

**COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

HAROLD FISHER, COMPLAINANT

v.

COUNTY OF MONTGOMERY SHERIFF'S DEPARTMENT, RESPONDENT

DOCKET NO. E-21522

FINDINGS OF FACT

S.F. Stipulation of Fact
N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

1. The Complainant is Harold Fisher, an adult Black male residing at 341 East Elm Street, Conshohocken, PA 19428. (S.F. 1, N.T. 13)
2. The Respondent is the Montgomery County Sheriff's Department which at all times relevant to this action employed four or more persons within the Commonwealth of Pennsylvania. (Complaint, N.T. 56-59, C.E. 12, C.E. 13, Respondent's Answer to Request for Admissions No.4)
3. On or about November 17, 1981, Complainant filed a notarized complaint of discrimination against Respondent with the Pennsylvania Human Relations Commission ("Commission") at Docket No. E-21522.
4. On or about December 17, 1981, Respondent filed an Answer to the complaint. (S.F. 3)
5. By letter dated December 16, 1982, the Commission notified Respondent that it had found probable cause to credit the allegations of the complaint. (S.F. 4)
6. On or about December 29, 1982, Respondent filed an Amended Answer to the complaint. (S.F. 5)
7. After the probable cause determination, the Commission and the Respondent attempted to eliminate the alleged discriminatory practice through conference, conciliation and persuasion. They were unable to do so. (S.F. 6)
8. By letter dated March 16, 1983, the Commission notified Respondent that a public hearing had been approved. (S.F. 7)
9. Complainant's salary is paid by Montgomery County. (N.T. 57)
10. Complainant began his employment as a Deputy Sheriff with Montgomery County in 1972 and remained so employed at the time of this hearing. (N.T. 30)
11. Complainant did not have to apply for employment or undergo an interview when Sheriff Hill or Sheriff Jenkins took office subsequent to 1972. (N.T. 58-59)

12. The County Commissioners had ultimate authority to approve or disapprove disciplinary actions taken by Sheriff Hill. (N.T. 123)
13. The County personnel office had to be notified of disciplinary actions taken by the Sheriff's Department. (N.T. 122-3)
14. On October 22, 1981, Respondent suspended Complainant without pay for thirty (30) working days. Complainant was advised that his suspension resulted from his violation of section 3.01 of Respondent's Regulations Manual (dealing with military courtesy). (C.E. 2, C.E. 4)
15. In early October of 1981, Complainant and another deputy transported a prisoner from Franklin County to Norristown. In preparation for this trip he withdrew \$100.00 in advance expense monies from Respondent's funds. (N.T. 31)
16. Upon returning from Franklin County, Complainant in accordance with regular procedures submitted an expense report and any remaining funds to Respondent administrative personnel. (N.T. 32)
17. Then - Sheriff Hill's secretary, Ruth Nolan, questioned Complainant when she was unable to locate his expense report. (N.T. 33, 132-4) He told her that he had already turned them in. (N.T. 33)
18. Complainant was subsequently questioned by Captain Rebar and Captain Rose about the whereabouts of the documents. (N.T. 33-38)
19. The missing documents were eventually located in the county controller's office. (N.T. 40, 131)
20. The questioning of Complainant culminated in a heated discussion between him and Sheriff Hill during which angry words were exchanged. Complainant left the room in anger. Sheriff Hill imposed the thirty day suspension solely as a result of that incident. (N.T. 39-40, 104-6, 137)
21. Complainant's suspension was the longest ever given out by Sheriff Hill. (N.T. 113)
22. Deputy Sheriff Quinn was suspended for ten days for insubordination; Quinn is White. (N.T. 63, C.E. 7(h))
23. Deputy Sheriff Aherns was suspended for fifteen days for pulling his gun and pointing it at another deputy during a quarrel on Respondent's premises; Aherns is White. (N.T. 63, 67-70, C.E. 7(j))
24. Sheriff Hill imposed Complainant's suspension without resort to any objective criteria. (N.T. 109-10)
25. Complainant was involuntarily transferred from one duty assignment to another as a result of his suspension. (N.T. 30, 45)
26. As a result of the suspension, Complainant, who was earning \$550.00 bi-weekly, lost gross salary of \$1,665.00. (N.T. 44-45)

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Act.
2. Respondent Montgomery County Sheriff's Department is an employer within the meaning of the Act and has been Complainant's employer at all times relevant to this case.
3. The Commission has jurisdiction over the parties and subject matter of this action.
4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter.

5. Complainant has met his initial burden of establishing a prima facie case by proof that:
 - a. He is a member of a protected class;
 - b. He suffered the adverse employment consequence of a thirty (30) day suspension; and
 - c. White employes who committed comparable offenses were less severely disciplined.
6. Respondent has failed to produce credible evidence of a legitimate, non-discriminatory reason for the extreme length of the suspension imposed upon Complainant.
7. The length of the suspension imposed upon Complainant was based on his race, in violation of Section 5 of the Act.
8. Complainant, having prevailed in this action, is entitled to an award of monies lost as a result of the discriminatory act, with interest, and an offer of transfer back to the duty assignment he held prior to the transfer.

OPINION

This case arises on a complaint filed by Harold Fisher ("Complainant") against the County of Montgomery Sheriff's Department ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about November 17, 1981, at Docket No. E-21522. Mr. Fisher alleged that the Respondent discriminated against him on the basis of his race, Black, by suspending him from his position as Deputy Sheriff for thirty (30) work days without pay, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("Act"); he denied committing the offense with which he was charged, and further alleged that a White Deputy Sheriff charged with a more serious offense received less severe discipline.

Commission staff investigated the case and found probable cause to credit the allegations of discrimination. A public hearing was approved after efforts to resolve the situation through conference and conciliation were unsuccessful. The hearing was held in Norristown, Pennsylvania, on March 5, 1984 before Commissioners Benjamin S. Loewenstein, Robert Johnson Smith, and Alvin E. Echols, Jr.

Before reaching the merits of this case it is necessary to resolve a preliminary issue, namely whether the County of Montgomery Sheriff's Department is Complainant's employer within the meaning of the Act. Respondent's position, while somewhat ambiguous, appears to be that the employer of Mr. Fisher is not the County of Montgomery but the Sheriff, who at the time of the actions complained of was Frederick B. Hill.

Section 5(a) of the Act provides in part that it is unlawful for any employer to discriminate against any individual in the terms and conditions of employment because of that individual's race. "Employer" is not specifically defined. We are therefore guided by common law concepts of master and servant. Harmony Volunteer Fire Company and Relief Association v. Pennsylvania Human Relations Commission, 459 A.2d 439, Pa. Cmwlth. (1983). As the Court held in Harmony, citing a long line of Pennsylvania cases, "(t)he relation of master and servant exists where the employer has the right to select the employe, the power to remove and discharge him, and the right to direct both what work shall be done and the way and manner in which it shall be done." Id. at 442, citations omitted.

Respondent's argument that the Sheriff and not the County is the employer is not fully developed. It is asserted that the Sheriff by statute has the authority to hire, fire, and supervise Deputy Sheriffs. Unlike the situation in Harmony, it is not denied that an employment relationship exists. Nor does Respondent contend that it lacked notice of Mr. Fisher's complaint. Indeed, the case was vigorously defended on its merits. Sole reliance is placed on statutory provisions providing for an elected Sheriff with authority to hire land fire deputies. Our inquiry however must be broader.

Montgomery County is a political subdivision and a creature of statute. 16 P.S. §3201. As a "body corporate" it has various powers and obligations, including the right to sue and be sued; the corporate power of the county is vested in the board of county commissioners. 16 P.S. §§3202, 3203. The sheriff and the county commissioners are elected. 16 P.S. §3401.

The sheriff by statute has the right to hire and fire deputies. 16 P.S. §4205. This power is far from absolute, however. The sheriff may hire only with authorization from the county salary board, Simon v. Del Vitto, 43 Pa. Cmwlth. 402, 403 A.2d 1335 (1979), which body also fixes the compensation of deputies. 16 P.S. §§4823. As complainant urges, it is obvious that the county through its salary board can exercise a great deal of control over the hiring of deputies by the exercise of its power to refuse to authorize salaries for them.

In addition, Complainant is defined by statute as a county employe for retirement purposes, 16 P.S. §4201, and is required to become a member of the county retirement system. 16 P.S. §4708. The statutory scheme itself thus creates a far more complex relationship than indicated by the provisions relied upon by Respondent.

More concretely, Mr. Fisher testified that his salary is paid by the county. His un rebutted testimony was that he was not required to reapply for continuing employment when either Sheriff Hill or the current sheriff took office, nor even interviewed by either man. Mr. Hill himself testified that the county commissioners..."approve or disapprove whatever I do..." (N.T. 123) in the context of disciplinary actions, and that the county personnel office had to be notified of any such actions. Nothing on this record supports the proposition that the sheriff employs deputies independent of ultimate control by the county. We therefore conclude that the county was and is Mr. Fisher's employer, and turn to the merits of his case.

Complainant bears the initial burden of establishing a prima facie case of discrimination under the Act. General Electric Corp. v. Pennsylvania Human Relations Commission, 469 Pa. 202, 265 A.2d 649 (1976); and see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If this burden is met, Respondent may prevail by showing a legitimate, non-discriminatory reason for the challenged conduct. Philadelphia Electric Co. v. Pennsylvania Human Relations Commission, Pa. Cmwlth. 448 A.2d 701 (1982). As the McDonnell Douglas Court indicated, the exact elements of the prima facie case there set out are not hard and fast rules, but rather a set of standards whose application to differing factual situations requires individualized variations. 411 U.S. at 802, N. 13. In this case we find that Complainant has made out his prima facie case by proof that:

- (1) He is a Black male and thus belongs to a protected class;

- (2) He suffered an adverse employment consequence, an unpaid thirty day suspension; and
- (3) White employees who committed offenses comparable to that with which he was charged were less severely disciplined.

Complainant began his employment as a Deputy Sheriff for Montgomery County in 1972 and remained so employed at the time of the hearing in this case. In early October, 1981, he and another deputy transported a prisoner from Franklin County to Norristown. Following regular procedures, he withdrew \$100.00 in advance expense funds to cover expenses of the trip such as gasoline and meals. Upon his return he submitted an expense report along with unspent money to administrative personnel at the Sheriff's Department. Receipts were not routinely issued and he did not receive one.

For reasons which were not developed at hearing, Sheriff Hill's secretary, Ruth Nolan, was apparently unable to locate the receipts and the balance of the expense money. The parties agree that she questioned Complainant about their whereabouts and that he told her that he had already turned them in. It is also agreed that Ms. Nolan next spoke to a Captain Rebar about the documents, and that both Captain Rebar and eventually a Captain Rose then questioned Complainant about them. Events culminated in an encounter between Complainant and Sheriff Hill. Finally, it is agreed that the documents were subsequently found in the county controller's office.

Much of the dispute in this matter centers on the meeting between Complainant and the Sheriff. Each in his testimony depicted the other as angry; each attributed to the other a substantially identical obscenity. We conclude that tempers were high on both sides, and that Complainant as well as Sheriff Hill expressed anger rather freely. We further conclude that events up to that point were not related to Complainant's race. Though he argues that Respondent's repeated questioning of him about the missing documents was racially motivated, we are not convinced on this record that it was anything more than a bureaucratic misunderstanding which generated frustration and anger in all concerned.

This is not the end of our inquiry, however; Complainant urges and we agree that even if some disciplinary action was warranted, the length of his suspension was disproportionate. The record establishes that Complainant's suspension was the longest ever given out by former Sheriff Hill. As indicated above, we also find that Complainant was more severely disciplined than Whites who were charged with comparable offenses.

Former Sheriff Hill testified that he determined the length of Complainant's suspension without reference to objective criteria. The Montgomery County Sheriff's Department Regulation Manual does not mention a system of progressive discipline, or any other objective standard for imposition of discipline. Sheriff Hill's decision was a subjective one, based as he testified on his anger at what he took to be Complainant's disrespectful attitude and the fact that this disrespect was displayed before other people.

In the two years just prior to Complainant's suspension, eleven individuals were disciplined by Respondent, ten of them White. In a nearly identical situation, Deputy Quinn, charged with

insubordination to a superior officer which included shouting, cursing, and calling the superior officer a liar before the entire office, received only a ten day suspension; Quinn is White. Deputy Aherns, accused of pulling his gun and pointing it at another Deputy during a quarrel which took place in the office before other deputies, was suspended for only fifteen days; Aherns too is White. Sheriff Hill testified, incredibly, that in his view Complainant's insubordination was more serious than drawing a gun on a fellow officer.

As noted, Respondent's imposition of discipline was based upon purely subjective criteria. It is well established that use of subjective criteria is inherently suspect, allowing as it does rationalization after the fact and concealment of discriminatory motives. General Electric Co. v. Pennsylvania Human Relations Commission, 365 A.2d at 657, N. 14. In this case we find that Respondent has failed to advance an adequate explanation for suspending Complainant for twice as long as a deputy who pulled a gun on a fellow officer and three times as long as a deputy also charged with public insubordination. We therefore conclude that the extreme length of Complainant's suspension was based on his race, in violation of Section 5 of the Act.

In addition, Complainant testified that he was involuntarily transferred from one duty assignment to another as a result of his suspension. The record is devoid of any explanation for the transfer. No other deputy who was disciplined received a transfer as part of that discipline. In the extent of discipline, as in the length of suspension, Complainant was treated differently than his White co-workers.

Following such a finding we are empowered by the Act to award appropriate relief, including reinstatement and backpay. Complainant is entitled to have his suspension reduced from thirty to ten days, the length of suspension imposed upon Deputy Quinn in the most nearly equivalent situation. Complainant is also entitled to an offer of reassignment to his prior duty assignment. We therefore direct entry of the order which follows:

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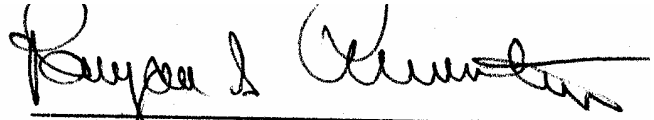
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RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this case, the Hearing Panel concludes that Respondent violated Section 5 of the Pennsylvania Human Relations Act, and therefore recommends that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.

July 30, 1984

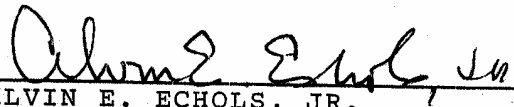
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BENJAMIN S. LOEWENSTEIN
CHAIRPERSON, HEARING PANEL

July 30, 1984

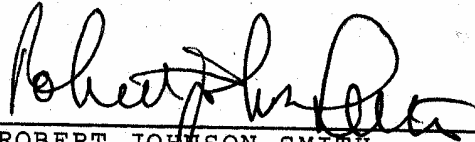
DATE



ALVIN E. ECHOLS, JR.
HEARING COMMISSIONER

July 30, 1984

DATE



ROBERT JOHNSON SMITH
HEARING COMMISSIONER

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FINAL ORDER

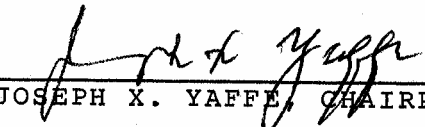
AND NOW, this 9th day of August, 1984, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the recommendation of the Hearing Panel, and therefore

ORDERS

1. Respondent shall cease and desist from discriminating against Complainant on the basis of his race;
2. Complainant's suspension shall be reduced from thirty (30) to ten (10) working days; Respondent shall change Complainant's personnel records to reflect this reduction;
3. Within thirty (30) days of the effective date of this Order, Respondent shall offer to Complainant reassignment to the duty he was performing prior to his suspension. Complainant shall be free to decline such reassignment and continue to perform his present duties;
4. Within thirty (30) days of the effective date of this Order, Respondent shall pay to Complainant the sum of \$1,110.00, less standard payroll deductions, plus 6% interest. Interest shall be calculated from the net amount owed with calculation beginning on December 1, 1981 and continuing until the day before actual payment to Complainant.
5. Payment of the amount described in Paragraph 4 of this Order shall be by check payable to Harold Fisher, tendered to Michael Hardiman, Esquire, at Mr. Hardiman's office address.
6. Within thirty (30) days of the effective date of this Order, Respondent shall submit to Mr. Hardiman a written report confirming its compliance with the terms of this Order, including a description of all calculations utilized in computing payroll deductions and interest.

Pennsylvania Human Relations Commission

BY:



JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:

BY:



ELIZABETH M. SCOTT, SECRETARY