COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GERALD BARBER, JAMES L. HALEY, JR., THE ESTATE OF JULIUS HARPER, RICHARD HILL, JAMES Y. ALI, Complainants v. MT. AIRY BETHESDA MANOR, INC., Respondent	DOCKET NOS. E-55783-D E-55785-D E-55786-D E-55787-D E-55789-D

FINDINGS OF FACT

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RECOMMENDATION OF HEARING PANEL

FINAL ORDER

FINDINGS OF FACT *

1. The Complainants herein are:

   a. Gerald Barber ("Barber");

   b. James L. Haley, Jr. ("Haley");

   c. Julius Harper ("Harper");

   d. Richard Hill ("Hill");

   e. James Y. Ali ("Ali");

(hereinafter either individually identified as indicated above, or collectively referred to as "Complainants"). (CE 4 at SF 1.)

2. The Respondent herein is the Mt. Airy Bethesda Manor, Inc. (hereinafter either "Respondent" or "Mt. Airy"). (CE 4 at SF 2.)

3. In 1990 the Mt. Airy Church of God in Christ (hereinafter "Church") was contemplating the future construction of a new church, and purchased property located at 6401 Ogontz Avenue, Philadelphia, Pennsylvania, on which a homeless shelter was being operated. (NT 411, 480, 609, 610.)

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* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

CE Complainants' Exhibit
NT Notes of Testimony (February 26-28, 1997 proceedings)
RE Respondent's Exhibit
SF Stipulations of Fact

4. This shelter was known as Bethesda Manor (hereinafter "Bethesda Shelter"), and was an adult male shelter funded by the City of Philadelphia (hereinafter "City"). NT 394, 410.

5. Upon the Church's purchase of the property on which Bethesda Shelter operated, LaVon Bracy (hereinafter "Bracy"), the City's Assistant Director of the Office of Service to Homeless Adults (hereinafter "OSHA"), called Reverend Ernest Morris (hereinafter "Rev. Morris"), the Church's founder and pastor for thirty-one years. (NT 410, 610, 629.)

6. Bracy called Rev. Morris to see if he would continue the homeless shelter for men. (NT 410, 610, 629.)

7. Although the Church expressed an interest in making Bethesda Shelter a family shelter, the Church agreed to continue Bethesda Shelter as a male shelter. (NT 411, 611, 632.)

8. Initially, the Church ran Bethesda Shelter directly. (NT 412.)

9. Subsequently, in 1990, the Church created Mt. Airy as a subsidiary corporation whose initial purpose was the operation of the Bethesda Shelter. (NT 405, 408, 409, 442, 479; CE 2.)

10. In the spring of 1991, another City-funded homeless shelter, the Stenton Family Center located at 1300 Tulpehocken Street, began to experience significant problems. (NT 46, 48, 253, 630.)

11. By May 1991, the approximately 35 to 40 employees of Building Better Families, managers of the Stenton Family Center, had not been paid in approximately seven weeks, and they walked out on strike. (NT 46, 48, 253.)

12. In May 1991, Bracy met with the employees of Building Better Families and announced that Building Better Families was being replaced as the service provider for the approximately 63 homeless families at the Stenton Family Center, and that an interim provider, Gaudenzia, Inc., would run the Stenton Family Center until the end of the fiscal year on June 30, 1991. (NT 46, 49-50, 253.)

13. Not wanting the Stenton Family Center to shut down, Bracy asked the striking Building Better Families employees to stay on, and for those who did Bracy indicated she would recommend to the new provider that they be hired. (NT 49, 52, 121, 208, 253, 267.)

14. In June 1991, Gaudenzia also operated a separate drug treatment program adjacent to the Stenton Family Center. (NT 666.)

15. When Gaudenzia became the interim provider, the number of employees at the Stenton Family Center was significantly reduced. (NT 51, 144, 167.)

16. The Complainants were Stenton Family Center employees of both Building Better Families and Gaudenzia. (NT 45, 47, 54, 165, 166, 172, 205, 206, 208, 210, 251, 252, 254.)

17. While an employee of Building Better Families, Haley, also known as Kaklil Abul Aziz and a Muslim for twenty-two years, supervised the security and maintenance departments. (NT 47.)

18. When Gaudenzia became the interim provider, Haley also supervised facility coordinators. (NT 51.)

19. The employees Haley supervised were:

a. In the security department: Ali, Harper, Barber, Taryn Slade, and Bobby Jordan.

b. In the maintenance department Haley supervised: Hill, Bernard Turner, and an individual identified only as Terrance. (NT 54, 62, 165, 206, 222-223, 252.)

20. Ali, also known as Jamal Yusef Ali, has been a Muslim since birth and began employment with Building Better Families in February 1991. (NT 161, 166.)

21. Harper, also known as Fareed Mohammed, who practiced the Islamic religion in or about June 1991, died on December 18, 1996. (NT 15-16, 121, 213.)

22. Barber, also known as Arees Ali, has been a Muslim since 1979 and had been an employee of Building Better Families since October 1990. (NT 245, 251.)

23. Hill, also known as Richard Rafiq, has been a Muslim for fifteen years and began employment with Building Better Families in April or May of 1991. (NT 62, 203, 205, 210.)

24. When Gaudenzia became the interim provider, all of the Complainants worked for Gaudenzia until June 30, 1991, at which time Gaudenzia was replaced by Mt. Airy. (NT 51, 56, 172, 208, 254.)

25. The Complainants were the only Muslims working for Gaudenzia. (NT 56.)

26. Each Complainant, while an employee of both Building Better Families and Gaudenzia, practiced certain aspects of their religion at work, including: group prayers; the wearing of kufis (hats), primarily, and less frequently other articles of clothing which have religious significance; exchanging a specific form of greeting with other adherents of the Islamic faith; and engaging in religious discussions with each other, shelter residents, and other non-Muslim employees. (NT 43, 44, 49, 54, 55, 56, 61, 141, 142, 163, 168, 171, 195, 205, 207, 221, 250, 261, 262, 404.)

27. In early June 1991, Bracy called Rev. Morris to invite him to her office to discuss the possibility of Mt. Airy becoming the service provider for the Stenton Family Center shelter. (NT 418, 632.)

28. It was Bracy's opinion that Mt. Airy had been doing a fine job with Bethesda Manor, and that since it had been the Church's original expression of wanting to run a family shelter, Mt. Airy would be a good choice to take over the troubled Stenton Family Center operation. (NT 611, 632.)

29. Rev. Morris and his wife did meet with Bracy at Bracy's office, at which time Bracy asked Rev. Morris if Mt. Airy would become the service provider at Stenton Family Center. (NT 419, 615.)

30. At that meeting Bracy generally outlined the problems at the Stenton Family Center:

a. a serious drug problem existed;

b. the facility was deplorably dirty and unfit for habitation;

c. the morale of both staff and residents was low; and

d. the security staff had general shortcomings, including inappropriate interactions between security staff and female residents.

31. After this meeting Rev. Morris called Bracy and asked Bracy if she would come to speak with the Mt. Airy Board. (NT 426, 633.)

32. On or about June 7, 1991, Bracy did meet for four to five hours with the Mt. Airy Board. (NT 429, 446, 491, 501, 566; RE 2.)

33. Bracy generally told the Mt. Airy Board the same things she had told Rev. Morris earlier regarding the problems at the Stenton Family Center. (NT 427, 428, 429, 446.)

34. Bracy generally informed the Board of her serious concerns regarding the current security force and recommended that some of the interim provider employees not be rehired. (NT 493-494, 554, 555, 566, 643.)

35. Reluctantly the Board decided to undertake the provider duties for the Stenton Family Center shelter. (NT 429, 430.)

36. A day or two later, Bracy told Rev. Morris he needed to know more details regarding the problems at the Stenton Family Center. (NT 636.)

37. Rev. Morris then met with Bracy a second time, at which time Bracy provided more detailed information regarding the chaotic situation at the shelter and her concerns with the security personnel. (NT 618, 622, 636, 637.)

38. Bracy advised Rev. Morris that she intended to hold him accountable for running an operation the City could be proud of, and that she wanted him to have persons working there who were trustworthy and in whom he could have confidence, and if that meant he had to change the entire staff, he should. (NT 636, 637.)

39. Bracy further informed Rev. Morris of the details of serious incidents which had occurred and of her concerns with security at the facility. (NT 637.)

40. Mt. Airy had formed a task force for the purpose of staffing the Stenton Family Center. (NT 437, 510-511.)

41. Mt. Airy changed the name from Stenton Family Center to Stenton Family Manor. (NT 499, 507.)

42. Rev. Morris was not in the position to independently make any hiring decisions, as the Mt. Airy Board had this authority. (NT 397, 426, 440.)

43. The first suggestion Rev. Morris gave the Board was, do not hire the interim provider's security force. (NT 425, 426, 436, 437, 449, 554.)

44. In advance of the application process, the Mt. Airy task force made the decision not to hire personnel on the interim provider's security force. (NT 449, 450-451; CE 20.)

45. On or about June 11, 1991, during a service at the Church, an announcement was made that applications were being accepted for positions at the Stenton Family Manor. (NT 437, 507.)

46. Applications were made available at that church service. (NT 459.)

47. Approximately one week later applications were distributed at the Stenton shelter, along with a list of available positions. (NT 507, 509.)

48. Each Complainant applied for a position with Mt. Airy. (NT 65, 172, 208, 231, 255, 278; CE 5, 12, 13, 14, 24.)

49. Mt. Airy's task force developed groups to review and screen applications according to positions, and then to interview selected applicants. (NT 463, 488, 509, 513, 564, 577, 586.)

50. Mt. Airy did not interview any of the Complainants. (NT 67, 174, 211, 263, 264; CE 20.)

51. Mt. Airy did hire many of the other Gaudenzia employees who applied for positions. (NT 82; CE 7; RE 6.)

52. Rev. Morris and other Mt. Airy Board members toured the Stenton Family shelter in June 1991. (NT 89, 90, 91, 92-93, 125-126, 174, 220-221, 230-231, 265, 431, 433-434, 523, 581-582.)

53. The Complainants did not directly inform anyone from Mt. Airy that their religion was Islam. (NT 129, 192, 231, 278, 433.)

54. While touring the facility, Rev. Morris did notice that kufis were worn by individuals there, but he associated that with pride in the African-American heritage and not with a particular religion. (NT 432-433, 468.)

55. People in Rev. Morris's church were known to have worn kufis generally, and particularly during Ethnic Day celebrations during Black History Month. (NT 468, 529-530, 532.)

56. Religion was not a criteria for employment with Mt. Airy and was not discussed during the selection process. (NT 433, 436, 441, 515-516, 577.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of these consolidated cases.

2. The parties and the PHRC have fully complied with the procedural prerequisites to a public hearing in these cases.

3. Mt. Airy is an "employer" within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. All Complainants are "individuals" within the meaning of the PHRA.

5. To establish a *prima facie* case of a religion-based refusal to hire, a Complainant must prove:

   a. that he is a member of a protected class who held a *bona fide* religious belief;

   b. that he applied and was qualified for a position for which Mt. Airy was seeking applicants;

   c. that he communicated his religious beliefs to Mt. Airy;

   d. that, despite his qualifications, a Complainant was denied a position; and,

   e. that the position was awarded to an applicant with either equal or fewer qualifications than a Complainant's, and who has a different religion than the Complainant.

6. The Complainants were unable to establish that they communicated their religious beliefs to Mt. Airy.

7. Complainant Hill failed to establish that a position for which he applied was awarded to an applicant with either equal or fewer qualifications.

OPINION

This consolidated matter arises on complaints filed on or about July 1, 1991, by Gerald Barber (hereinafter "Barber"), James L. Haley, Jr. (hereinafter "Haley"), Julius Harper (hereinafter "Harper"), Richard Hill (hereinafter "Hill"), and Jamal Y. Ali (hereinafter "Ali"), or collectively hereinafter referred to as "Complainants," against the Mount Airy Church of God in Christ (hereinafter the "Church") with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). The Complainants alleged that the Church did not hire them because of their religion, Islam, in violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951, *et seq.* (hereinafter "PHRA"). On or about March 30, 1993, the Complainants amended their complaints to include Mt. Airy Bethesda Manor, Inc. (hereinafter "Mt. Airy") as a Respondent.

PHRC staff investigated the allegations and at the investigation's conclusion informed the Church and Mt. Airy that probable cause existed to credit the Complainants' allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. On or about March 6, 1995, the Church and Mt. Airy filed a Motion for Rescission of Finding of Probable Cause and to Dismiss. In correspondence dated April 25, 1995, PHRC staff acknowledged receipt of that motion and advised the Church and Mt. Airy that the finding of probable cause would not be rescinded.

Subsequently, the PHRC notified the parties that it had approved these matters for a public hearing. Initially these matters were assigned to a hearing examiner who reviewed the Church's and Mt. Airy's motion and, by an interlocutory

order dated September 15, 1995, denied the motion. Subsequently, these matters were reassigned to a three-member hearing panel which conducted a hearing on January 30, 1996 on the limited issue of the PHRC's jurisdiction over the Church and Mt. Airy. On May 21, 1996, the PHRC issued an order dismissing the Church from these cases because the PHRC lacked jurisdiction over the Church.

The public hearing of the remaining parties was held on February 26, 1997, and continued on February 27 and 28. Commissioner Alvin E. Echols, Jr., Esquire, presided as chairperson of the hearing panel, with Commissioners Raquel Otero de Yiengst, Ph.D., and Daniel D. Yun, M.D., also serving on the hearing panel. The parties were afforded an opportunity to submit post-hearing briefs. Post-hearing briefs from all parties were received in late May 1997.

First, all parties' briefs continue to discuss the issue of PHRC's jurisdiction over Mt. Airy. In its May 21, 1996 adjudication, the PHRC resolved the question of the PHRC's jurisdiction over Mt. Airy by holding that, under the circumstances present here, Mt. Airy is not a "charitable organization" within the meaning of Section 4(b) of the PHRA. Accordingly, this issue will not be revisited here.

Instead we turn to the substantive question presented: Have the Complainants proven that Mt. Airy unlawfully discriminated against them because of their religion when Mt. Airy did not hire them? In these consolidated disparate treatment cases, the Complainants allege that Mt. Airy treated them less favorably than others because of their religion, Islam. To prevail, the Complainants are required to prove that Mr. Airy had a discriminatory intent or motive. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). The Complainants must carry their initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, *supra*; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase *prima facie case* denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer unlawfully discriminated against the employee. *Id*. at 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id.* It raises an inference of discrimination "only because we presumed these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 467, 577 (1978).

In McDonnell Douglas, the United States Supreme Court held that a plaintiff may prove a *prima facie* case of discrimination in a failure-to-hire case by demonstrating:

(i) that he belongs to a racial minority;

(ii) that he applied and was qualified for a job for which the employer was seeking applicants;

(iii) that, despite his qualifications, he was rejected; and

(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802, n.13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 268 43 FEP 1018 (6th Cir. 1987).

Here, we adapt the McDonnell Douglas test because this case involves alleged religion-based refusals to hire. On the question of what constitutes a *prima facie* showing in a religion-based claim, we are guided by standards which have developed under federal laws. Since 1980, the Pennsylvania Supreme Court has recognized that there are particularly appropriate situations where the interpretation of the PHRA and federal civil rights legislation should be in harmony. Chmill v. City of Pittsburgh, 412 A.2d 860 (Pa. 1980). In Chmill, the Pennsylvania Supreme Court declared: "Indeed, as our prior cases have suggested, the Human Relations Act should be construed in light of principles of fair employment law which have emerged relative to the federal [statute]. . . " citing General Electric Corporation v. PHRC, 469 Pa. 292, 365 A.2d 649 (1976).

As recently as 1993, appellate courts in Pennsylvania have continued to recognize federal precedent as valuable in interpreting the PHRA. Kryeski v. Schott Glass Technologies, 626 A.2d 595 (Pa. Superior Court 1993). Accordingly, we turn to federal precedent to supplement Pennsylvania precedent which has not specifically addressed a case which alleges a religion-based refusal to hire. In the case of Byrd v. Johnson, 31 FEP 1651 (D.C. D.C. 1983), a district court basically followed

the McDonnell Douglas formula but specifically added that, "[i]n order to establish a *prima facie* case of religious discrimination, a plaintiff must also demonstrate that he holds a *bona fide* religious belief and that he communicated his belief to his potential employer." *Id.* at 1668, citing Brener v. Diagnostic Center Hospital, 671 F.2d 141, 144, 28 FEP 907 (5th Cir. 1982); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 884, 24 FEP 859 (9th Cir. 1980); Brown v. General Motors Corporation, 601 F.2d 956, 959, 20 FEP 94 (8th Cir. 1979); Redmond v. GAF Corporation, 574 F.2d 897, 901, 17 FEP 208 (7th Cir. 1978).

Accordingly, to establish a *prima facie* case of a religion-based refusal to hire, the Complainants must individually show:

1. that he is a member of a protected class who held a *bona fide* religious belief;

2. that he applied and was qualified for a position for which Mt. Airy was seeking applicants;

3. that he communicated his religious beliefs to Mt. Airy;

4. that, despite his qualifications, a Complainant was denied a position; and,

5. that the position was awarded to an applicant with either equal or less qualifications than a Complainant's, and who has a different religion than the Complainant.

PHRC v. Johnstown Redevelopment Authority, 527 Pa. 71, 588 A.2d 497 (1991).

If a Complainant established a *prima facie* case, the burden would then shift to Mt. Airy to "articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. Mt. Airy would be required to rebut the

presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be "clear and reasonably specific," *Id.* at 285, and "legally sufficient to justify a judgment" for Mt. Airy. *Id.* at 255. However, if a *prima facie* case is established, Mt. Airy would not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If Mt. Airy would be required to carry this burden of production and succeeds, a Complainant would then be required to satisfy a burden of persuasion and show that any legitimate reasons offered by Mt. Airy were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden would merge with the burden of persuading us that a Complainant has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that Mr. Airy intentionally discriminated against a Complainant remains at all times with the Complainant. *Id.* at 253.

On the initial question of whether any Complainant can establish a *prima facie* case, the analysis is the same for each Complainant on the first four elements of the requisite *prima facie* showing. Analysis of the fifth element differs with regard to the circumstances of Hill's rejection, as compared to the other four Complainants.

In these cases, there is no dispute with respect to either the first or second element of the requisite *prima facie* showing. All of the Complainants were clearly *bona fide* adherents of the Islamic religion, making them each members of a protected class. Similarly, all five Complainants applied for positions for which Mt. Airy was seeking applicants.

The first fundamental area of dispute in these cases revolves around the third listed element in the required *prima facie* showing: i.e., whether any Complainant communicated his religious beliefs to Mt. Airy. Both the Complainants' brief and the PHRC brief on behalf of the complaint submit that it is appropriate to infer that Mt. Airy was aware of the Complainants' religion.

Both briefs point to the role Edna Smalls (hereinafter "Smalls") played in the transition from Gaudenzia as interim provider to Mt. Airy taking over on July 1, 1991. When the City removed Building Better Families from Stenton Family Center, the City asked Smalls to function as the executive director of the shelter during the interim period while Gaudenzia provided shelter services. (NT 390.) The evidence presented at the public hearing reveals that, clearly, Smalls knew that each of the Complainants was a Muslim. (NT 401.) The issue becomes, was Smalls' awareness of the Complainants' religion in any way attributable to Mt. Airy? The Complainants assert that Smalls was an agent of Mt. Airy. Both briefs submit that, prior to Mt. Airy's selection process, Smalls had been hired by Mt. Airy to be the director of the Stenton Family Manor beginning July 1, 1991.

While it is clear that Smalls did become Mt. Airy's director beginning July 1, 1991, it is not clear when the decision was made that Smalls would become the Stenton director. Smalls testified that when Mt. Airy personnel first toured Stenton Family Center, Smalls was informed by the director of the Bethesda Shelter that he, Mr. Willis, would be assuming the position of director of the Stenton shelter. (NT 394.) Smalls indicated that she had to make a pitch for herself by suggesting that a family shelter needed a female role model. (NT 395.) Smalls further testified that

it was not until Gaudenzia's temporary role ended on June 30, 1991 that Smalls was asked to remain as director. (NT 390.)

Although Mt. Airy's mid-June 1991 job-listing (CE 6) did not list the director's position as being available, it has not been established that the position of director was not listed because Smalls had been selected at that point. Even if one were to conclude Smalls had been selected before the job-listing was prepared, clearly Small had not become an employee of Mt. Airy until July 1, 1991. Until July 1, 1991, Smalls remained an employee of Gaudenzia. It would not be until July 1, 1991 that any knowledge Smalls may have had could be attributable to Mt. Airy. Unless it could be shown that Smalls conveyed information to Mt. Airy regarding the Complainants' religion, Mt. Airy can not be found to have been aware of the Complainants' religion just because Smalls knew their religion.

On this point, the record describes Smalls as having performed only duties which one would normally attribute to an acting director. For example, Smalls facilitated Gaudenzia employees being provided with Mt. Airy applications (NT 68), helping make scheduling arrangements for the interviews of Gaudenzia employees (NT 67, 83), and helping Mt. Airy's Board understand the duties and responsibilities of the various jobs at the shelter. (NT 564.) Nothing in the record established that Smalls participated otherwise in Mt. Airy's employee selection process. On the contrary, only Mt. Airy personnel screened applications, interviewed prospective applicants, and ultimately selected their employees.

Second, both briefs generally argue that the Complainants' actions made their religion known. In combination, the briefs point to evidence that the Complainants actively prayed at work, wore religious garb, greeted Muslims with a recognizable

religious greeting, and discussed religion with each other, residents, and co-workers. The Complainants' argument is that Mt. Airy "had ample opportunity, through a variety of sources, to learn of those beliefs." However, the evidence presented with respect to religious activities of the Complainants' reveals that only the wearing of kufis was obvious to Mt. Airy personnel who made tours of the shelter.

Although the Complainants may have prayed at the shelter, when tours occurred the Complainants had not been engaging in their prayer routines. Specifically, the Complainants who testified indicated that if they did speak to tour members, the conversations did not involve religious content. Further, while the Complainants may have used a Muslim greeting with other Muslims, there is no evidence that any Mt. Airy tour member either viewed such a greeting or even knew specifically who the Complainants were, had such a greeting generally occurred at the shelter.

On the subject of wearing religious garb, each Complainant may well have worn a kufi while Mt. Airy tours took place. However, it became clear that merely wearing a kufi does not automatically mean one is a Muslim. Apparently, a kufi can also be worn as a general expression of pride in an individual's African-American heritage. The simple act of wearing a kufi is not a sufficient substitute for evidence which establishes that the Complainants either directly informed Mt. Airy of their religion, or that Mr. Airy knew of the religion of the Complainants.

The brief on behalf of the complaint also observes that a credibility determination is necessary regarding another matter which has a direct bearing on the issue of Mt. Airy's knowledge of the Complainants' religion. Haley offered testimony that during a meeting with Smalls, Smalls told Haley that "We can apply for the position

but, you know, we probably wouldn't get them because, as I understand it, they want to get rid of the Muslim element from the building." (NT 103.) Smalls adamantly denies having said this to Haley. (NT 395-396.) Clearly a credibility assessment is in order.

Several matters tend to indicate that Haley's version is not worthy of credit. First, the surrounding circumstances of the relationship between the Complainants in June 1991 would lead to the general conclusion that had Smalls said such a thing to Haley, Haley would likely have immediately told the other Muslims of Smalls' comment. However, not one other Complainant submitted that Haley ever approached them with such a devastating set of circumstances. Instead, Haley's version finds Haley keeping such obviously anger-provoking information to himself. In the realm of common experience, an individual with such information which would have an important effect on a friend would certainly tell that friend. This circumstance weakens the credibility of Haley's version.

Another aspect of Haley's testimony on another subject gives good cause to consider this testimony with caution. Haley was asked if, "during the incumbency of Building Better Families, there was a substantial drug problem at the shelter?" (NT 144-145.) The exchange which followed on this issue substantially weakens the probative value of Haley's testimony generally. At first Haley agrees "there was a drug problem at the shelter itself." (NT 145.) Then he follows with the statement, "I wasn't aware there was a drug problem throughout the shelter. Just the City entirely." (NT 145.) Haley's testimony was far from clear and positive, and was viewed instead as a feigned evasiveness. Upon subsequently being confronted with

previous deposition testimony in which Haley agreed there was a substantial drug problem at the shelter, Haley then clearly agreed that the drug problems had been substantial.

Conversely, Smalls' testimony lacked any *indicia* of bias. Although having been a previous employee of Mt. Airy, at the time of her testimony at public hearing Smalls had no relationship to Mt. Airy from which any interest could arise. Accordingly, Smalls' disinterested version of the events is found to be the more credible recollection.

Keeping in mind that there is a significant question regarding Haley's versions of both the alleged conversation with Smalls and the degree of the drug problem in the shelter, we turn to yet another alleged incident. Haley testified that while Mt. Airy's program liaison, Elder Hunter, was on a tour, Hunter allegedly made a "light humored" reference to an Arab. (NT 97.) Haley further submitted that Hunter told Haley he hoped Haley wasn't offended, and that Haley responded that he wasn't, and that Hunter "outnumbered us two to one." (NT 98.)

Hunter was unavailable to testify since he was deceased at the time of public hearing. Accordingly, the credibility of Haley's allegation must again be weighed. On this point, no weight will be given to Haley's contention. Haley's equivocal testimony on other matters renders this testimony to have no probative value.

Finally, in an attempt to meet this *prima facie* element, the brief on behalf of the complaint argues that since both Harper's and Ali's applications named their Islamic ministers as references, Mt. Airy was thereby informed of their religion. On this point, the obligation to establish by a preponderance of the evidence that Mt. Airy was advised of the Complainants' religion is simply not met by this point.

Accordingly, the Complainants have not sufficiently met this element of the requisite *prima facie* showing.

The fourth element of the *prima facie* showing is easily met by all of the Complainants, in that none of the Complainants was hired. It is on the fifth element that Hill must be separated from the remaining four Complainants. First, however, the brief on behalf of the complaints submits that this element should simply be "that, after his rejection, the position remained open and the employer continued to seek applicants." In PHRC v. Johnstown Redevelopment Authority, 588 A.2d 497 (Pa. 1991), the Pennsylvania Supreme Court indicated that as part of a *prima facie* showing, an unsuccessful applicant is required to establish that they were at least as well qualified as a successful applicant. *Id.* at 501. Thus, this additional component would normally be added to the fifth required element, as stated.

However, the particular facts of these cases require a different analysis of Hill's situation, compared with the remaining Complainants. As for the Complainants who were members of Gaudenzia's security force, Mt. Airy revealed that even before the hiring process commenced, Mt. Airy made a decision not to consider those on Gaudenzia's security force.

Hill was not on the security force and, therefore, would be responsible to establish the fifth element in full. Here, an insufficient effort was extended to compare Hill's qualifications with those of the applicants selected to be hired in the maintenance department. Of the six individuals listed as having been hired for maintenance (CE 21; RE 6), the record appears to contain only Hill's application and that of Bernard Turner (CE 13, 22; RE 4(C).) This makes it impossible to make an analysis of the relative qualifications of Hill and the five selected for maintenance.

Hill's application can only be compared to Turner's, and when doing so it can not be said, from the limited information provided on Hill's application, that he was at least as qualified as Turner. Accordingly, in addition to having failed to establish that Mt. Airy knew of his religion, Hill has also failed in his burden to establish that he was at least as qualified as those selected to perform maintenance duties at the Stenton Family Manor.

For each Complainant, this matter could end here due to the Complainants' failures to properly establish their requisite *prima facie* cases. However, assuming *arguendo* that Barber, Haley, Harper, and Ali could establish a *prima facie* case, Mt. Airy offered legitimate nondiscriminatory reasons for not hiring these Complainants. Mt. Airy witnesses credibly testified that religion was neither a criteria for working at the Stenton shelter nor played any part in Mt. Airy's selection process.

On the contrary, Mt. Airy asserts that Bracy's revelation that the security department had an array of problems led to the decision not to hire Barber, Haley, Harper, and Ali, not their religion. The record considered as a whole discloses that Bracy first generally informed Rev. Morris of the problems with security. Bracy next generally instructed Mt. Airy's Board of these problems with security. Finally, Bracy detailed the nature of security problems to Rev. Morris who credibly testified that his first suggestion to the Mt. Airy Board was not to hire the security personnel. Mt. Airy thus asserts that before the hiring process even began, a decision was made not to hire the security which they perceived had been the source of significant problems at the Stenton Family Center.

In the case of Action Industries, Inc. v. PHRC, 518 A.2d 610 (Pa. Commonwealth Ct. 1986), the court stated that, "Central to establishing discrimi-

natory intent is the mind-set of the employer at the time of its alleged discriminatory conduct." Here, both Bracy and Board members who participated in the hiring process and testified agree that the Board was given the distinct impression that the security force was significantly problematic. This problem was conveyed to the Board in such a way as to create a two-fold perception:

1. drugs were infiltrating the shelter, and

2. members of the security force were inappropriately interacting with female residents of the shelter.

This second factor is of import when considering the attempt to show Mt. Airy's articulated reasons were pretextual. Generally, the Complainants initially point to Taryn Slade, a non-Muslim member of the Gaudenzia security force, who was hired by Mt. Airy. Fundamentally, Slade is a woman; the Complainants are men. This is significant because part of the problem with security, as perceived by the Mt. Airy Board, was that there had been inappropriate contact between male security members and female residents, in direct violation of a rule against staff fraternization. (NT 149.)

Added to this factor is the circumstance that Slade was ultimately not hired by Mt. Airy as a security employee, but as a facility coordinator. Mt. Airy's hiring process can best be described as a situation-generated frantic attempt to fully staff an unfamiliar family shelter. Mt. Airy's contract with the City was scheduled to commence on July 1, 1991, and the application review and interviewing process did not begin until approximately the third week of June 1991.

Both the Complainants' brief and the brief on behalf of the complaints touch on the remaining non-Muslim Gaudenzia security employee, Bobby Jordan. Haley

offered relatively vague, uncorroborated testimony that Mt. Airy had attempted, unsuccessfully, to contact Jordan to offer him a position. Not only was this testimony extremely ambiguous, no attempt was made to offer any corroboration for Haley's version of what occurred regarding Jordan.

The evidence considered as a whole leads to the reasonable inference that, if called, Jordan's experience may well have been similar to a call Barber testified he had received from Hunter. Barber testified that Hunter called him to inquire if Barber was interested in a job, and that when Barber told Hunter he worked at Gaudenzia, Barber never heard from Hunter again. (NT 263-264.) If Jordan had been called, the nature of that call could have been similar to the call Barber described. It is simply not credible that if Jordan was a Gaudenzia security employee, he would have been unreachable. It is much more likely that either Jordan was not called or, if called, his experience was similar to Barber's.

In conclusion, Complainants Barber, Haley, Harper, and Ali have not offered sufficient evidence upon which to base a finding that Mt. Airy's articulated reasons for not hiring them are pretextual. Further, since none of the Complainants has established a *prima facie* case by a preponderance of the evidence, the complaints in these matters should be dismissed. An appropriate Final Order follows.

COMMONWEALTH OF PENNSYLVANIA

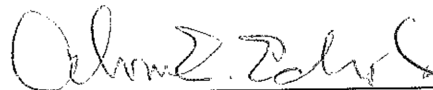
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

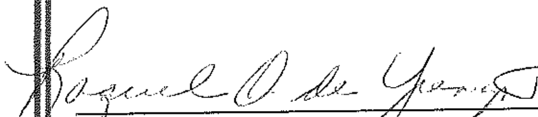
GERALD BARBER, JAMES L. HALEY, JR., THE ESTATE OF JULIUS HARPER, RICHARD HILL, JAMES Y. ALI, Complainants v. MT. AIRY BETHESDA MANOR, INC., Respondent	DOCKET NOS. E-55783-D E-55785-D E-55786-D E-55787-D E-55789-D

RECOMMENDATION OF THE HEARING PANEL

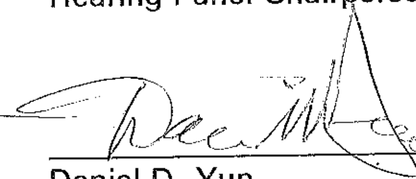
Upon consideration of the entire record in the above-captioned consolidated matters, the Hearing Panel finds that the Complainants have failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Panel's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Hearing Panel recommends issuance of the attached Final Order.



Alvin E. Echols, Jr.
Hearing Panel Chairperson



Raquel Otero de Yiengst
Hearing Panel Member



Daniel D. Yun
Hearing Panel Member

COMMONWEALTH OF PENNSYLVANIA

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FINAL ORDER

AND NOW, this 30th day of September, 1997, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Hearing Panel. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

that the complaints in these consolidated cases be, and the same hereby are, dismissed.

By: Robert Johnson Smith /ca
Robert Johnson Smith, Chairperson

Attest:

Russell S. Howell /ca
Russell S. Howell, Assistant Secretary