

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

PHYLLIS A. CARNEY, Petitioner :

v. : NO. 308 C. D. 1978

COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA HUMAN RELATIONS :
COMMISSION, HOMER C. FLOYD, :
EXECUTIVE DIRECTOR, :
Respondent :

BEFORE: HONORABLE ROY WILKINSON, JR., Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE JOHN A. MacPHAIL, Judge

ARGUED: JUNE 4, 1979 - HARRISBURG

O P I N I O N

OPINION BY JUDGE ROGERS

FILED: AUGUST 9, 1979

Phyllis A. Carney has filed a petition for review in the nature of mandamus seeking an order compelling the Pennsylvania Human Relations Commission (PHRC): to reopen its investigation of charges of sex discrimination against her by her employer; to grant her a preliminary hearing before three or more Commissioners at which she would be accorded the right to present and cross-examine witnesses and offer evidence; and to pay to her reasonable counsel fees and costs in this proceeding. The PHRC has filed preliminary objections in the nature of a demurrer asserting that the petition was not timely filed and that the petition failed to state a cause of action for mandamus.

Preliminary objections in the nature of a demurrer admit all well pleaded facts and inferences deducible therefrom, but not conclusions of law. Independent Association of Pennsylvania Liquor Control Board Employees v. Commonwealth, 35 Pa. Commonwealth Ct. 133, 384 A.2d 1367 (1978).

Ms. Carney alleges that she filed a complaint with the PHRC charging that her employment at Magee Memorial Hospital had been terminated solely because of her sex; that her rate of compensation while employed was lower than that of male employees with similar responsibilities; and that the hospital had not, as required by law, provided posted notice of rights guaranteed by the Pennsylvania Human Relations Act. Other allegations are that the PHRC notified

her by letter that it had dismissed her complaint because after investigation it believed that no probable cause existed to support her charges; that she filed a request for reconsideration; that this request was granted and that a conference was held on July 29, 1976 attended by her, her counsel, counsel for PHRC and an employer representative; that at the conference no participants testified under oath, no other evidence was received and no record of the proceedings made; and that a week later she was notified by letter that the PHRC had again determined that no probable cause for her complaint existed and reaffirmed its action dismissing the complaint.

Section 9 of the Pennsylvania Human Relations Act (PHRA), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §959, provides pertinently:

"Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may make, sign and file with the Commission a verified complaint, in writing

After the filing of any complaint, or whenever there is reason to believe that an unlawful discriminatory practice has been committed, the Commission shall make a prompt investigation in connection therewith.

If it shall be determined after such investigation that no probable cause exists for crediting the allegations of the complaint, the Commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the Commission a written request for a preliminary hearing before the Commission to determine probable cause for crediting the allegations of the complaint. . . .

The Commission shall establish rules or practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Three or more members of the Commission shall constitute the Commission for any hearing required to be held by the Commission under this act. . . ."

PHRC has adopted regulations under Section 9 to be found at Subchapter F, 16 Pa. Code §§ 42.61, 42.62 and 42.63. These, pertinent to this case are the following:

"42.62. Request for reconsideration of dismissal.

(a) If the complaint is dismissed, the complainant may request reconsideration of the dismissal of the complaint.

(b) The request for reconsideration of the dismissal of a complaint may be made only once for each ground of dismissal.

(c) A request for reconsideration of dismissal shall be in writing, shall state specifically the grounds relied on, and may contain new evidence not previously considered by the Commission.

(d) A request for reconsideration of dismissal and a request for a preliminary hearing shall be filed within ten days of the receipt of the notice of dismissal of the complaint."

"§42.63. Reconsideration of dismissal.

(a) If the request for reconsideration of dismissal is granted, the matter will be referred to staff counsel who will consider any new evidence and secure new information as may be necessary and appropriate and who may convene a preliminary hearing (if) requested by the complainant in a timely manner.

(b) When a preliminary hearing is convened by staff counsel, the testimony taken at such preliminary hearing will not be transcribed or under oath. The staff counsel will hear the evidence, reinvestigate the facts if necessary, and file a report and recommendation with the Commission.

.....

(d) If, upon reconsideration of a complaint dismissed upon a finding of no probable cause, Commission staff determines that no probable cause exists to credit the allegations of the complaint, a finding of no probable cause will be made and reported to the Commissioners, and the Commissioners may reaffirm their dismissal of the complaint or take such other action as the Commissioners may deem appropriate."

It will be noted that while Section 9 of PHRA provides only for a preliminary hearing, the regulations provide for an additional procedure called a request for reconsideration, presumably to be accompanied by the statutory request for preliminary hearing. By §42.63(a), apparently the request for reconsideration is not intended to entail the participation of the complainant but is an entirely internal matter, one result of which may be the convening of a preliminary hearing. Further, under §42.63(b) of the regulations, the preliminary hearing consists only of what the petitioner here has properly described as the conference she attended on July 29, 1976, at which there was no testimony under oath, evidence or record made.

Ms. Carney alleges that following the conference of July 29, 1976, and after being told for the second time that PHRC would dismiss her complaint, the Commission (apparently in response to her further request) notified her by letter dated August 23, 1977 that the conference she had attended was the preliminary hearing. She contends here that this was no hearing; that PHRC by Section 9 is required to have a preliminary hearing upon her request; and

that such preliminary hearing by the same Section 9 must be conducted by three or more members of the Commission. PHRC answers that Section 9 gives it sole and unfettered discretion to have a preliminary hearing or not to have one and that hence, even if the events of July 29, 1976 did not constitute a preliminary hearing, the petition does not describe a ministerial duty necessary for mandamus to lie. We agree with PHRC that Section 9 does not mandate a preliminary hearing whenever requested. Therefore, since this preliminary hearing is not a hearing "required to be held by the Commission", no commissioner is required to be present at the preliminary hearing.

We have concluded, however, that PHRC was, as a prerequisite to a valid determination that no probable cause existed, to afford Ms. Carney a hearing conforming to the requirements of the Administrative Agency Law (AAL), Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.1 et seq., which was in effect at the time of the PHRC actions complained of.¹ Although Section 51 of the AAL did not name PHRC as an agency to which the Act applied, the same Section provided that the Act would apply to any other agency made subject to the provisions of the Act by any other Act of Assembly. Section 10 of PHRA in effect at the time of the Commission's actions complained of here, states pertinently: "Except as otherwise provided herein any order of the Commission may be reviewed under provisions of the Act of June four, one thousand nine hundred forty-five (Pamphlet Laws 1388), known as the 'Administrative Agency Law,' and its amendments." Section 44

of the AAL, 71 P.S. §1710.44, provides pertinently: "After hearing, the court shall affirm the adjudication unless it shall find . . . that the provisions of sections thirty-one to thirty-five inclusive of this act have been violated in the proceeding before the agency. . . ."

Clearly, a determination by PHRC that no probable cause exists for crediting the allegations of a complaint and dismissing the complaint is an adjudication, defined as "any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceedings in which the adjudication is made" Section 2(a) of AAL, 71 P.S. §1710.2(a). Section 31 of the AAL, 71 P.S. §1710.31, provided that every adjudication must be founded upon notice of a hearing and an opportunity to be heard. Section 31, 71 P.S. §1710.31 and Section 32, 71 P.S. §1710.32 provided that at such hearing, evidence may be received and examination and cross-examination permitted. The testimony was to be transcribed and a full and complete record made. Section 31, 71 P.S. §1710.31. The conference of July 29, 1976 conducted in this case did not comply with these requirements. Hence, we cannot say that as respects a hearing Ms. Carney's petition does not state a cause of action.

The PHRC, in support of its preliminary objection in the

nature of a demurrer, also argues that mandamus would not lie because Mr. Carney had an adequate alternative remedy at law under Section 12 of PHRA, 43 P.S. §962. Subsection (b) provides that the procedures and determination under PHRA is the exclusive remedy for a person who files a complaint under PHRA. Subsection (c) states the following exception: .

"(c) In cases involving a claim of discrimination, if a complainant invokes the procedures set forth in this act, that individual's right of action in the courts of the Commonwealth shall not be foreclosed. If within one (1) year after the filing of a complaint with the Commission, the Commission dismisses the complaint or has not entered into a conciliation agreement to which the complainant is a party, the Commission must so notify the complainant. On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to freedom from discrimination granted by this act. . . ."

The Legislature clearly intended that a complainant exhaust the procedures under the PHRA as a condition to the accrual of a right of action in the Court of Common Pleas. The purpose of making the remedy exclusive was, as the Pennsylvania Supreme Court has stated, "that the Legislature recognized that only an administrative agency with broad remedial powers, exercising particular expertise, could cope effectively with the pervasive problem of unlawful discrimination." Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association, 453 Pa. 124, 133-34, 306 A.2d 881, 887 (1973).

We believe the procedures before the PHRC and the right to sue in the court of common pleas together constitute the statutory

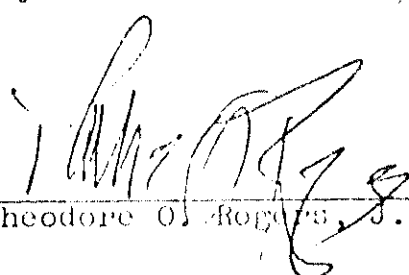
remedy of petitioner and are not alternative adequate remedies. Petitioner has challenged the validity of the probable cause determination that formed the basis for dismissing her complaint, because she was afforded an inadequate hearing. As we have stated, a determination by the PHRC that no probable cause exists to credit the allegations of the complaint can be made only after a hearing at which testimony is recorded, Section 31 of AAL, 71 P.S. §1710.31, and must be supported by findings and reasons, Section 34 of AAL, 71 P.S. §1710.34. Therefore the dismissal of Ms. Carney's complaint was invalid and she properly seeks in this mandamus action to exhaust her remedy before the PHRC. If after a hearing conforming to the standards set forth in the Administrative Agency Law, the PHRC determines there is no probable cause to credit her complaint, petitioner may then pursue an action in the court of common pleas.

The PHRC also raised by way of the preliminary objection the asserted bar of laches to filing the petition. "[T]he defense of laches cannot be brought before the court by way of preliminary objections but must be raised as an affirmative defense in a responsive pleading under the hearing 'New Matter.' See Pa. R.C.P. 1030." Rose Tree Media School District v. Department of Public Instruction, 431 Pa. 233, 238-39, 244 A.2d 754, 756 (1968) (footnote omitted).

We therefore enter the following:

O R D E R

AND NOW, this 9th day of August, 1979, the preliminary objections of the Pennsylvania Human Relations Commission are hereby overruled.



Theodore O. Rogers, J.

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1. The Act of June 4, 1945 was repealed, effective June 27, 1978, by Section 2(a) of the Judiciary Act Repealer Act, Act of April 28, 1978, P.L. 202, 42 P.S. §20002(a) [1244]. Materially identical provisions (still called the Administrative Agency Law) are now codified in Title 2 of Consolidated Statutes, 2 Pa. C.S. §§ 501-508, 701-704.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

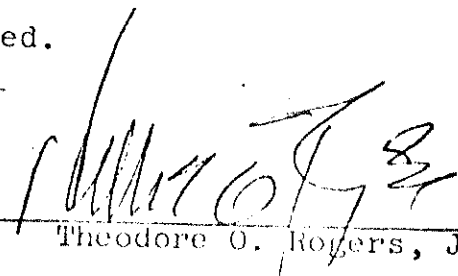
PHYLLIS A. CARNEY, Petitioner :

v. : NO. 308 C.D. 1978

COMMONWEALTH OF PENNSYLVANIA, :
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EXECUTIVE DIRECTOR, :
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O R D E R

AND NOW, this 9th day of August, 1979, the preliminary objections of the Pennsylvania Human Relations Commission are hereby overruled.



Theodore O. Rogers, J.

CERTIFIED FROM THE RECORD

AUG 9 1979

Francis C. Barbush
CHIEF CLERK

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY,
Complainant

vs.

MAGEE MEMORIAL HOSPITAL,
Respondent

:
:
:
:
:
:
:

DOCKET NO. E-5564

PROBABLE CAUSE HEARING
ADJUDICATION

I. FACTUAL STATEMENT OF THE CASE

On or about February 20, 1973 Phyllis A. Carney (Complainant) filed a complaint with the Pennsylvania Human Relations Commission (Commission) against the Magee Memorial Hospital For Convalescents (Respondent). The Complainant alleged that the Respondent discriminated against her because of her sex, female, by compensating her at a lower salary rate than male employees with similar responsibilities and by terminating her from her position as an Administrative Assistant. The Complainant further alleged that the Respondent had failed to post notices as required by the Pennsylvania Human Relations Act (Act)¹.

The Commission undertook an investigation of the complaint and on or about July 7, 1975 informed the Complainant that it had determined that no probable cause existed to credit the allegations in the complaint. The Commission also informed the Complainant that, based upon its finding, her case had been closed. The Complainant was given ten days to request reconsideration of the decision.

¹Section 955(j) of the Act requires those subject to the Act to, "...post and exhibit prominently in his place of business any fair practices notice prepared and distributed by the Pennsylvania Human Relations Commission". 43 P.S. 955(j) (Supp. 1980-81). This allegation was not seriously litigated as an issue during the hearing. Moreover, it appears from the record in the case that notices had been posted by the Respondent (see: Commission Exhibit #7).

The Complainant did file a timely request for reconsideration which was granted. On July 29, 1976, a conference was held which was attended by counsel for the Commission, Complainant and Respondent. Subsequent to this conference additional investigation was undertaken by the Commission. On or about August 4, 1977 the Commission notified the Complainant that it had again closed her case on the grounds that no probable cause existed to credit the allegations of the complaint.

Following the second no probable cause case closure, the Complainant filed a petition for review in the nature of mandamus against the Commission in Commonwealth Court. This action sought to compel the Commission to reopen its investigation and to grant her a preliminary hearing before three or more Commissioners. The Commission filed preliminary objections to the petition which were overruled by the Court on August 9, 1979, Carney v. Com., Pennsylvania H.R. Com'n., 404 A.2d 760 (Cmwltth. 1979). Thereafter, counsel for the Commission and the Complainant entered into a stipulated agreement whereby the Commission would convene a Preliminary Hearing in lieu of further litigation.

On January 30, 1981, a hearing was held before Michael Hardiman, Assistant General Counsel for the Commission, Harrisburg Regional Office.²

²In overruling the preliminary objections, the Court had specifically indicated that given the nature of the hearing the Complainant was seeking there was no requirement that a Commissioner be present at the hearing, Id. at p. 763.

Claudette Spencer, Assistant General Counsel for the Commission, Philadelphia Regional Office, represented the Commission on behalf of its prior determination. John Matrullo, Esquire, represented the Complainant and David T. Duff, Esquire, represented the Respondent. At the close of the hearing all parties were given the opportunity to submit Post Hearing Briefs.³

II. PRELIMINARY CONSIDERATIONS

In addition to the need to consider this case on its merits, several collateral issues were raised that require resolution. The first of these relates to the issuance of a subpoena ad testificandum and a subpoena duces tecum by the Commission following receipt of an application for issuance by the Complainant. The Respondent, on the day of the hearing, filed formal objections to the subpoena duces tecum while providing some of the documents sought. The objections were taken under adversement and the hearing

³Briefs were originally due thirty days after receipt of the transcript. However, as a consequence of several rulings and additional post hearing requests (see infra at p. 4) briefs were not submitted until April 21, 1981.

continued. The parties were also given ten days to brief this issue. Subsequently, the parties decided not to pursue this matter. There was therefore, no need to rule on the objections filed.

A second issue raised by the Complainant concerned her inability to gain access to the Commission's case file. Complainant sought both access to the case file and a continuance of the hearing. The first request was granted; the second denied. The hearing officer did indicate that the hearing could be reconvened at a subsequent date if necessary. Subsequent to the hearing, the parties agreed to supplement the record by introducing documents obtained from the Commission's files rather than reconvene. Two documents were submitted by the Complainant which were labeled as Complainant's exhibits 13 and 14. Respondent objected to the admission of these documents as inappropriate and not in keeping with the prior agreement to permit supplementation. The hearing officer did exclude the document labeled as Complainant's Exhibit 13 while admitting Complainant's Exhibit 14.

Lastly, the Complainant alleged that there was an inherent due process violation of his client's rights owing to the fact that both the hearing officer and counsel representing the Commission's prior determination were Assistant General Counsel employed by the Commission.

Counsel for the Complainant did admit that he had no intention of introducing evidence designed to show actual prejudice (N.T. 15).⁴ Accordingly, the hearing continued, Commonwealth, Human Rel-Com'n v. Thorp, R & A, 361 A.2d 497, 501 (Cmwlth. 1975).

III. POSITIONS OF THE PARTIES INVOLVED

A. POSITION OF THE COMMISSION IN BEHALF OF ITS PRIOR DETERMINATION.

The Commission indicated that its role was limited to a presentation on the record of the findings previously made by the Commission and the basis for those findings (N.T. 15, 16). During the hearing the Commission introduced a number of exhibits calculated to serve this purpose. These documents included:

- (1) the complaint filed by Mrs. Carney (Com. Exh. 1);
- (2) the 5/28/75 Case Closing Recommendation, including analysis, (Com. Exh. 3);
- (3) the 7/7/75 notification of closing sent to the Complainant (Com. Exh. 2);
- (4) the 7/16/75 correspondence requesting reconsideration of the decision to close (Com. Exh. 4);
- (5) the 10/31/75 letter from Complainant indicating the submission of additional information (Com. Exh. 5);

⁴N.T. - stands for Notes of Testimony and will be used throughout.

Other abbreviations used include:

- a) Com. Exh. - Commission Exhibits
- b) R. Exh. - Respondent Exhibit
- c) C. Exh. - Complainant Exhibit

- (6) the second case closing recommendation, including analysis, dated 5/27/77, (Com. Exh. 6);
- (7) the second notification of closing letter, dated 8/4/77, (Com. Exh. 7).

The Commission was not an active participant at the hearing nor did it submit a post hearing brief.

B. POSITION OF THE COMPLAINANT

The Complainant takes the position that the Commission erred in a number of ways. From a factual standpoint the Complainant alleges that the Commission erred as follows:

- (a) in concluding that the Complainant was a clerical employee;
- (b) in comparing the Complainant's position to the position held by one Carol Supern;
- (c) in finding that the Complainant was replaced by another female; and
- (d) in failing to consider the Complainant's allegations of discrimination" in terms of condition of employment".

In a more general sense, and from a legal standpoint, the Complainant argues that the Commission's findings regarding the reason for termination were against the weight of the evidence and were erroneous. Further, the Complainant contends that she has produced substantial evidence that the Commission erred in its finding.

C. POSITION OF THE RESPONDENT

The Respondent takes the position that the Commission correctly determined on two separate occasions that no probable cause existed to credit the allegations of the

complaint. Factually, the Respondent's arguments include:

- (a) the only job comparable to the position held by the Complainant was also held by a female;
- (b) the Complainant earned more than the only other person in a comparable position;
- (c) there were no similarly situated males who were compensated at a higher rate than the Complainant;
- (d) the Complainant was terminated due to her inability to take shorthand and because her attitude had created personality conflicts; and
- (e) the Complainant's duties and responsibilities were assumed by females.

Apart from the factual arguments, the Respondent contends that the Complainant's burden at the hearing was to present new evidence or demonstrate that there was a serious error in the prior determination.

IV. FINDINGS OF FACT - CONCLUSIONS OF LAW AND ANALYSIS

A. FINDINGS OF FACT

1. The Complainant herein is Phyllis A. Carney, an adult female, who resides at 606 North Seventh Street, Philadelphia, Pennsylvania. (N.T. 41).
2. The Respondent herein is the Magee Memorial Hospital, Philadelphia, Pennsylvania. (N.T. 138).
3. The Complainant was employed by the Respondent in September, 1969, as an Executive Secretary. (N.T. 41-42).
4. In June, 1970 the Complainant's job title was changed to Administrative Assistant. (N.T. 43; R. Exh. 5).
5. On February 2, 1973 the Complainant was terminated from employment with the Respondent. (N.T. 54).

6. On or about February 20, 1973, the Complainant filed a complaint with the Commission alleging that the Respondent terminated her because of her sex, female. Complainant also alleged that while employed she was compensated at a lower rate than were male employees holding positions with similar responsibilities. (Com. Exh. 1).
7. Commission staff investigated the allegations in the complaint and on or about May 28, 1975 recommended that the case be closed on the grounds that no probable cause existed to credit the allegations. (Com. Exh. 3).
8. The Commission staff decision was based upon investigation which resulted in the conclusion that there were no male employees who performed duties comparable to the Complainant; that the closest analogous position to the Complainant's was held by a female (Medical Secretary to the Medical Director); that the Complainant earned more than all other clerical employees; and that the Complainant was replaced by a female. (Com. Exh. 3).
9. The Complainant filed a request for reconsideration of the decision to close her case which was granted. On July 29, 1976 a conference was held to consider the case. In attendance were counsel for the Commission, Respondent and Complainant. No sworn testimony was taken.
10. Subsequent to the July 29, 1976 conference, Commission staff renewed its investigation of the Complainant's allegations. (Com. Exh. 6).
11. Investigation included a review of information, data and documents provided by both the Complainant and the Respondent including: Complainant's Application form, assorted job descriptions, prior investigative notes, interviews with Joseph Rainville and Paul LeBrecht (Respondent employees), correspondence from Complainant's Counsel, personnel records of the Complainant and other employees and various employment applications and resumes. (Com. Exh. 6).

12. Commission staff, on or about May 27, 1977, recommended that the case be closed on the grounds that no probable cause existed to credit the allegations. (Com. Exh. 6).
13. The Complainant was notified of the no probable cause finding on or about August 4, 1977. (Com. Exh. 7).
14. The second Commission staff decision was based upon evidence uncovered during its investigation which led to the conclusion that the Complainant was hired as an Executive Secretary in September, 1969, and became an Administrative Assistant in May, 1970. Investigation also led to conclusion that the Complainant did not hold a position comparable to any male employee and that the only other Administrative Assistant position was held by another female who served as a Medical Secretary to the Medical Director. Investigation also led to the conclusion that a new Administrator, Joseph Rainville, replaced the Complainant with another female because Rainville indicated a need for a secretary who could take shorthand; and because of the Complainant's attitude about her position. (Com. Exh. 6; N.T. 54, 153).
15. From approximately June, 1970, until her termination, the Complainant served as an Executive Secretary/Administrative Assistant. (N.T. 43, 47, 84).
16. There were no male employees who held the position of executive secretary/administrative assistant either during or subsequent to the Complainant's employment with the Respondent. (Com. Exh. 6).
17. The position mostly closely analogous to the Complainant's was that of Medical Secretary to the Medical Director which was held by a female. (Com. Exh. 6; N.T. 145, 148).
18. The Complainant's wages were substantially equally to those earned by the Medical Secretary. (R. Exh. 5 and 6).

19. During the time period subsequent to the departure of Paul LaBrecht, who had served as Assistant Administrator and Business Manager, and prior to the appointment of Joseph Rainville as Administrator, the Complainant did not assume the duties of Assistant Administrator. (N.T. 152; Com. Exh. 6).
20. Following the termination of the Complainant, Thomas Martin (Comptroller and later Assistant Administrator) did not assume her position as Executive Secretary/Administrative Assistant. Her secretarial duties were assumed by another female (Julie Shavel) and her personnel duties were also assumed by a female (Patricia Racey). (N.T. 138, 152; R-3 and R-4; N.T. 56, 102).
21. During the course of the January 30, 1981 hearing the Complainant did not introduce material evidence that had not previously been considered by the Commission Staff.

B. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Complainant and Respondent and the subject matter of the Complaint under the Act, pursuant to Section 9 of the Act, 43 P.S. 959.
2. Investigation by Commission staff failed to uncover evidence sufficient to support a finding that there was probable cause to believe that the Complainant had been discriminated against because of her sex, female, either with respect to compensation or regarding her termination from employment.
3. The Complainant has failed to produce evidence sufficient to support her allegation that Commission staff erred in concluding that no probable cause existed.
4. Probable cause to credit the allegations contained in the complaint has not been established.

IV. ANALYSIS

The essential issue presented in this case is whether Commission staff correctly determined that no probable cause existed to credit the allegations in the complaint. Probable Cause has been defined as, "An apparent state of facts found to exist upon reasonable inquiry which would induce a reasonably intelligent and prudent man to believe..., in a civil case, that a cause of action existed. Blacks Law Dictionary, Revised Fourth Edition at p. 1365 (1968).

In determining the correctness of a no probable cause decision, the appropriate legal standard to use is one which will determine whether the decision is supported by evidence sufficient to convince a reasonable mind to a fair degree of certainty, PLRB v. Elks Motor Sales Co., 388 Pa. 173, 130 A.2d 501 (1957). There is no requirement that the decision be free from all doubt. The key is the existence of evidence sufficient to convince the reasonable person. After reviewing the evidence of record in this case it is clear that the above standard has been satisfied. The Commission decision that no probable cause existed was based upon evidence sufficient to convince a reasonable person.

It should be noted in this case that two separate though interrelated investigations into the allegation found in the complaint did occur. The investigations included a review of information and documents provided both by the Complainant and the Respondent. Investigation

also included personal interviews with Respondent employees and the submission of affidavits by several employees. This investigation resulted in a finding that the evidence was insufficient to warrant a probable cause finding. Nothing produced by the Complainant during the course of the hearing leads to a contrary conclusion. In fact, the evidence presented at the hearing amounted to little more than a review of evidence already in the hands of the Commission at the time the May 27, 1977 no cause recommendation was made. No new and material evidence was introduced nor was there any evidence that an incorrect legal standard was applied.

The facts clearly showed that the Complainant was hired as a secretary in September, 1969. Approximately ten months later, the Complainant's title was changed to Administrative Assistant. From that time until her termination she served in the capacity of secretary/administrative assistant. The position most closely comparable to the Complainant's was that of Medical Secretary/Administrative Assistant. This position was also held by a female. Certainly, these two jobs were not identical. However, they were the two positions that combined secretarial and administrative functions. Moreover, the evidence showed that the Complainant's secretarial functions, subsequent to her termination, were assumed by a female while the personnel functions were also assumed by a female. The evidence produced by the Complainant does not support

a conclusion that she assumed the position of Assistant Administrator following the departure of Paul LaBrecht or that Thomas Martin assumed her position of executive secretary/administrative assistant. Thus, the Complainant failed to establish the crucial element of a prima facie charge of sex discrimination, namely that others not in the Complainant's class were treated differently. SEE GENERALLY: McDonnell-Douglas v. Green, 411 U.S. 792 (1973). It was the lack of evidence to support the charge following the investigation and conversely the existence of evidence which rebutted the allegations in the charge that led to the decision to recommend that the case be closed as no probable cause. The evidence of record is sufficient to support that recommendation.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY, :
Complainant :
vs. : DOCKET NO. E-5564
MAGEE MEMORIAL HOSPITAL, :
Respondent :

RECOMMENDATION OF HEARING OFFICER

AND NOW, this 20th day of *MAY*, 1981, in consideration of the entire record in this matter, the Hearing Officer hereby adopts the attached as his proposed Factual Statement of the Case, Preliminary Considerations, Positions of the Parties Involved, Findings of Fact, Conclusions of Law, Analysis and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY

Michael Hardiman
Michael Hardiman
Assistant General Counsel
Pa. Human Relations Commission
301 Muench Street
Harrisburg, Pennsylvania 17102

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY, :
Complainant :
vs. : DOCKET NO. E-5564
MAGEE MEMORIAL HOSPITAL, :
Respondent :

ORDER

AND NOW, to wit, this 2nd day of July, 1981,
upon consideration of the Findings of Fact, Conclusions
of Law, Analysis and Recommendation of the Hearing Officer,
and pursuant to the provisions of Section 9 of the
Pennsylvania Human Relations Act, as amended, the
Pennsylvania Human Relations Commission hereby

O R D E R S

that the case be closed on the grounds that no probable
cause exists to credit the allegations of the complaint.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY Joseph X. Yaffe
Joseph X. Yaffe, Chair

ATTEST:

BY: Elizabeth M. Scott
Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY,
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vs.

MAGEE MEMORIAL HOSPITAL,
Respondent

DOCKET NO. E-5564

PROBABLE CAUSE HEARING
ADJUDICATION

I. FACTUAL STATEMENT OF THE CASE

On or about February 20, 1973 Phyllis A. Carney (Complainant) filed a complaint with the Pennsylvania Human Relations Commission (Commission) against the Magee Memorial Hospital For Convalescents (Respondent). The Complainant alleged that the Respondent discriminated against her because of her sex, female, by compensating her at a lower salary rate than male employees with similar responsibilities and by terminating her from her position as an Administrative Assistant. The Complainant further alleged that the Respondent had failed to post notices as required by the Pennsylvania Human Relations Act (Act)¹.

The Commission undertook an investigation of the complaint and on or about July 7, 1975 informed the Complainant that it had determined that no probable cause existed to credit the allegations in the complaint. The Commission also informed the Complainant that, based upon its finding, her case had been closed. The Complainant was given ten days to request reconsideration of the decision.

¹Section 955(j) of the Act requires those subject to the Act to, "...post and exhibit prominently in his place of business any fair practices notice prepared and distributed by the Pennsylvania Human Relations Commission". 43 P.S. 955(j) (Supp. 1980-81). This allegation was not seriously litigated as an issue during the hearing. Moreover, it appears from the record in the case that notices had been posted by the Respondent (see: Commission Exhibit #7).

The Complainant did file a timely request for reconsideration which was granted. On July 29, 1976, a conference was held which was attended by counsel for the Commission, Complainant and Respondent. Subsequent to this conference additional investigation was undertaken by the Commission. On or about August 4, 1977 the Commission notified the Complainant that it had again closed her case on the grounds that no probable cause existed to credit the allegations of the complaint.

Following the second no probable cause case closure, the Complainant filed a petition for review in the nature of mandamus against the Commission in Commonwealth Court. This action sought to compel the Commission to reopen its investigation and to grant her a preliminary hearing before three or more Commissioners. The Commission filed preliminary objections to the petition which were overruled by the Court on August 9, 1979, Carney v. Com., Pennsylvania H.R. Com'n., 404 A.2d 760 (Cmwlth. 1979). Thereafter, counsel for the Commission and the Complainant entered into a stipulated agreement whereby the Commission would convene a Preliminary Hearing in lieu of further litigation.

On January 30, 1981, a hearing was held before Michael Hardiman, Assistant General Counsel for the Commission, Harrisburg Regional Office.²

²In overruling the preliminary objections, the Court had specifically indicated that given the nature of the hearing the Complainant was seeking there was no requirement that a Commissioner be present at the hearing, Id. at p. 763.

Claudette Spencer, Assistant General Counsel for the Commission, Philadelphia Regional Office, represented the Commission on behalf of its prior determination. John Matrullo, Esquire, represented the Complainant and David T. Duff, Esquire, represented the Respondent. At the close of the hearing all parties were given the opportunity to submit Post Hearing Briefs.³

II. PRELIMINARY CONSIDERATIONS

In addition to the need to consider this case on its merits, several collateral issues were raised that require resolution. The first of these relates to the issuance of a subpoena ad testificandum and a subpoena duces tecum by the Commission following receipt of an application for issuance by the Complainant. The Respondent, on the day of the hearing, filed formal objections to the subpoena duces tecum while providing some of the documents sought. The objections were taken under adversement and the hearing

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continued. The parties were also given ten days to brief this issue. Subsequently, the parties decided not to pursue this matter. There was therefore, no need to rule on the objections filed.

A second issue raised by the Complainant concerned her inability to gain access to the Commission's case file. Complainant sought both access to the case file and a continuance of the hearing. The first request was granted; the second denied. The hearing officer did indicate that the hearing could be reconvened at a subsequent date if necessary. Subsequent to the hearing, the parties agreed to supplement the record by introducing documents obtained from the Commission's files rather than reconvene. Two documents were submitted by the Complainant which were labeled as Complainant's exhibits 13 and 14. Respondent objected to the admission of these documents as inappropriate and not in keeping with the prior agreement to permit supplementation. The hearing officer did exclude the document labeled as Complainant's Exhibit 13 while admitting Complainant's Exhibit 14.

Lastly, the Complainant alleged that there was an inherent due process violation of his client's rights owing to the fact that both the hearing officer and counsel representing the Commission's prior determination were Assistant General Counsel employed by the Commission.

Counsel for the Complainant did admit that he had no intention of introducing evidence designed to show actual prejudice (N.T. 15).⁴ Accordingly, the hearing continued, Commonwealth, Human Rel-Com'n v. Thorp, R & A, 361 A.2d 497, 501 (Cmwlth. 1975).

III. POSITIONS OF THE PARTIES INVOLVED

A. POSITION OF THE COMMISSION IN BEHALF OF ITS PRIOR DETERMINATION.

The Commission indicated that its role was limited to a presentation on the record of the findings previously made by the Commission and the basis for those findings (N.T. 15, 16). During the hearing the Commission introduced a number of exhibits calculated to serve this purpose. These documents included:

- (1) the complaint filed by Mrs. Carney (Com. Exh. 1);
- (2) the 5/28/75 Case Closing Recommendation, including analysis, (Com. Exh. 3);
- (3) the 7/7/75 notification of closing sent to the Complainant (Com. Exh. 2);
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Other abbreviations used include:

- a) Com. Exh. - Commission Exhibits
- b) R. Exh. - Respondent Exhibit
- c) C. Exh. - Complainant Exhibit

- (6) the second case closing recommendation, including analysis, dated 5/27/77, (Com. Exh. 6);
- (7) the second notification of closing letter, dated 8/4/77, (Com. Exh. 7).

The Commission was not an active participant at the hearing nor did it submit a post hearing brief.

B. POSITION OF THE COMPLAINANT

The Complainant takes the position that the Commission erred in a number of ways. From a factual standpoint the Complainant alleges that the Commission erred as follows:

- (a) in concluding that the Complainant was a clerical employee;
- (b) in comparing the Complainant's position to the position held by one Carol Supern;
- (c) in finding that the Complainant was replaced by another female; and
- (d) in failing to consider the Complainant's allegations of discrimination" in terms of condition of employment".

In a more general sense, and from a legal standpoint, the Complainant argues that the Commission's findings regarding the reason for termination were against the weight of the evidence and were erroneous. Further, the Complainant contends that she has produced substantial evidence that the Commission erred in its finding.

C. POSITION OF THE RESPONDENT

The Respondent takes the position that the Commission correctly determined on two separate occasions that no probable cause existed to credit the allegations of the

complaint. Factually, the Respondent's arguments include:

- (a) the only job comparable to the position held by the Complainant was also held by a female;
- (b) the Complainant earned more than the only other person in a comparable position;
- (c) there were no similarly situated males who were compensated at a higher rate than the Complainant;
- (d) the Complainant was terminated due to her inability to take shorthand and because her attitude had created personality conflicts;
~~and~~
- (e) the Complainant's duties and responsibilities were assumed by females.

Apart from the factual arguments, the Respondent contends that the Complainant's burden at the hearing was to present new evidence or demonstrate that there was a serious error in the prior determination.

IV. FINDINGS OF FACT - CONCLUSIONS OF LAW AND ANALYSIS

A. FINDINGS OF FACT

1. The Complainant herein is Phyllis A. Carney, an adult female, who resides at 606 North Seventh Street, Philadelphia, Pennsylvania. (N.T. 41).
2. The Respondent herein is the Magee Memorial Hospital, Philadelphia, Pennsylvania. (N.T. 138).
3. The Complainant was employed by the Respondent in September, 1969, as an Executive Secretary. (N.T. 41-42).
4. In June, 1970 the Complainant's job title was changed to Administrative Assistant. (N.T. 43; R. Exh. 5).
5. On February 2, 1973 the Complainant was terminated from employment with the Respondent. (N.T. 54).

6. On or about February 20, 1973, the Complainant filed a complaint with the Commission alleging that the Respondent terminated her because of her sex, female. Complainant also alleged that while employed she was compensated at a lower rate than were male employees holding positions with similar responsibilities. (Com. Exh. 1).
7. Commission staff investigated the allegations in the complaint and on or about May 28, 1975 recommended that the case be closed on the grounds that no probable cause existed to credit the allegations. (Com. Exh. 3).
8. The Commission staff decision was based upon investigation which resulted in the conclusion that there were no male employees who performed duties comparable to the Complainant; that the closest analogous position to the Complainant's was held by a female (Medical Secretary to the Medical Director); that the Complainant earned more than all other clerical employees; and that the Complainant was replaced by a female. (Com. Exh. 3).
9. The Complainant filed a request for reconsideration of the decision to close her case which was granted. On July 29, 1976 a conference was held to consider the case. In attendance were counsel for the Commission, Respondent and Complainant. No sworn testimony was taken.
10. Subsequent to the July 29, 1976 conference, Commission staff renewed its investigation of the Complainant's allegations. (Com. Exh. 6).
11. Investigation included a review of information, data and documents provided by both the Complainant and the Respondent including: Complainant's Application form, assorted job descriptions, prior investigative notes, interviews with Joseph Rainville and Paul LeBrecht (Respondent employees), correspondence from Complainant's Counsel, personnel records of the Complainant and other employees and various employment applications and resumes. (Com. Exh. 6).

12. Commission staff, on or about May 27, 1977, recommended that the case be closed on the grounds that no probable cause existed to credit the allegations. (Com. Exh. 6).
13. The Complainant was notified of the no probable cause finding on or about August 4, 1977. (Com. Exh. 7).
14. The second Commission staff decision was based upon evidence uncovered during its investigation which led to the conclusion that the Complainant was hired as an Executive Secretary in September, 1969, and became an Administrative Assistant in May, 1970. Investigation also led to conclusion that the Complainant did not hold a position comparable to any male employee and that the only other Administrative Assistant position was held by another female who served as a Medical Secretary to the Medical Director. Investigation also led to the conclusion that a new Administrator, Joseph Rainville, replaced the Complainant with another female because Rainville indicated a need for a secretary who could take shorthand; and because of the Complainant's attitude about her position. (Com. Exh. 6; N.T. 54, 153).
15. From approximately June, 1970, until her termination, the Complainant served as an Executive Secretary/Administrative Assistant. (N.T. 43, 47, 84).
16. There were no male employees who held the position of executive secretary/administrative assistant either during or subsequent to the Complainant's employment with the Respondent. (Com. Exh. 6).
17. The position mostly closely analogous to the Complainant's was that of Medical Secretary to the Medical Director which was held by a female. (Com. Exh. 6; N.T. 145, 148).
18. The Complainant's wages were substantially equally to those earned by the Medical Secretary. (R. Exh. 5 and 6).

19. During the time period subsequent to the departure of Paul LaBrecht, who had served as Assistant Administrator and Business Manager, and prior to the appointment of Joseph Rainville as Administrator, the Complainant did not assume the duties of Assistant Administrator. (N.T. 152; Com. Exh. 6).
20. Following the termination of the Complainant, Thomas Martin (Comptroller and later Assistant Administrator) did not assume her position as Executive Secretary/Administrative Assistant. Her secretarial duties were assumed by another female (Julie Shavel) and her personnel duties were also assumed by a female (Patricia Racey). (N.T. 138, 152; R-3 and R-4; N.T. 56, 102).
21. During the course of the January 30, 1981 hearing the Complainant did not introduce material evidence that had not previously been considered by the Commission Staff.

B. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Complainant and Respondent and the subject matter of the Complaint under the Act, pursuant to Section 9 of the Act, 43 P.S. 959.
2. Investigation by Commission staff failed to uncover evidence sufficient to support a finding that there was probable cause to believe that the Complainant had been discriminated against because of her sex, female, either with respect to compensation or regarding her termination from employment.
3. The Complainant has failed to produce evidence sufficient to support her allegation that Commission staff erred in concluding that no probable cause existed.
4. Probable cause to credit the allegations contained in the complaint has not been established.

IV. ANALYSIS

The essential issue presented in this case is whether Commission staff correctly determined that no probable cause existed to credit the allegations in the complaint. Probable Cause has been defined as, "An apparent state of facts found to exist upon reasonable inquiry which would induce a reasonably intelligent and prudent man to believe... in a civil case, that a cause of action existed. Blacks Law Dictionary, Revised Fourth Edition at p. 1365 (1968).

In determining the correctness of a no probable cause decision, the appropriate legal standard to use is one which will determine whether the decision is supported by evidence sufficient to convince a reasonable mind to a fair degree of certainty, PLRB v. Elks Motor Sales Co., 388 Pa. 173, 130 A.2d 501 (1957). There is no requirement that the decision be free from all doubt. The key is the existence of evidence sufficient to convince the reasonable person. After reviewing the evidence of record in this case it is clear that the above standard has been satisfied. The Commission decision that no probable cause existed was based upon evidence sufficient to convince a reasonable person.

It should be noted in this case that two separate though interrelated investigations into the allegation found in the complaint did occur. The investigations included a review of information and documents provided both by the Complainant and the Respondent. Investigation

also included personal interviews with Respondent employees and the submission of affidavits by several employees. This investigation resulted in a finding that the evidence was insufficient to warrant a probable cause finding. Nothing produced by the Complainant during the course of the hearing leads to a contrary conclusion. In fact, the evidence presented at the hearing amounted to little more than a review of evidence already in the hands of the Commission at the time the May 27, 1977 no cause recommendation was made. No new and material evidence was introduced nor was there any evidence that an incorrect legal standard was applied.

The facts clearly showed that the Complainant was hired as a secretary in September, 1969. Approximately ten months later, the Complainant's title was changed to Administrative Assistant. From that time until her termination she served in the capacity of secretary/administrative assistant. The position most closely comparable to the Complainant's was that of Medical Secretary/Administrative Assistant. This position was also held by a female. Certainly, these two jobs were not identical. However, they were the two positions that combined secretarial and administrative functions. Moreover, the evidence showed that the Complainant's secretarial functions, subsequent to her termination, were assumed by a female while the personnel functions were also assumed by a female. The evidence produced by the Complainant does not support

a conclusion that she assumed the position of Assistant Administrator following the departure of Paul LaBrecht or that Thomas Martin assumed her position of executive secretary/administrative assistant. Thus, the Complainant failed to establish the crucial element of a prima facie charge of sex discrimination, namely that others not in the Complainant's class were treated differently. SEE GENERALLY: McDonnell-Douglas v. Green, 411 U.S. 792 (1973). It was the lack of evidence to support the charge following the investigation and conversely the existence of evidence which rebutted the allegations in the charge that led to the decision to recommend that the case be closed as no probable cause. The evidence of record is sufficient to support that recommendation.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY,
Complainant

vs.

MAGEE MEMORIAL HOSPITAL,
Respondent

:
:
:
:
:
:

DOCKET NO. E-5564

RECOMMENDATION OF HEARING OFFICER

AND NOW, this 20th day of *MAY*, 1981, in consideration of the entire record in this matter, the Hearing Officer hereby adopts the attached as his proposed Factual Statement of the Case, Preliminary Considerations, Positions of the Parties Involved, Findings of Fact, Conclusions of Law, Analysis and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY

Michael Hardiman

Michael Hardiman
Assistant General Counsel
Pa. Human Relations Commission
301 Muench Street
Harrisburg, Pennsylvania 17102

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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PHYLLIS A. CARNEY, :
Complainant :
:

vs. :
:

DOCKET NO. E-5564

MAGEE MEMORIAL HOSPITAL, :
Respondent :

ORDER

AND NOW, to wit, this 2nd day of July, 1981,
upon consideration of the Findings of Fact, Conclusions
of Law, Analysis and Recommendation of the Hearing Officer,
and pursuant to the provisions of Section 9 of the
Pennsylvania Human Relations Act, as amended, the
Pennsylvania Human Relations Commission hereby

O R D E R S

that the case be closed on the grounds that no probable
cause exists to credit the allegations of the complaint.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY Joseph X. Yaffe
Joseph X. Yaffe, Chair

ATTEST:

BY: Elizabeth M. Scott
Elizabeth M. Scott, Secretary

I. FACTUAL STATEMENT OF THE CASE

On or about February 20, 1973 Phyllis A. Carney (Complainant) filed a complaint with the Pennsylvania Human Relations Commission (Commission) against the Magee Memorial Hospital For Convalescents (Respondent). The Complainant alleged that the Respondent discriminated against her because of her sex, female, by compensating her at a lower salary rate than male employees with similar responsibilities and by terminating her from her position as an Administrative Assistant. The Complainant further alleged that the Respondent had failed to post notices as required by the Pennsylvania Human Relations Act (Act)¹.

The Commission undertook an investigation of the complaint and on or about July 7, 1975 informed the Complainant that it had determined that no probable cause existed to credit the allegations in the complaint. The Commission also informed the Complainant that, based upon its finding, her case had been closed. The Complainant was given ten days to request reconsideration of the decision.

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The Complainant did file a timely request for reconsideration which was granted. On July 29, 1976, a conference was held which was attended by counsel for the Commission, Complainant and Respondent. Subsequent to this conference additional investigation was undertaken by the Commission. On or about August 4, 1977 the Commission notified the Complainant that it had again closed her case on the grounds that no probable cause existed to credit the allegations of the complaint.

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The Complainant takes the position that the Commission erred in a number of ways. From a factual standpoint the Complainant alleges that the Commission erred as follows:

- (a) in concluding that the Complainant was a clerical employee;
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C. POSITION OF THE RESPONDENT

The Respondent takes the position that the Commission correctly determined on two separate occasions that no probable cause existed to credit the allegations of the

complaint. Factually, the Respondent's arguments include:

- (a) the only job comparable to the position held by the Complainant was also held by a female;
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Apart from the factual arguments, the Respondent contends that the Complainant's burden at the hearing was to present new evidence or demonstrate that there was a serious error in the prior determination.

IV. FINDINGS OF FACT - CONCLUSIONS OF LAW AND ANALYSIS

A. FINDINGS OF FACT

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21. During the course of the January 30, 1981 hearing the Complainant did not introduce material evidence that had not previously been considered by the Commission Staff.

B. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Complainant and Respondent and the subject matter of the Complaint under the Act, pursuant to Section 9 of the Act, 43 P.S. 959.
2. Investigation by Commission staff failed to uncover evidence sufficient to support a finding that there was probable cause to believe that the Complainant had been discriminated against because of her sex, female, either with respect to compensation or regarding her termination from employment.
3. The Complainant has failed to produce evidence sufficient to support her allegation that Commission staff erred in concluding that no probable cause existed.
4. Probable cause to credit the allegations contained in the complaint has not been established.

IV. ANALYSIS

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In determining the correctness of a no probable cause decision, the appropriate legal standard to use is one which will determine whether the decision is supported by evidence sufficient to convince a reasonable mind to a fair degree of certainty, PLRB v. Elks Motor Sales Co., 388 Pa. 173, 130 A.2d 501 (1957). There is no requirement that the decision be free from all doubt. The key is the existence of evidence sufficient to convince the reasonable person. After reviewing the evidence of record in this case it is clear that the above standard has been satisfied. The Commission decision that no probable cause existed was based upon evidence sufficient to convince a reasonable person.

It should be noted in this case that two separate though interrelated investigations into the allegation found in the complaint did occur. The investigations included a review of information and documents provided both by the Complainant and the Respondent. Investigation

also included personal interviews with Respondent employees and the submission of affidavits by several employees. This investigation resulted in a finding that the evidence was insufficient to warrant a probable cause finding. Nothing produced by the Complainant during the course of the hearing leads to a contrary conclusion. In fact, the evidence presented at the hearing amounted to little more than a review of evidence already in the hands of the Commission at the time the May 27, 1977 no cause recommendation was made. No new and material evidence was introduced nor was there any evidence that an incorrect legal standard was applied.

The facts clearly showed that the Complainant was hired as a secretary in September, 1969. Approximately ten months later, the Complainant's title was changed to Administrative Assistant. From that time until her termination she served in the capacity of secretary/administrative assistant. The position most closely comparable to the Complainant's was that of Medical Secretary/Administrative Assistant. This position was also held by a female. Certainly, these two jobs were not identical. However, they were the two positions that combined secretarial and administrative functions. Moreover, the evidence showed that the Complainant's secretarial functions, subsequent to her termination, were assumed by a female while the personnel functions were also assumed by a female. The evidence produced by the Complainant does not support

a conclusion that she assumed the position of Assistant Administrator following the departure of Paul LaBrecht or that Thomas Martin assumed her position of executive secretary/administrative assistant. Thus, the Complainant failed to establish the crucial element of a prima facie charge of sex discrimination, namely that others not in the Complainant's class were treated differently. SEE GENERALLY: McDonnell-Douglas v. Green, 411 U.S. 792 (1973). It was the lack of evidence to support the charge following the investigation and conversely the existence of evidence which rebutted the allegations in the charge that led to the decision to recommend that the case be closed as no probable cause. The evidence of record is sufficient to support that recommendation.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

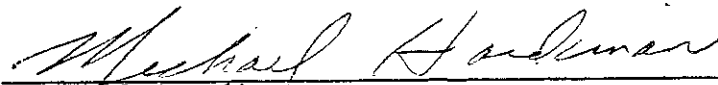
PHYLLIS A. CARNEY, :
Complainant :
vs. : DOCKET NO. E-5564
MAGEE MEMORIAL HOSPITAL, :
Respondent :

RECOMMENDATION OF HEARING OFFICER

AND NOW, this 26th day of *MAY*, 1981, in consideration of the entire record in this matter, the Hearing Officer hereby adopts the attached as his proposed Factual Statement of the Case, Preliminary Considerations, Positions of the Parties Involved, Findings of Fact, Conclusions of Law, Analysis and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY


Michael Hardiman
Assistant General Counsel
Pa. Human Relations Commission
301 Muench Street
Harrisburg, Pennsylvania 17102

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY,	:	
Complainant	:	
	:	
vs.	:	DOCKET NO. E-5564
	:	
MAGEE MEMORIAL HOSPITAL,	:	
Respondent	:	

PROBABLE CAUSE HEARING
ADJUDICATION

I. FACTUAL STATEMENT OF THE CASE

On or about February 20, 1973 Phyllis A. Carney (Complainant) filed a complaint with the Pennsylvania Human Relations Commission (Commission) against the Magee Memorial Hospital For Convalescents (Respondent). The Complainant alleged that the Respondent discriminated against her because of her sex, female, by compensating her at a lower salary rate than male employees with similar responsibilities and by terminating her from her position as an Administrative Assistant. The Complainant further alleged that the Respondent had failed to post notices as required by the Pennsylvania Human Relations Act (Act)¹.

The Commission undertook an investigation of the complaint and on or about July 7, 1975 informed the Complainant that it had determined that no probable cause existed to credit the allegations in the complaint. The Commission also informed the Complainant that, based upon its finding, her case had been closed. The Complainant was given ten days to request reconsideration of the decision.

¹Section 955(j) of the Act requires those subject to the Act to, "...post and exhibit prominently in his place of business any fair practices notice prepared and distributed by the Pennsylvania Human Relations Commission". 43 P.S. 955(j) (Supp. 1980-81). This allegation was not seriously litigated as an issue during the hearing. Moreover, it appears from the record in the case that notices had been posted by the Respondent (see: Commission Exhibit #7).

The Complainant did file a timely request for reconsideration which was granted. On July 29, 1976, a conference was held which was attended by counsel for the Commission, Complainant and Respondent. Subsequent to this conference additional investigation was undertaken by the Commission. On or about August 4, 1977 the Commission notified the Complainant that it had again closed her case on the grounds that no probable cause existed to credit the allegations of the complaint.

Following the 'second no probable cause case closure, the Complainant filed a petition for review in the nature of mandamus against the Commission in Commonwealth Court. This action sought to compel the Commission to reopen its investigation and to grant her a preliminary hearing before three or more Commissioners. The Commission filed preliminary objections to the petition which were overruled by the Court on August 9, 1979, Carney v. Com., Pennsylvania H.R. Com'n., 404 A.2d 760 (Cmwlth. 1979). Thereafter, counsel for the Commission and the Complainant entered into a stipulated agreement whereby the Commission would convene a Preliminary Hearing in lieu of further litigation.

On January 30, 1981, a hearing was held before Michael Hardiman, Assistant General Counsel for the Commission, Harrisburg Regional Office.²

²In overruling the preliminary objections, the Court had specifically indicated that given the nature of the hearing the Complainant was seeking there was no requirement that a Commissioner be present at the hearing, Id. at p. 763.

Claudette Spencer, Assistant General Counsel for the Commission, Philadelphia Regional Office, represented the Commission on behalf of its prior determination. John Matrullo, Esquire, represented the Complainant and David T. Duff, Esquire, represented the Respondent. At the close of the hearing all parties were given the opportunity to submit Post Hearing Briefs.³

II. PRELIMINARY CONSIDERATIONS

In addition to the need to consider this case on its merits, several collateral issues were raised that require resolution. The first of these relates to the issuance of a subpoena ad testificandum and a subpoena duces tecum by the Commission following receipt of an application for issuance by the Complainant. The Respondent, on the day of the hearing, filed formal objections to the subpoena duces tecum while providing some of the documents sought. The objections were taken under adversement and the hearing

³Briefs were originally due thirty days after receipt of the transcript. However, as a consequence of several rulings and additional post hearing requests (see infra at p. 4) briefs were not submitted until April 21, 1981.

continued. The parties were also given ten days to brief this issue. Subsequently, the parties decided not to pursue this matter. There was therefore, no need to rule on the objections filed.

A second issue raised by the Complainant concerned her inability to gain access to the Commission's case file. Complainant sought both access to the case file and a continuance of the hearing. The first request was granted; the second denied. The hearing officer did indicate that the hearing could be reconvened at a subsequent date if necessary. Subsequent to the hearing, the parties agreed to supplement the record by introducing documents obtained from the Commission's files rather than reconvene. Two documents were submitted by the Complainant which were labeled as Complainant's exhibits 13 and 14. Respondent objected to the admission of these documents as inappropriate and not in keeping with the prior agreement to permit supplementation. The hearing officer did exclude the document labeled as Complainant's Exhibit 13 while admitting Complainant's Exhibit 14.

Lastly, the Complainant alleged that there was an inherent due process violation of his client's rights owing to the fact that both the hearing officer and counsel representing the Commission's prior determination were Assistant General Counsel employed by the Commission.

Counsel for the Complainant did admit that he had no intention of introducing evidence designed to show actual prejudice (N.T. 15).⁴ Accordingly, the hearing continued, Commonwealth, Human Rel-Com'n v. Thorp, R & A, 361 A.2d 497, 501 (Cmwlth. 1975).

III. POSITIONS OF THE PARTIES INVOLVED

A. POSITION OF THE COMMISSION IN BEHALF OF ITS PRIOR DETERMINATION.

The Commission indicated that its role was limited to a presentation on the record of the findings previously made by the Commission and the basis for those findings (N.T. 15, 16). During the hearing the Commission introduced a number of exhibits calculated to serve this purpose. These documents included:

- (1) the complaint filed by Mrs. Carney (Com. Exh. 1);
- (2) the 5/28/75 Case Closing Recommendation, including analysis, (Com. Exh. 3);
- (3) the 7/7/75 notification of closing sent to the Complainant (Com. Exh. 2);
- (4) the 7/16/75 correspondence requesting reconsideration of the decision to close (Com. Exh. 4);
- (5) the 10/31/75 letter from Complainant indicating the submission of additional information (Com. Exh. 5);

⁴N.T. - stands for Notes of Testimony and will be used throughout.

Other abbreviations used include:

- a) Com. Exh. - Commission Exhibits
- b) R. Exh. - Respondent Exhibit
- c) C. Exh. - Complainant Exhibit

- (6) the second case closing recommendation, including analysis, dated 5/27/77, (Com. Exh. 6);
- (7) the second notification of closing letter, dated 8/4/77, (Com. Exh. 7).

The Commission was not an active participant at the hearing nor did it submit a post hearing brief.

B. POSITION OF THE COMPLAINANT

The Complainant takes the position that the Commission erred in a number of ways. From a factual standpoint the Complainant alleges that the Commission erred as follows:

- (a) in concluding that the Complainant was a clerical employee;
- (b) in comparing the Complainant's position to the position held by one Carol Supern;
- (c) in finding that the Complainant was replaced by another female; and
- (d) in failing to consider the Complainant's allegations of discrimination" in terms of condition of employment".

In a more general sense, and from a legal standpoint, the Complainant argues that the Commission's findings regarding the reason for termination were against the weight of the evidence and were erroneous. Further, the Complainant contends that she has produced substantial evidence that the Commission erred in its finding.

C. POSITION OF THE RESPONDENT

The Respondent takes the position that the Commission correctly determined on two separate occasions that no probable cause existed to credit the allegations of the

complaint. Factually, the Respondent's arguments include:

- (a) the only job comparable to the position held by the Complainant was also held by a female;
- (b) the Complainant earned more than the only other person in a comparable position;
- (c) there were no similarly situated males who were compensated at a higher rate than the Complainant;
- (d) the Complainant was terminated due to her inability to take shorthand and because her attitude had created personality conflicts; and
- (e) the Complainant's duties and responsibilities were assumed by females.

Apart from the factual arguments, the Respondent contends that the Complainant's burden at the hearing was to present new evidence or demonstrate that there was a serious error in the prior determination.

IV. FINDINGS OF FACT - CONCLUSIONS OF LAW AND ANALYSIS

A. FINDINGS OF FACT

1. The Complainant herein is Phyllis A. Carney, an adult female, who resides at 606 North Seventh Street, Philadelphia, Pennsylvania. (N.T. 41).
2. The Respondent herein is the Magee Memorial Hospital, Philadelphia, Pennsylvania. (N.T. 138).
3. The Complainant was employed by the Respondent in September, 1969, as an Executive Secretary. (N.T. 41-42).
4. In June, 1970 the Complainant's job title was changed to Administrative Assistant. (N.T. 43; R. Exh. 5).
5. On February 2, 1973 the Complainant was terminated from employment with the Respondent. (N.T. 54).

6. On or about February 20, 1973, the Complainant filed a complaint with the Commission alleging that the Respondent terminated her because of her sex, female. Complainant also alleged that while employed she was compensated at a lower rate than were male employees holding positions with similar responsibilities. (Com. Exh. 1).
7. Commission staff investigated the allegations in the complaint and on or about May 28, 1975 recommended that the case be closed on the grounds that no probable cause existed to credit the allegations. (Com. Exh. 3).
8. The Commission staff decision was based upon investigation which resulted in the conclusion that there were no male employees who performed duties comparable to the Complainant; that the closest analogous position to the Complainant's was held by a female (Medical Secretary to the Medical Director); that the Complainant earned more than all other clerical employees; and that the Complainant was replaced by a female. (Com. Exh. 3).
9. The Complainant filed a request for reconsideration of the decision to close her case which was granted. On July 29, 1976 a conference was held to consider the case. In attendance were counsel for the Commission, Respondent and Complainant. No sworn testimony was taken.
10. Subsequent to the July 29, 1976 conference, Commission staff renewed its investigation of the Complainant's allegations. (Com. Exh. 6).
11. Investigation included a review of information, data and documents provided by both the Complainant and the Respondent including: Complainant's Application form, assorted job descriptions, prior investigative notes, interviews with Joseph Rainville and Paul LeBrecht (Respondent employees), correspondence from Complainant's Counsel, personnel records of the Complainant and other employees and various employment applications and resumes. (Com. Exh. 6).

12. Commission staff, on or about May 27, 1977, recommended that the case be closed on the grounds that no probable cause existed to credit the allegations. (Com. Exh. 6).
13. The Complainant was notified of the no probable cause finding on or about August 4, 1977. (Com. Exh. 7).
14. The second Commission staff decision was based upon evidence uncovered during its investigation which led to the conclusion that the Complainant was hired as an Executive Secretary in September, 1969, and became an Administrative Assistant in May, 1970. Investigation also led to conclusion that the Complainant did not hold a position comparable to any male employee and that the only other Administrative Assistant position was held by another female who served as a Medical Secretary to the Medical Director. Investigation also led to the conclusion that a new Administrator, Joseph Rainville, replaced the Complainant with another female because Rainville indicated a need for a secretary who could take shorthand; and because of the Complainant's attitude about her position. (Com. Exh. 6; N.T. 54, 153).
15. From approximately June, 1970, until her termination, the Complainant served as an Executive Secretary/Administrative Assistant. (N.T. 43, 47, 84).
16. There were no male employees who held the position of executive secretary/administrative assistant either during or subsequent to the Complainant's employment with the Respondent. (Com. Exh. 6).
17. The position mostly closely analogous to the Complainant's was that of Medical Secretary to the Medical Director which was held by a female. (Com. Exh. 6; N.T. 145, 148).
18. The Complainant's wages were substantially equally to those earned by the Medical Secretary. (R. Exh. 5 and 6).

19. During the time period subsequent to the departure of Paul LaBrecht, who had served as Assistant Administrator and Business Manager, and prior to the appointment of Joseph Rainville as Administrator, the Complainant did not assume the duties of Assistant Administrator. (N.T. 152; Com. Exh. 6).
20. Following the termination of the Complainant, Thomas Martin (Comptroller and later Assistant Administrator) did not assume her position as Executive Secretary/Administrative Assistant. Her secretarial duties were assumed by another female (Julie Shavel) and her personnel duties were also assumed by a female (Patricia Racey). (N.T. 138, 152; R-3 and R-4; N.T. 56, 102).
21. During the course of the January 30, 1981 hearing the Complainant did not introduce material evidence that had not previously been considered by the Commission Staff.

B. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Complainant and Respondent and the subject matter of the Complaint under the Act, pursuant to Section 9 of the Act, 43 P.S. 959.
2. Investigation by Commission staff failed to uncover evidence sufficient to support a finding that there was probable cause to believe that the Complainant had been discriminated against because of her sex, female, either with respect to compensation or regarding her termination from employment.
3. The Complainant has failed to produce evidence sufficient to support her allegation that Commission staff erred in concluding that no probable cause existed.
4. Probable cause to credit the allegations contained in the complaint has not been established.

IV. ANALYSIS

The essential issue presented in this case is whether Commission staff correctly determined that no probable cause existed to credit the allegations in the complaint. Probable Cause has been defined as, "An apparent state of facts found to exist upon reasonable inquiry which would induce a reasonably intelligent and prudent man to believe..., in a civil case, that a cause of action existed. Blacks Law Dictionary, Revised Fourth Edition at p. 1365 (1968).

In determining the correctness of a no probable cause decision, the appropriate legal standard to use is one which will determine whether the decision is supported by evidence sufficient to convince a reasonable mind to a fair degree of certainty, PLRB v. Elks Motor Sales Co., 388 Pa. 173, 130 A.2d 501 (1957). There is no requirement that the decision be free from all doubt. The key is the existence of evidence sufficient to convince the reasonable person. After reviewing the evidence of record in this case it is clear that the above standard has been satisfied. The Commission decision that no probable cause existed was based upon evidence sufficient to convince a reasonable person.

It should be noted in this case that two separate though interrelated investigations into the allegation found in the complaint did occur. The investigations included a review of information and documents provided both by the Complainant and the Respondent. Investigation

also included personal interviews with Respondent employees and the submission of affidavits by several employees. This investigation resulted in a finding that the evidence was insufficient to warrant a probable cause finding. Nothing produced by the Complainant during the course of the hearing leads to a contrary conclusion. In fact, the evidence presented at the hearing amounted to little more than a review of evidence already in the hands of the Commission at the time the May 27, 1977 no cause recommendation was made. No new and material evidence was introduced nor was there any evidence that an incorrect legal standard was applied.

The facts clearly showed that the Complainant was hired as a secretary in September, 1969. Approximately ten months later, the Complainant's title was changed to Administrative Assistant. From that time until her termination she served in the capacity of secretary/administrative assistant. The position most closely comparable to the Complainant's was that of Medical Secretary/Administrative Assistant. This position was also held by a female. Certainly, these two jobs were not identical. However, they were the two positions that combined secretarial and administrative functions. Moreover, the evidence showed that the Complainant's secretarial functions, subsequent to her termination, were assumed by a female while the personnel functions were also assumed by a female. The evidence produced by the Complainant does not support

a conclusion that she assumed the position of Assistant Administrator following the departure of Paul LaBrecht or that Thomas Martin assumed her position of executive secretary/administrative assistant. Thus, the Complainant failed to establish the crucial element of a prima facie charge of sex discrimination, namely that others not in the Complainant's class were treated differently. SEE GENERALLY: McDonnell-Douglas v. Green, 411 U.S. 792 (1973). It was the lack of evidence to support the charge following the investigation and conversely the existence of evidence which rebutted the allegations in the charge that led to the decision to recommend that the case be closed as no probable cause. The evidence of record is sufficient to support that recommendation.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY, :
Complainant :
vs. : DOCKET NO. E-5564
MAGEE MEMORIAL HOSPITAL, :
Respondent :

RECOMMENDATION OF HEARING OFFICER

AND NOW, this 20th day of *MAY*, 1981, in consideration of the entire record in this matter, the Hearing Officer hereby adopts the attached as his proposed Factual Statement of the Case, Preliminary Considerations, Positions of the Parties Involved, Findings of Fact, Conclusions of Law, Analysis and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY

Michael Hardiman
Michael Hardiman
Assistant General Counsel
Pa. Human Relations Commission
301 Muench Street
Harrisburg, Pennsylvania 17102

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS A. CARNEY, :
Complainant :
vs. : DOCKET NO. E-5564
MAGEE MEMORIAL HOSPITAL, :
Respondent :

ORDER

AND NOW, to wit, this 2nd day of July, 1981,
upon consideration of the Findings of Fact, Conclusions
of Law, Analysis and Recommendation of the Hearing Officer,
and pursuant to the provisions of Section 9 of the
Pennsylvania Human Relations Act, as amended, the
Pennsylvania Human Relations Commission hereby

O R D E R S

that the case be closed on the grounds that no probable
cause exists to credit the allegations of the complaint.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY Joseph X. Yaffe
Joseph X. Yaffe, Chair

ATTEST:

BY: Elizabeth M. Scott
Elizabeth M. Scott, Secretary