 Pa.C.S. § 2307(c) ("Correction and revision.--The Office of Administration may correct clerical errors occurring in connection with the preparation of an eligible list and revise the eligible list accordingly. No individual who has been appointed as the result of certification from the eligible list shall be displaced by the action.").

66 Commission Adjudication at 35-39.

67 *Id.* at 37.

the classified service is the essence of a non-merit factor," which is "antithetical to the purpose of the merit system and veterans' preference."[68]

From the Commission's perspective, Lynn's acceptance of the DOC's offer of employment was valid because Lynn "qualified for veterans' preference for *appointment* to" the CWTI position and Lynn was within the Rule of Three on the original and amended eligible lists.[69] The Commission declared that its ruling on Lynn's section 2704 non-merit discrimination claim was a basis for its order displacing Novotnak in favor of Lynn that was "separate and independent" from its ruling on Lynn's section 2307 technical discrimination claim.[70]

The DOC sought review in the Commonwealth Court. The OA moved to intervene and filed its own petition for review in the Commonwealth Court. The court granted the OA's motion and consolidated both petitions for review. The DOC and the OA both argued that Lynn was not entitled to selection preference as a veteran because the CWTI position was a promotion for him, and that the Commission had ordered an unconstitutional result at odds with *Hoffman* and *Chester*.

The Commonwealth Court affirmed the Commission's order. According to the Commonwealth Court, "denying Lynn the [CWTI] position would constitute discrimination against Lynn based on non-merit factors under the [CSRA]."[71] The court also affirmed

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68 *Id.* at 38.

69 *Id.* at 38-39 (emphasis added).

70 *See id*. Presumably, the DOC installed Lynn in the CWTI position following the Commission's October 26, 2020 order. The DOC filed motions to stay the Commission's order while the case was on appeal, but the Commission and the Commonwealth Court denied the motions.

71 *Lynn*, 2022 WL 433098, at *4.

the Commission's separate finding of technical discrimination, holding that the DOC improperly rescinded Lynn's verbal offer under section 2307(c) of the CSRA.[72]

Regarding non-merit discrimination, the Commonwealth Court believed that the DOC and the OA misunderstood what constitutes a promotion under the CSRA and VPA and wrongly characterized Novotnak's placement in the CWTI position as an appointment instead of a promotion, ignoring his existing DOC employment and the increase in pay.[73] The Commonwealth Court rejected the argument of the DOC and the OA that the CSRA defined "promotion" and "class" to mean that an employee could move from one classified position to a higher paying classified position only through a promotion.[74]

Under *Chester*, the Commonwealth Court believed that Lynn and Novotnak were indistinguishable in terms of their entitlement to the veterans' preference because both sought to advance within the same organization.[75] Moreover, the court explained, veterans' preference exists to benefit the public, not just to reward a veteran. The court agreed with the Commission that awarding veterans' preference to Novotnak, but not to Lynn, penalized Lynn for already working in the classified service. Nor did distinguishing between Lynn and Novotnak based upon their classified status fulfill the VPA's goal of providing the public with the value of the intangible qualities of veterans in the classified service. The Commonwealth Court concluded that "awarding veterans' preference points to Novotnak, but not to Lynn, constituted discrimination on non-merit factors."[76] Further, "the Commission did not err in determining that Lynn was entitled to veterans' preference

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72 *Id.* at *6-8.

73 *See id.* at *5.

74 *See id.* at *5-6.

75 *Id*. at *6 (citing *Chester*, 730 A.2d at 949).

76 *Id.*

points regarding the [CWTI] position."[77] The Commonwealth Court affirmed the Commission's order ousting Novotnak and installing Lynn into the CWTI position.[78]

The OA petitioned this Court for review of the Commonwealth Court's order. In a limited grant, we agreed to address whether the order contravened *Hoffman* and *Chester* by awarding Lynn veterans' preference in the context of a promotion.[79] We also directed the parties "to address the related issue of whether a non-civil service employee seeking a civil service position at a higher pay scale in the same department is seeking a promotion such that the individual is ineligible for the veterans' preference."[80]

III. Arguments

According to the OA, the Commonwealth Court's conclusion that OA and DOC discriminated against Lynn by awarding Novotnak (and not Lynn) veterans' preference ignores the express language of the CSRA.[81] The OA contends that, because the veterans' preference provisions in Chapter 51 of the VPA modify the hiring process for public classified service positions, the VPA relates to the same class of persons or things

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77 *Id.* The Commonwealth Court's reference to "veterans' preference points" is confusing, as the Commission did not base its decision upon the discrepancy in awarding points pursuant to section 7103(a) of the VPA. In fact, the Commission specifically found that Lynn was within the Rule of Three on the original and amended eligible lists, even without adding the ten bonus points. Commission Adjudication at 38-39. The Commission based its decision upon OA's alleged error in determining that Lynn was "not a veteran for purposes of appointment to [the CWTI position]," which then resulted in alleged "disparate treatment" of Lynn as compared to Novotnak. *Id.* at 38 n.30.

78 *Lynn*, 2022 WL 433098, at *8.

79 *See Dep't of Corr. v. Lynn*, 284 A.3d 1181 (Pa. 2022). We declined to review two additional issues presented by the OA, including a challenge to the Commission's technical discrimination ruling.

80 *Id.*

81 *See* OA's Br. at 20-22.

as the CSRA and must be read *in pari materia* with the CSRA.[82] The VPA does not define the term promotion, the OA observes, but the CSRA does. The CSRA's definition of promotion, the OA points out, is modified by the defined terms "employee" and "class," both of which are limited to the classified service.[83] Under the plain language of the CSRA, the OA emphasizes, a promotion is exclusive to an employee's movement between two classified service job classes.[84] Therefore, the OA argues, the CWTI position would be a promotion for Lynn but not for Novotnak, and only Novotnak was entitled to veterans' preference.[85] The OA contends that the Commonwealth Court erred by focusing upon Novotnak's existing employment with DOC and his potential to increase his salary when considering whether the CWTI position represented a promotional opportunity to Novotnak.[86] The OA believes it did not engage in non-merit discrimination because the CSRA expressly differentiates between classified and non-classified service, such that *Chester*'s discussion of promotions is not applicable to Novotnak.[87]

The Commission disagrees that the CSRA's general definition of promotion governs the outcome in this case. From the Commission's perspective, the OA's reliance upon the CSRA's general definitions is flawed because the CSRA and its accompanying regulations have specific provisions providing for the promotion of individuals employed

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82 *Id.* at 15-16.

83 *Id.* at 21 (citing 71 Pa.C.S. § 2103).

84 *Id.*

85 *Id.* at 22.

86 *Id.* at 20-22.

87 *Id.* at 25-26.

in unclassified positions to classified positions, demonstrating that a promotion is not limited to classified service employees.[88]

The Commission further argues that, in ruling upon Lynn's non-merit discrimination claim, the Commonwealth Court properly balanced *Chester*'s "constitutional concerns" with section 2704's discrimination prohibitions.[89] In *Chester*, the Commission maintains, this Court recognized that applying veterans' preference to unknown external candidates is rational and reasonable, but applying a preference to internal candidates is not because the employer has had the opportunity "to compare the candidates' performance in the same workplace."[90] Lynn and Novotnak were similarly situated, the Commission insists, and awarding veterans' preference to one but not the other constituted discrimination based upon non-merit factors.[91] The issue of whether or not one is entering the classified service, the Commission maintains, is irrelevant to the constitutional determination of whether granting veterans' preference is reasonably related to the public interest in

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88 Commission's Br. at 17-25. Specifically, the Commission points out that section 2301(a) describes a procedure where an unskilled laborer in an unclassified service may "enter the classified service by promotion without examination." *Id.* at 18 (citing 71 Pa.C.S. § 2301(a)). The OA's temporary regulations referred to "appointment of a Commonwealth employee" as a promotion; the Commission argues that a "Commonwealth employee" includes unclassified service employees. *Id.* at 19-20 (quoting 4 Pa. Code § 602.4(a)(3) (repealed March 12, 2022)).

In reply, the OA notes that the promotion without examination exception in section 2301(a) is inapplicable to Novotnak, as it requires the individual to move into a classified position without taking an examination through a specific procedure. OA's Reply Br. at 8 (citing 71 Pa.C.S. § 2301(a)). The OA acknowledges that section 2301(a) is a limited exception to the general definition of promotion in section 2103 but argues that it does not override the general statutory definition for all other purposes. *See id.* at 7-8.

89 Commission's Br. at 14-16.

90 *Id.* at 12-15 (quoting *Chester*, 730 A.2d at 949 (emphasis removed)).

91 *Id.* at 14.

superior performance of the CWTI's duties.[92] The Commission claims that neither *Hoffman* nor *Chester* limited their holdings to classified service employees seeking promotions, and it urges this Court to find that the elevation of an unclassified service Commonwealth employee to a classified service position in a higher pay scale is a promotion.[93] If we do that, the Commission argues, neither Lynn nor Novotnak was entitled to veterans' preference, and the Commonwealth Court properly ordered DOC to oust Novotnak and to promote Lynn.[94]

IV. Analysis

We begin our analysis by observing that the parties frame their dispute within the confines of the existing jurisprudence. None of the parties asks us to overturn *Schmid*, *O'Neill*, *Hoffman*, or *Chester*. The parties agree that, under *Hoffman* and *Chester*, awarding veterans' preference under section 7103(a) and section 7104(b) is unconstitutional in the context of a promotion. The parties further agree that Lynn was seeking a promotion and, therefore, was not entitled to veterans' preference.[95]

Unlike our prior cases involving veterans' preference, this dispute began with Lynn's complaint to the Commission averring that the DOC discriminated against him under section 2704 of the CSRA. Section 2704 prohibits discrimination against an

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92 *Id.* at 15.

93 *Id.* at 16, 24-25.

94 *Id.* at 25 nn.9-10.

95 The Commission's position on appeal has shifted from its adjudicatory rationale. Originally, the Commission determined that Lynn "should have been considered a veteran within the rule of three" and that Lynn "qualified for veterans' preference for appointment" to the CWTI position. Commission Adjudication at 38. Before this Court, the Commission continues to argue that Novotnak was seeking a promotion and that Lynn should not have been treated disparately from Novotnak, but it concedes that, consistent with *Hoffman* and *Chester*, Lynn, too, was "clearly seeking a promotion" and should not be awarded veterans' preference if this Court determines that both Novotnak and Lynn were seeking a promotion. *See* Commission's Br. at 9, 25 n.9.

employee of the Commonwealth in examination and promotion with respect to the classified service because of "nonmerit factors." The parties disagree on whether the OA and the DOC were entitled to treat Lynn and Novotnak differently. The dispute turns on whether Novotnak, who was an unskilled laborer in the unclassified service at the DOC, was seeking a promotion when he sought to move into a classified service position in a higher pay range with the DOC. OA insists that Novotnak was not seeking a promotion within the specialized meaning of the CSRA and MPC, but an appointment, because Novotnak sought to enter the classified service for the first time. The Commission maintains that Novotnak was seeking a promotion, not an appointment, and, under the reasoning of *Chester*, Novotnak was not entitled to veterans' preference because he was already employed by the DOC.

This Court's review of agency adjudications is limited to determining whether the agency violated constitutional rights, committed errors of law, or made factual findings unsupported by substantial evidence.[96] Because this case requires us to interpret the CSRA and the VPA, which involve questions of law, our standard of review is *de novo*, and our scope of review is plenary.[97]

Our statutory interpretation is guided by the Statutory Construction Act, which directs that we must "ascertain and effectuate the intention of the General Assembly."[98] "[G]enerally, the best indicator of legislative intent is the plain language of the statute."[99] When considering the words of the statute, we "construe words and phrases according to their 'common and approved' usage or, as appropriate, their 'peculiar and appropriate

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96 *Bowman v. Dep't of Env't Res.*, 700 A.2d 427, 428 (Pa. 1997); 2 Pa.C.S. § 704.

97 *Vellon v. Dep't of Transp.*, 292 A.3d 882, 890 (Pa. 2023).

98 1 Pa.C.S. § 1921(a).

99 *Scungio Borst & Assocs. v. 410 Shurs Lane Devs., LLC*, 146 A.3d 232, 238 (Pa. 2016); 1 Pa.C.S. § 1921(b).

or statutorily provided meanings.'"[100] Instead of viewing words and phrases in isolation, we must consider the context in which they appear.[101]

When the words of a statute are clear and free from ambiguity, this Court may not disregard the letter of the statute under the pretext of pursuing its spirit.[102] If there is ambiguity in the wording of a statute, this Court "may discern the General Assembly's intent by examining considerations outside of the words of the statute."[103] In addition, when construing a statute, we must, if possible, give effect to all of its provisions.[104]

The Statutory Construction Act permits courts to ascertain the intent of the General Assembly through certain presumptions.[105] Among those presumptions is that "the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth," and that the General Assembly intends to favor the public interest over any private interest.[106] We also may presume that the General Assembly does not intend a result that is absurd, impossible to execute, or unreasonable.[107] When faced with conflicting general and specific provisions, we must construe the provisions in a manner that gives effect to both, or, if the provisions are irreconcilable, we must interpret the special provision as an exception to the general provision.[108]

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100 *Id*. (quoting *Freedom Med. Supply, Inc. v. State Farm Fire and Cas. Co.*, 131 A.3d 977, 980 (Pa. 2016)).

101 *Id.*; *see also* 1 Pa.C.S. § 1903(a).

102 1 Pa.C.S. § 1921(b).

103 *Vellon*, 292 A.3d at 890 (citing 1 Pa.C.S. § 1921(c)).

104 1 Pa.C.S. § 1921(a).

105 *See id.* § 1922.

106 *Id.* § 1922(3), (5).

107 *Id.* § 1922(1).

108 *Id.* § 1933.

Of note in this particular dispute is the General Assembly's command to construe statutes *in pari materia* together, if possible, as one statute.[109] This instruction applies when statutes or parts of statutes relate to the same persons or things or to the same class of persons or things.[110] The CSRA expressly directs that "[n]othing in this part shall be construed to repeal or supersede the provisions" of certain sections related to military affairs, including the provisions addressing employment preferences.[111]

As noted earlier, the VPA does not define the word "promotion." Therefore, we must consider the context of the General Assembly's use of the word.[112] Because sections 7103(a) and 7104(b) of the VPA pertain to classified service examinations, and distinguish between appointments and promotions, the meaning of the term promotion as applied to an unclassified service employee seeking a classified service position is not clear. Thus, as used within the VPA, the term "promotion" is ambiguous.

Given that the VPA and the CSRA relate to the same class of persons and things, they are to be read *in pari materia*, and we must construe them together as one statute.[113] At the time that the DOC was seeking to fill the CWTI position, Section 2103 of the CSRA defined a "promotion" as the "movement of an employee to another class in a pay range with a higher maximum salary."[114] As the OA points out, the defined terms "employee"

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109 *Id.* § 1932(b).

110 *Id.* § 1932(a).

111 71 Pa.C.S. § 3303.

112 1 Pa.C.S. § 1903(a).

113 *Id.* § 1932. *Accord Chester*, 730 A.2d at 946 (using the definition of "employment list" in the former Civil Service Act, 71 P.S. § 741.3(n) (repealed 2002), to interpret the phrase "qualifications required by law" in section 7103(a) of the VPA).

114 71 Pa.C.S. § 2103. The statutory definition of promotion has changed over time. At the time we decided *Hoffman*, for example, the definition of promotion in the former CSA encompassed movement from an unclassified position to a classified position, (continued…)

and "class" modify Section 2103's definition of "promotion."[115] Crucially, the Commonwealth Court's analysis omitted reference to the term "employee," which is limited to an individual already working in the classified service.[116] The CSRA's full definition of promotion is the "movement of an employee [*i.e.*, an individual legally occupying a position in the classified service] to another class [*i.e.*, a group of positions in the classified service which are sufficiently similar] in a pay range with a higher maximum salary."[117]

Novotnak, of course, was not "an individual legally occupying a position in the classified service" when he applied for the CWTI position.[118] Therefore, the CWTI position did not constitute a promotion for Novotnak within the meaning of the VPA when read *in pari materia* with the CSRA. Instead, because Novotnak was entering the

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because it was defined as "a change to a position in a class carrying a higher maximum salary." 71 P.S. § 741.3(u) (repealed 2002).

[115] 71 Pa.C.S. § 2103. We are not persuaded by the Commission's argument that because section 2301(a) of the CSRA uses the term "promotion" for permitting an unskilled laborer in the unclassified service to enter the classified service without an examination, that the General Assembly must have intended promotions to include ascension from the unclassified service to the classified service. The "promotion without examination" procedure refers to a specific and isolated method of entering the classified service which did not apply here. Pursuant to the Statutory Construction Act, we deem "promotion" as used in section 2301(a) to constitute an exception to the general definition in section 2103. *See* 1 Pa.C.S. § 1933.

[116] *See Lynn*, 2022 WL 433098, at *5 (discussing the definitions of "promotion" and "class" but not "employee").

[117] *See* 71 Pa.C.S. § 2103. In contrasting between promotions and appointments as used in the statute, *O'Neill* referred to a dictionary definition of promotion, which was "to advance from a given grade or class as qualified for one higher." *O'Neill*, 83 A.2d at 384. Because the General Assembly defined "promotion" in the CSRA, we refer to the explicit statutory definition instead of *O'Neill*'s general definition.

[118] Nor did Novotnak take a "promotion examination," which is an "examination for a position in a particular class, admission to which is *limited to an employee in the classified service who has held a position in another class*." 71 Pa.C.S. § 2103 (emphasis added).

classified service by examination for a position two pay grades above his current unclassified position, the CWTI role constituted an appointment.

Lynn, on the other hand, was indeed "an individual legally occupying a position in the classified service" who sought to advance to a different classified service job in a higher pay range. Lynn was seeking a promotion, not an appointment. The consequence of the distinction between an appointment and a promotion is that the employer must afford preference to an appointment but cannot afford it to a promotion.[119] Consequently, Novotnak was entitled to veterans' preference, but Lynn was not. Under Section 7103(a) of the VPA, Novotnak received a ten-point boost to his examination score, bringing him within the Rule of Three. Section 7104(b) of the VPA then *required* the DOC to afford Novotnak a mandatory selection preference and to select Novotnak over the non-veteran candidates and non-preferenced veterans seeking promotions, including Lynn.

Lynn has never challenged the DOC's selection of Novotnak on constitutional grounds. Lynn did not aver that the VPA and CSRA were unconstitutional as applied to a veteran entering the classified service who was already employed by a public employer. Lynn's challenge, in relevant part, was based upon statutory non-merit discrimination. Thus, Lynn's challenge was grounded in Section 2704 of the CSRA, not in the United States or Pennsylvania Constitutions.

Under Section 2704's burden-shifting rubric, Lynn bore the initial burden to prove a *prima facie* case of discrimination. A complainant satisfies this burden by producing sufficient evidence that, "if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred."[120] If the complainant is successful, "a presumption

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[119] 51 Pa.C.S. §§ 7103(a), 7104(b) (1976 version); *Chester*, 730 A.2d at 949-50.

[120] *Moore v. Pa. Civ. Serv. Comm'n*, 922 A.2d 80, 85 (Pa. Cmwlth. 2007) (citations omitted).

of discrimination arises which, if not rebutted by the appointing authority, becomes determinative of the factual issue of the case."[121] The complainant's initial burden is not onerous.[122] Nevertheless, to establish a *prima facie* case and avoid dismissal, the complainant must allege specific facts showing treatment disparate from others similarly situated.[123]

In analyzing Lynn's discrimination claim, both the Commission and the Commonwealth Court erroneously assumed that Lynn and Novotnak were similarly situated. From there, the Commission and the Commonwealth Court leapfrogged directly to an assumption of disparate treatment based upon Lynn's classified service status. But Lynn and Novotnak were not similarly situated. To be sure, overlapping commonalities exist between them: same veteran status, same employer, and same pay grade. Yet under the CSRA, the very difference that the Commission and the Commonwealth Court pinpointed as a discriminatory non-merit factor—Lynn's classified service status—is what operates to require dissimilar treatment. That the OA treated Lynn differently from Novotnak based upon their respective employment classifications is precisely how a merit-based system operates.

Lynn already received preference upon his original appointment to the classified service, so he is not being denied anything to which he was entitled, or as the Commission put it, being subjected to a penalty for already being in the classified service.[124] Under the law in effect at the time, the OA was obligated to treat Lynn differently. As such, Lynn failed to establish a *prima facie* case that it was more likely than not that OA discriminated

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121 *Dep't. of Health v. Nwogwugwu*, 594 A.2d 847, 850 (Pa. Cmwlth. 1991).

122 *Id.*

123 *See id.* at 851.

124 *See* Commission Adjudication at 37.

against Lynn in examination or promotion with respect to the classified service because of other non-merit factors.[125]

Both the Commission and the Commonwealth Court worried that providing preference to Novotnak and not to Lynn would defy the purpose of the CSRA and VPA.[126] Even if that were the case, that would not convert the two into being similarly situated for purposes of a non-merit discrimination claim under Section 2704. Moreover, the Commission compounded matters by conflating the constitutional considerations behind equal protection and due process with the task of assessing statutory non-merit discrimination. By invoking *Chester*, the Commission implied that Novotnak's ascension could not be considered an appointment without offending constitutional principles. Lynn, who would have carried the "heavy burden" of doing so, never raised such an argument, let alone proved such a proposition.[127]

The Commonwealth Court piled onto the Commission's assessment, asserting that awarding "veterans' preference to Novotnak at the exclusion of

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[125] *See* 71 Pa.C.S. § 2704.

[126] *See* Commission Adjudication at 38 ("To treat an individual *less* favorably solely because they are a member of the classified service is the essence of a non-merit factor, and antithetical to the purpose of the merit system and veterans' preference.") (emphasis in original); *Lynn*, 2022 WL 43308, at *6 ("[T]he purpose of veterans' preference is not solely a reward to the veteran for military service. *More importantly*, it is also a formal recognition of the value of intangible qualities developed during significant military service, which benefits the public when a veteran is placed in a civil service position. Here, awarding veterans' preference to Novotnak while denying it to Lynn does not fulfill the purposes of the veterans' preference legislation.") (emphasis added; quotation marks removed).

We question the Commonwealth Court's proclamation that rewarding veterans was a less important purpose than benefitting the public by employing a veteran who brings intangible qualities to public service. Neither section 7102(a) of the VPA nor this Court's cases interpreting the VPA prioritized one purpose over the other.

[127] *See Pa. Tpk. Comm'n v. Com.*, 899 A.2d 1085, 1094 (Pa. 2006) ("[T]he party challenging the constitutionality of a statute bears a heavy burden of persuasion.").

Lynn . . . mischaracterize[d] what constitutes a promotion for the purposes of both" the CSRA and VPA.[128] Instead of undertaking a statutory analysis to decide what constituted a promotion, the Commonwealth Court took cues from *Chester*. But *Chester* concerned whether the mandatory preference provisions of Section 7104(b) ran "afoul of the Constitution in the context of appointments to a civil service position."[129] Crucially, neither *Chester*, nor *Schmid*, nor *O'Neill*, nor *Hoffman*, addressed whether the Commonwealth could constitutionally create a statutory scheme that distinguishes between classified and unclassified service for the purpose of promotions, or whether the Commonwealth could apply such a scheme in a manner resulting in different treatment of veterans employed in distinct service classifications. As such, *Chester* is inapposite.[130]

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[128] *Lynn*, 2022 WL 43308, at *5.

[129] *Chester*, 730 A.2d at 949. *Chester* relied upon *O'Neill*. *Id.* at 948. *O'Neill*'s rationale for not applying veterans' preference to promotions did include the diminishment of the proportional benefit accruing to the public from employing veterans over non-veterans as time passed. *See id.* In context, however, the *O'Neill* Court was concerned that the statutory scheme provided veterans with the "same total of gratuitous percentage points" for "examinations for successive promotions." *O'Neill*, 83 A.2d at 383. Boosting a non-classified unskilled worker's examination score indefinitely is quite different from boosting an unskilled worker's score in the context of an initial appointment into the classified service at the same agency. There may be rational reasons for the latter but not the former that reasonably relate to merit-based employment and the preference of veterans. Because Lynn did not raise an as-applied constitutional challenge, we do not decide this issue today.

[130] The Commission noted that the Commonwealth Court has rejected the position that veterans' preference may only be used once during an individual's career in public service. Commission Adjudication at 17 n.13 (citing *Cutler v. Pa. Civ. Serv. Comm'n*, 924 A.2d 706 (Pa. Cmwlth. 2007) (applying preference to a move from one classified service position to another in the same pay range because the CSA's statutory definition of promotion required a change in pay)). Indeed, the Commonwealth Court in *Cutler* interpreted *Chester* as leaving open the possibility that a veteran may receive preferences for multiple appointment examinations, but not promotional examinations, during the course of a classified service career. *See Cutler*, 924 A.2d at 715-16. We leave the issue of whether a veteran may receive preference for multiple appointment examinations for another day, as this issue is not before us.

V. Conclusion

We hold that it is not discriminatory under Section 2704 of the CSRA for a public employer to apply veterans' preference to the initial appointment of a veteran into the classified service from the employer's unclassified service, but not to apply veterans' preference to a veteran who is being promoted within the classified service. Because Lynn was seeking a promotion within the meaning of the CSRA and VPA, the Commission and the Commonwealth Court erred by determining that Lynn was entitled to veterans' preference. Furthermore, the Commission and the Commonwealth Court erred by determining that Lynn was subject to non-merit discrimination under the circumstances in this case, and that, as a remedy, Lynn was entitled to be installed in the CWTI position.

Despite this error, however, Lynn will remain in the CWTI position[131] based upon the procedural posture of this case. The Commission had ordered the DOC to install Lynn into the position based upon the alternate grounds that displacing Lynn from the position after the OA amended the eligible list constituted technical discrimination in violation of Section 2307(a) of the CSRA, and the Commonwealth Court affirmed.[132] The OA separately sought allowance of appeal as to whether the Commonwealth Court erred in affirming the Commission's order on the grounds of technical discrimination. We did not grant review of this issue. Because it is outside the scope of our limited grant of allowance of appeal, we do not consider the propriety of the Commonwealth Court's order on technical discrimination grounds.[133] Accordingly, we leave undisturbed the Commonwealth Court's order affirming the Commission's October 26, 2022 order

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131 Recall that DOC sought, but was denied, a stay of the Commission's October 26, 2020 order requiring DOC to install Lynn into the CWTI position.

132 Commission Adjudication at 35; *Lynn*, 2022 WL 433098 at *6-8.

133 *See Marion v. Bryn Mawr Tr. Co.*, 288 A.3d 76, 93 (Pa. 2023).

reinstating Lynn in the CWTI position and returning Novotnak to his prior position as a remedy for technical discrimination.

We affirm the order of the Commonwealth Court in part and reverse in part.

Chief Justice Todd and Justices Donohue and Dougherty join the opinion.

Justice Mundy files a concurring opinion in which Justice Brobson joins.