IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 726 COMMONWEALTH DOCKET 1977

COMMONWEALTH of PENNSYLVANIA, Pennsylvania HUMAN RELATIONS COMMISSION

v.

BERKS COUNTY PRISON, WALTER G. SCHIPE, Warden,

Appellant

BRIEF FOR APPELLEE

In support of the Order of the Pennsylvania Human Relations Commission at Docket No. E-8210

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A. WAS THERE AMPLE EVIDENCE ON THE RECORD THAT THE RESPONDENT COMMITTED A VIOLATION OF SECTION 5(D) OF THE PENNSYLVANIA HUMAN RELATIONS ACT?

(Answered in the affirmative.)

B. WAS THE ADMISSION OF THE TESTIMONY OF MR. BAILEY CONCERNING THE CONVERSATION BETWEEN MR. SANTORO AND MR. FULCHER IMPROPER?

(Answered in the negative.)

C. ASSUMING ARGUENDO THAT MR. BAILEY'S TESTIMONY CONCERNING A PHONE CONVERSATION WAS IMPROPER AND/OR INADMISSIBLE WAS IT HARMLESS ERROR?

(Answered in the affirmative.)

COUNTER STATEMENT OF THE CASE

This case involves a Complaint filed with the Pennsylvania Human Relations Commission at Docket No. E-8210, charging the Respondent, Berks County Prison and Walter G. Schipe, Warden, the Complainant's former employer, with refusing to rehire the Complainant as a prison guard as a direct result of the Complainant filing a Complaint at Docket No. E-5211P charging the Respondent with a violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended. The Complainant charged that this conduct of the Respondent was in violation of Section 5(d) of the Act.

An investigation into the allegations contained in the Complaint was made by representatives of the Commission, and a determination was made that there was probable cause to credit the allegations of the Complaint. Thereupon, the Commission endeavored to eliminate the unlawful practice complained of by conciliation. This endeavor was unsuccessful and a public hearing was convened pursuant to Section 9 of the Act. The Hearing Panel consisted of Commissioners Everett E. Smith, Consuelo Jordan, and Doris Leader. Marc Kranson, Esquire, served as advisor to the Hearing Panel. The public hearing was convened and completed on November 4, 1976.

Thomas F. Baker, Esquire, Assistant General Counsel of the Commission, presented the case on behalf of the Complainant.

John E. Ruth, Esquire, represented the Respondent.

An Order was entered on March 4, 1977, which the Respondent appealed to this Honorable Court.

SUMMARY OF ARGUMENT

A. 43 P.C.S. §955(d) prohibits employers from refusing to rehire individuals because of a prior Complaint with the Pennsylvania Human Relations Commission. An employer must show that a Complainant was not the best able or most competent to perform a job. An administrative agency can properly decline to believe a Respondent. The record is replete with proof of the pretextual nature of the employer's defense.

B. The strict laws of evidence that govern a criminal trial are not applicable to an administrative agency with a statutory exemption. The employer-appellant's attorney's withdrawal of his objection allowed the Commission to consider the phone conversation now belatedly objected to on appeal.

C. The consideration of ten lines of testimony by the Commission that merely corroborates a stipulation of fact, an admission by the assistant warden, as well as the statements of the warden's secretary is harmless error, if error at all.

ARGUMENT A

A. THE RECORD IN THIS CASE SUPPORTS THE FINDING OF THE COMMISSION THAT THE EMPLOYER HAS VIOLATED SECTION 5(D) OF THE PENNSYLVANIA HUMAN RELATIONS ACT IN THAT: (1) THE REFUSAL OF THE EMPLOYER-APPELLANT TO REHIRE THE COMPLAINANT CONSTITUTES RETALIATION; (2) THE COMPLAINANT HAD BEEN AN EMPLOYEE OF THE EMPLOYER-APPELLANT, AND MOREOVER WAS CERTAINLY AN INDIVIDUAL WITHIN THE MEANING OF 5(D); (3) THE EMPLOYER-APPELLANT FAILED TO MEET ITS BURDEN OF SHOWING THAT THE COMPLAINANT WAS NOT THE BEST ABLE AND MOST COMPETENT; (4) THE RECORD IS REPLETE WITH SUBSTANTIAL EVIDENCE THAT EMPLOYER-APPELLANT FAILED TO REHIRE THE COMPLAINANT DUE TO HIS HAVING FILED A COMPLAINT; (5) THE COMMISSION DETERMINED THE CREDIBILITY OF WITNESSES AND FOUND THE EMPLOYER-APPELLANT'S ASSIGNED REASONS PRETEXTUAL.

1. The employer-appellant has maintained that Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission v. Thorpe, Reed and Armstrong, 361 A2d 497, controls this appeal. The Commission-appellee agrees, but prefers to adopt a plain sense view of Thorpe, Reed and Armstrong, supra, rather than employer-appellants' strained and twisted reading. This Honorable Court in Thorpe, Reed and Armstrong, supra, held that the loss to Ms. Hanson of the prestige which comes with an association with a law firm of good standing, and whatever benefits she might have gained through continuing to handle the matters of any firm clients, the use of office space, the services of a secretary

and a messenger, use of the firm library, use of copying and other office machines was unlawful under Section 5(d) of the Pennsylvania Human Relations Act, Thorpe, Reed and Armstrong, supra, p. 502. Surely, the denial to Mr. Bailey of obtaining employment and earning a living constitutes discrimination under Section 5(d) of the Act. As this Honorable Court recently recognized in Pittsburgh Press Co. v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, No. 1275 CD 1976, ____ A.2d ____, we are dealing with the "efforts of individuals to sell the only thing that they have to offer: their labor . . . the quest for employment may cause the liveliest, political or social controversy of the day to shrink to insignificance by comparison."

Act of omission such as failure to rehire or recall are clearly within the statutory prescription of Section 5(d) not to "discriminate in any manner," (emphasis mine) 43 P.S. §955(d).

2. The employer-appellant claims that a current employer/employee relationship is necessary for Section 5(d) of the Act to be applicable. The Commission submits that the legislature did not so hold and in fact, specifically spelled out its intent by the use of the word, individual, rather than employee, in Section 5(d).

> For any employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act (emphasis mine).

Moreover, in the instant case, this Honorable Court need not decide the full extent of Section 5(d)'s protection since the Complainant had been employed by the employer-appellant as a prison guard and while also employed had filed a Complaint against the employer-appellant at Docket No. E-5211P (said Complaint being the basis for Employer-appellant's failure to rehire the Complainant) (C. Finding of Fact 3, 4, 16; RR 215(a), 217(a)).

3. The employer-appellant contends that the Commission failed to consider the best able and most competent clause in light of G.C. Murphy Co. v. Pa. Human Relations Commission, 314 A.2d 356 (1974). The Commission respectfully submits that the holding of the Pennsylvania Supreme Court in General Electric Corp. v. Commonwealth of Pa., Pa. Human Relations Commission, at 365 A.2d 649 (1976), at p. 654, made it clear that it is the employer who must shoulder the burden of demonstrating that a Complainant was NOT best able and most competent to perform the services required. The Commission clearly showed the Complainant: (a) resigned in good standing (NT 129, RR 132(a)); (b) during his previous employment with the employer-appellant he had been selected to train new police recruits (NT 109-18, RR 112(a), 121(a)); (c) that he reacted to conflict situations with firmness and without physical violence (NT 171, RR 174(a) (d) he customarily conducted public tours of the prison; (e) he had accumulated approximately five years of prison work;

(f) the inmate medic never had occasion to treat any inmate for alleged mistreatment by the Complainant (NT 182, RR 185(a)). Moreover, as the Opinion clearly states, "when the Complainant reapplied for a job with Respondent, he had accumulated approximately five years of prison work, he had worked security in the United States Marine Corps, earned a Bachelor of Arts Degree in Criminal Justice Administration with a major in Corrections, and had been employed part-time as a security guard by the City of Reading, Parks Department. In addition, the Complainant has worked as a guard for the Graterford (Pennsylvania) State Prison which noted that he had, "a good record with no evidence of any unusual display of temper," (RR 225(a)). In short, the Complainant was qualified for a position as a prison guard at Berks County Prison as of August, 1974, when he applied (Commission's Finding of Facts 14, RR 216(a)). Complainant clearly made out a prima facie case of discrimination in that he applied for a job in which he was qualified, his application was rejected, the employer hired other applicants of equal or lesser qualifications and the Complainant is a member of a protected class under Section 5(d), as well as under 5(a) (Complainant's former Complaint had been on discrimination on the basis of race). The Commission was under no burden to prove that the Complainant was the best able or most competent, rather, the employer-appellant failed to meet its burden of showing that Mr. Bailey was not the best able and most competent.

4. The employer appellant next contends that there is not substantial evidence in the record to support the Commission's Finding of Fact No. 16. Commission respectfully draws this Honorable Court's attention to portions of the record that appear after the Commission's Finding of Fact No. 16 which amply support the Commission's finding:

a. TR p. 18, RR 21(a), where the qualifications of the Complainant are set forth at length

b. TR pp. 50-53, RR 53, 56(a), the warden's testimony on cross-examination that he had rehired a former guard that had been involved in a poolroom brawl.

c. TR p. 56, RR 59(a), testimony of the warden on cross-examination that he relied on oral representations by staff as to the alleged incidences by Mr. Bailey and failed to maintain former reports.

d. TR p. 58, RR 61(a), testimony of warden on cross-examination that he failed to comply with the minimum standard operating procedures for Pennsylvania County Prisons in documenting alleged incidences by Mr. Bailey, and moreover, that the warden had no objection to Mr. Bailey obtaining a gun permit.

e. Tr pp. 66-69, RR 69(a), 72(a), the warden's testimony on cross-examination that he notified Graterford that the Complainant had an alleged temper and moreover continued to allow Mr. Bailey to continue working in his prison up to the time as Mr. Bailey chose to resign to further his education and admission that he had no personal knowledge of Mr. Bailey's

actions and accordingly relied upon the reports of the deputies and guards.

f. TR. p. 86, RR 89(a), that no suits were filed against Mr. Bailey alleging that Mr. Bailey had been involved in guard brutality.

g. TR p. 119, RR 121(a), Mr. Santoro's admission on direct by his own counsel that he had considered the Human Relations suit involvement in evaluating the Complainant's re-employment.

h. TR p. 161, RR 164(a), the warden's secretary's recollection of the Respondent phrase, "would you hire someone who put a suit against you."

i. TR p. 182, RR 185(a), the inmate medic testimony that he never had occasion to write up the brutality by Mr. Bailey.

j. C. 10, RR 3203(a), the minimum requirements that the employer-appellant failed to adhere to for the Complainant.

k. C. 11, RR 205(a), the actual letter by the employer-appellant for Complainant's gun permit.

l. App. A-10, RR 230(a), the employer-appellant's admission that it's Assistant Warden had spoken on the phone about the prospects of the Complainant's rehire.

m. App. A-11, RR 230(a), that the employer-appellant's records do not have any formal written warnings or informal warnings about the Complainant's alleged explosive temper.

n. App. A-12, RR 230(a), Complainant had no problems at Graterford Prison.

Moreover, the record as a whole reflects substantial evidence to support the Commission Finding No. 16. NOTE: The

Commission in this Argument has expressly refrained from referring to any of Mr. Bailey's testimony as to the phone conversation between Mr. Santoro and Mr. Fulcher, which is the basis of the employer-appellant's Argument B. The Commission does so only to avoid repeating this entire section of defense in response to the employer's repetitive argument in Argument B, and does not admit that Mr. Bailey's testimony (all ten lines of it) was improper or inadmissible. That issue is treated at length in Argument B, intra.

5. The employer-appellant's last contention is that the Commission declined to believe the testimony of the warden, Mr. Schipe, and Mr. Santoro. The Commission respectfully demurs to this contention for the reasons set forth at great length with appropriate citations in the Opinion entered in this case beginning in relevant part at p. 225(a) of the reproduced record and continuing through 226(a), 227(a), 228(a) and 229(a).

ARGUMENT B

B. WAS THE ADMISSION OF THE TESTIMONY OF MR. BAILEY CONCERNING THE CONVERSATION BETWEEN MR. SANTORO AND MR. FULCHER IMPROPER?

Employer-appellant's contention that 18 P.C.S.§§5702-5703 prohibit the admission of the testimony of Mr. Bailey concerning the conversation between Mr. Santoro and Mr. Fulcher, is fatally defective on two counts. The cases cited by the employer-appellant refer to criminal proceedings before a court of law in the Commonwealth of Pennsylvania. The Pennsylvania Crimes Code specifically refers to "legal proceedings." All of the cases interpreting 18 P.C.S. §5703 have been applied to legal proceedings at a court of law, or equity. In contrast, this appeal to Commonwealth Court is from an administrative agency, and more importantly, an administrative agency with a clear statutory exemption from the strict rules of evidence required in a criminal proceeding. The Pennsylvania Human Relations Act, in Section 9, captioned Procedure, clearly provides that "the Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity," (43 P.C.S. 959). It is hornbook law that administrative agencies are held to a standard substantially less than that required by courts of law or equity. The appropriate standard can be found in the General Rules of Administrative Practice and Procedure that are applicable to the Pennsylvania Human Relations Commission as well as the majority of all

administrative agencies within this Commonwealth. Specifically, Title I, Chapter 35, of the Pennsylvania General Rules of Administrative Practice and Procedure provides in Section 35.161 that the evidence should be of the kind which would effect reasonable and fair minded men in the conduct of their daily affairs. The United States Supreme Court in considering this issue held that an administrative tribunal may consider evidence which would be incompetent in a judicial proceeding, Perkins v. Endicott, Johnson Corp., 317 U.S. 501.

Employer-appellant has cited no authority whatsoever for its rather novel position that the technical prescription in the criminal code of the Pennsylvania Statute is applicable to an administrative hearing such as held by the Pennsylvania Human Relations Commission, the Public Utility Commission, the Labor Relations Board, the Unemployment Compensation Board of Review, as well as the majority of the administrative agencies in the Commonwealth.

In fact, Corpus Juris Secundum, in its section on evidence notes that the purpose of a rule such as contained in 43 P.C.S. §959 "is to free administrative boards from compulsion of technical rules so that mere admission of matter which would be deemed incompetent in judicial proceedings will not invalidate an administrative order," 73 C.J.S. p. 441 §122, NOTE 14.

There is still yet another reason why the admission into evidence of Mr. Bailey's testimony was proper for the Commission. The record clearly reflects that the employer-appellant's attorney,

Mr. Ruth, after initially objecting, withdrew his objection, with the proviso that the Commission counsel lay a foundation to indicate that Mr. Bailey had in fact heard the conversation (RR 12(a), 13(a)). Accordingly, the testimony by Mr. Bailey as to what he heard Mr. Santoro tell Mr. Fulcher, while admittedly hearsay, was not properly objected to by the employer-appellant's attorney, and moreover, counsel failed to reinstate his objection and let the matter drop and instead proceeded to make an objection to the Complainant's proposed Exhibit 2 (which was a totally separate matter having nothing to do with the conversation). It has been a maxim of Pennsylvania law that "inadmissible evidence . . . including hearsay evidence, admitted without objection, is not a nulity or void of probative force, but is to be given its natural probative effect as if it was in law admissible," Poluski v. Glen Alden Coal Co., 286 Pa. 473, 133 A. 819-820.

Moreover, this Honorable Court had occasion to consider exactly the same issue in Raymond Walker v. Unemployment Compensation Board of Review, 367 A.2d 366. There, Judge Bowman set forth the following guideline: "hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand," Walker, supra, at p. 370. The Commission submits that there is ample competent evidence supporting the recent holding of the hearing panel, as set forth in more detail in Argument A, supra. For either of the above

reasons, or both, the Commission's admission of Mr. Bailey's testimony regarding the telephone conversation was proper.

ARGUMENT C

C. ASSUMING ARGUENDO THAT MR. BAILEY'S TESTIMONY CONCERNING A PHONE CONVERSATION WAS IMPROPER AND/OR INADMISSIBLE, WAS IT HARMLESS ERROR?

Assuming arguendo, that this Honorable Court declines to find that the Commission acted properly, in admitting Mr. Bailey's testimony, the Commission contends that it was merely harmless error. The Supreme Court of Pennsylvania has already ruled on the effect of a violation of the statute cited by the employer-appellant (moreover, in a case which specifically refers to the cases cited by employer-appellant in support of its position).

Justice Eagen, held in Commonwealth v. Glover, 286 A.2d 349 that a detective who overheard a telephone conversation by an extension phone, and who repeated what he heard at the trial only committed harmless error, Glover, supra, at 352. This case parallels almost exactly the situation presented for review to the Honorable Court today. This case involves an overhearing on an extension phone of a conversation, an admission, as well as proof that the conversation involved the parties so specified. In the instant case, employer-appellant has stipulated to the fact that there was a telephone conversation between Mr. Santoro and Mr. Fulcher, and moreover, Mr. Santoro, the employer-appellant's witness, as well as an agent of the warden, admitted under direct examination by his own counsel that he had made a statement such as Mr. Bailey describes.

Mr. Bailey's testimony (all ten lines of it) was nothing more than corroborative. Thus, even if this Honorable Court adopted the employer-appellant's reasoning that Commonwealth v. McCoy, 442 Pa. 234, 275 A.2d 28, and Commonwealth v. Murray, 423 Pa. 37, 223 A.2d 102 (1966) were controlling, then, it is submitted that Glover, supra, which interprets the above cases would also be controlling. The Commission submits that even with the exclusion of Mr. Bailey's testimony on the telephone conversation, the finding of fact of the Human Relations Commission are supported by sufficient, substantial and competent evidence and accordingly, the Human Relations Commission's Order should be affirmed (see Argument A-4, pp. 9, 10, 11, intra).

CONCLUSION

The Order of the Pennsylvania Human Relations Commission is supported by substantial evidence and in conformity with the laws of this Commonwealth. Accordingly, the Order of the Commission should be affirmed without modification, and the appellant's arguments rejected.

Respectfully submitted,

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