

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD R. DREW,
Complainant

v.

CITY OF ERIE,
DEPARTMENT OF PUBLIC SAFETY,
Respondents

DOCKET NO. E-56948-AD

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

- 11. Members of the promotion board were: then Captain Guy L. Mattocks, now Chief Deputy; Captain Stephen J. Kovacs; Captain William J. Serafini; and Captain Dennis E. Tobin.
- 12. Each promotion board member interviewed each applicant and had available to him the personnel jacket of each applicant.
- 13. Captain Dennis E. Tobin did not retain his interview notes after promotions were made.
- 14. The promotion board made a recommendation of four candidates to Chief DeDionisio.
- 15. Those recommended were: Karen S. Weston, a caucasian female; Charles E. Bowers, a caucasian male; Thomas P. Adams, a caucasian male; and Edward Gryniewicz, a caucasian male.
- 16. Those applicants recommended were promoted to the lieutenant positions on July 1, 1991.
- 17. The yearly salary for lieutenants and sergeants for the years 1991-1996 are as follows (base salary):

Year	Lieutenant	Sergeant
1991	\$30,652.00	\$29,528.00
1992	32,184.00	31,004.00
1993	33,954.00	32,709.00
1994	35,991.00	34,672.00
1995	37,445.00	36,072.00
1996	38,943.00	37,515.00

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 Gregory A. Kable
 City Solicitor
 City of Erie

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 Lorraine S. Caplan
 Assistant Chief Counsel
 Pennsylvania Human
 Relations Commission

FINDINGS OF FACT *

1. The Complainant, Ronald R. Drew (hereinafter "Drew"), is an individual whose race is black. (NT 41; SF 7.)
2. The Respondent is the City of Erie, Department of Public Safety (hereinafter "the police department"). (SF 6.)
3. Prior to 1974, then-Chief of Police Gemelli was making an effort to recruit black police officers. (NT 28.)
4. At some point prior to 1974, federal court Judge Weber issued a consent order which led to the 1974 hiring of 20 new police officers: ten blacks and ten whites. (NT 28.)
5. Drew was one of the ten black officers hired in May 1974. (NT 28; CE A-80, C.)
6. Following a mandated six months' training period, Drew was initially assigned as a uniformed patrol officer in the police department's traffic division. (NT 31.)

* The foregoing Stipulations of Fact are incorporated herein as if fully set forth. 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	Complainant's Exhibit
NT	Notes of Testimony
SF	Stipulations of Fact

7. Drew stayed in the patrol division until 1977, whereupon Drew was assigned to the police department's crime prevention/police community relations area. (NT 45.)

8. While in this division, Drew was promoted to the rank of sergeant on February 15, 1982. (NT 32, 52; CE A-2.)

9. In 1984 Drew was reassigned from crime prevention/police community relations to the criminal investigations division (hereinafter "CID"). (NT 95; CE A-63.)

10. Effective October 5, 1987, Drew was reassigned from CID to uniformed duties in the police department's patrol division. (NT 33, 51, 117, 130; CE A-64.)

11. On two separate occasions during Drew's assignment to the CID, Erie County District Attorney Michael Cauley directed letters to the police department regarding serious investigative failures on the part of Drew. (NT 50, 117; CE A-64.)

12. The police department investigated the district attorney's assertion that Drew was both negligent and derelict, and a recommendation was made that Drew be demoted and reassigned out of CID and back to uniform patrol duties. (NT 117, 130; CE A-66, A-77.)

13. Drew was not demoted but, effective October 5, 1987, Drew was transferred. (NT 33, 51, 117, 130; CE A-64.)

14. In early 1991, the police department experienced a shortage of lieutenants in the traffic division. (NT 70, 82.)

15. In early March 1991, Police Chief DeDionisio directed that an announcement for lieutenant and sergeant vacancies be posted. (NT 75; CE B.)

16. The notice instructed police officers interested in becoming candidates for the vacant sergeant and lieutenants' positions to submit a request to Chief DeDionisio not later than March 19, 1991. (NT 73, 74; CE B.)

17. Such requests were to include specific information which included a chronological list of applicable assignments and experiences. (CE B.)

18. On March 19, 1991, Drew submitted a request to be considered a candidate for promotion to the rank of lieutenant. (NT 40; CE C.)

19. Eleven other police officers also submitted their requests to be considered for promotion to lieutenant. (NT 93.)

20. As the merit promotion system using competitive testing would not be operational until the Fall of 1991, Chief DeDionisio established a four-member promotion board for consideration of candidates for both sergeant and lieutenant vacancies. (NT 30, 68, 76, 125; CE C.)

21. The promotion board was composed of the police department's four captains: Guy Mattocks (hereinafter "Mattocks"), currently the department's deputy chief; Steven Kovacs (hereinafter "Kovacs"); Dennis Tobin (hereinafter "Tobin"); and William Serafini (hereinafter "Serafini"). (NT 71.)

22. Members of the promotion board are all white males. (NT 139.)

23. Initially, Chief DeDionisio and Kovacs together developed general consideration criteria for the positions of sergeant and lieutenant. (NT 69.)

24. Chief DeDionisio also met with the promotion board and charged them with interviewing all candidates and returning recommendations of whom to promote. (NT 76, 125.)

25. Thereafter, the promotion board developed a detailed promotion criteria list. (NT 73, 77, 83; CE L.)

26. The promotion board also discussed relevant areas of inquiry for candidates, and subsequently Kovacs prepared a list of questions to be asked of each candidate. (NT 92, 93, 125-126; CE G-1.)

27. Thereafter, in May 1991, the promotion board interviewed 12 candidates for the lieutenant vacancies and all candidates for sergeant vacancies. (NT 92, 125.)

28. The promotion board also reviewed each candidate's personnel file. (NT 74, 112.)

29. Interviews of candidates for promotion to lieutenant lasted between fifteen to twenty-five minutes each. (NT 123.)

30. Promotion board members made written notes regarding candidates' answers to the list of questions asked of each. (CE G.)

31. After all candidates were interviewed, the promotion board discussed each candidate at length. (NT 94, 126.)

32. Following these discussions, as instructed by Chief DeDionisio, each promotion board member independently listed six choices for promotion to lieutenant. (NT 96, 97, 126.)

33. Drew was not listed on any promotion board member's initial list of their six choices. (NT 110, 111.)

34. The promotion board then further discussed their choices, and, again, independently narrowed the list to four candidates. (NT 97, 114, 127.)

35. The promotion board presented Chief DeDionisio with the following list of promotion candidates to fill the four patrol division lieutenant vacancies: Sergeant Edward Grynceswicz, Sergeant Charles Bowers, Sergeant Thomas Adams, and Sergeant Karen Weston. (NT 41, 77, 98, 114.)

36. All of the candidates recommended are white. (NT 41.)

37. Without modification, Chief DeDionisio presented the list of four candidates recommended for promotion to lieutenant to Erie City's mayor, Joyce Savocchio. (NT 77, 88.)

38. Under applicable provisions of the Third Class City Code, the mayor has the final say regarding police department promotions. (NT 69, 87.)

39. Without modification, Mayor Savocchio approved the promotion board's recommendation. (NT 77, 88.)

40. Drew's complaint specifically alleged racial discrimination with respect to the promotion of Adams and Weston only. (CE D.)

41. Drew also testified that he has no problems with either Grynceswicz or Bowers' promotions and stated, "They certainly deserved it." (NT 41.)

42. Drew further testified that he believed he deserved to be promoted to lieutenant more than either Weston or Adams because he had more seniority as a sergeant than either of them. (NT 41.)

43. Drew became a sergeant on February 15, 1982, while Adams was not made a sergeant until May 1988, and Weston not until September 1988. (CE O.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Respondent is an employer within the meaning of the Act.
5. Complainant has established a *prima facie* case of failure to promote by proving that:
 - a. he is a member of a protected class;
 - b. he applied for and was qualified for a position for which the Respondent was seeking applicants;
 - c. despite the Complainant's qualifications, he was denied a promotion; and
 - d. the promotion was awarded to a promotion candidate with either equal or less qualifications, and who is not in the Complainant's protected class.
6. The Respondent offered evidence of legitimate, nondiscriminatory reasons for not promoting the Complainant.
7. The Complainant failed to prove that the legitimate, nondiscriminatory reasons offered by the Respondent were pretextual.

OPINION

This case arises on a complaint filed by Ronald R. Drew (hereinafter "Drew") against the City of Erie, Department of Public Safety (hereinafter "the police department"), on or about October 28, 1991, at Docket No. E-56948-AD. In his complaint Drew generally alleged he was denied a promotion to lieutenant. Drew alleged the promotion denial was both age-based and race-based discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA").

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated Drew's allegations, and at the conclusion of the investigation concluded that probable cause existed only with respect to Drew's race-based claim. The investigation determined that no cause existed to credit Drew's age-based claim.

Thereafter, the PHRC attempted to eliminate the alleged unlawful promotion denial through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified the parties that it had approved a public hearing of Drew's race-based allegation.

The public hearing was held on April 11, 1996, in Erie, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Lorraine S. Caplan. Gregory Karle, Esquire, appeared on behalf of the police department. Following the public hearing, the parties were afforded an opportunity to submit briefs. The post-hearing briefs were both received on June 11, 1996.

In this disparate treatment case, Drew specifically alleges that the police department treated him less favorably than two specific individual candidates for promotion to lieutenant because of his race, black. To prevail, Drew is required to prove that the police department had a discriminatory intent or motive in failing to promote him. 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). Drew must carry the 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 presume 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. 567, 577 (1978).

In McDonnell Douglas, the U.S. 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 with 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 only slightly adapt the McDonnell Douglas test because this case involves an alleged race-based refusal to promote. To establish a *prima facie* case here, Drew must show:

- 1. that he is a member of a protected class;
- 2. that he applied for and he was qualified for a position for which the police department was seeking applicants;
- 3. that, despite his qualifications, Drew was denied the promotion; and,

4. that the promotion was awarded to a promotion candidate with either equal or fewer qualifications than Drew's, and who is a different race than Drew.

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

If Drew establishes a *prima facie* case, the burden shifts to the police department "to articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. The police department must 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 the police department. *Id.* at 255. However, the police department does 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 the police department carries this burden of production, Drew must then satisfy a burden of persuasion and show that the legitimate reasons offered by the police department were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden now merges with the burden of persuading us that he has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that the police department intentionally discriminated against Drew remains at all times with Drew. *Id.* at 253.

On the initial question of whether Drew can establish a *prima facie* case, the parties' dispute revolves around the fourth element of the *prima facie* requirement.

There is no dispute in this case that Drew is a member of a protected category, that Drew requested promotion to the position of lieutenant for which he was qualified, that he was denied the promotion, and that promotions to lieutenant were awarded to white candidates.

The remaining question in the *prima facie* area is whether Drew established that he was either better qualified, or at least as well qualified, as either Adams or Weston. Johnstown Redevelopment Authority, *supra* at 500. Again, we are mindful that Drew's burden in this regard should not be onerous. *Id.* at 499.

Under all of the circumstances presented, Drew established that he was at least as qualified as both Adams and Weston. At the public hearing, Drew introduced a substantial number of documents reflecting Drew's accomplishments as a police officer. These documents commemorate Drew's outstanding community service through a series of awards, stand as evidence of a broad range of training certifications, certify various accomplishments, attest to departmental recognition and commendation of notable police work, and speak of citizenry's gratitude for dedicated service. Collectively, Drew's record confirms a general recognition that Drew was certainly well qualified for promotion to lieutenant.

Further, Drew offered testimony that he had been promoted to sergeant before either Adams or Weston. In Drew's opinion, this factor made him more qualified than either Adams or Weston.

When a promotion selection process contains elements of subjective decision-making, as we find here, a Complainant is significantly disadvantaged in the

requirement to establish that he was at least as qualified as an individual selected for promotion. Here, there were so many layers involved in the consideration of who would be recommended for promotion, that a comparison of qualifications for the purpose of a *prima facie* showing should be an overall observation. A precise analysis of qualification comparisons made by individual promotion board members with regard to selection factors board members considered important is more appropriate after the articulation of legitimate, nondiscriminatory reasons has occurred.

A lengthy quote from Allegheny Housing, *supra*, is appropriate here:

There is bound to be confusion where, as here, part of the employer's explanation attacks the plaintiff's qualifications for the job. If a plaintiff must prove a *prima facie* case by producing evidence of her qualifications before the defendant is obligated to proceed with a defense, there will almost of necessity be, at the close of the plaintiff's case in chief, evidence that she was qualified sufficient to avoid dismissal. At that point no evidence has been admitted on the other side. When the employer then produces evidence of disqualification, this could be understood either as an attack on the elements of the *prima facie* case, or as an attempt to meet the employer's burden of offering a legitimate, non-discriminatory reason. Regardless of its characterization, however, its impact is the same. The employer, understandably, would prefer not to have to offer a defense at all until a more substantial case had been presented against it. Nevertheless, in the interest of having the ultimate question of discrimination resolved on the merits rather than for procedural failings such as lack of specificity, given the importance of circumstantial proof in such cases, it is appropriate to the remedial purpose of the Act that the *prima facie* case not be an onerous one.

Allegheny Housing at 318-319.

Here, in effect, the police department's brief argues that we should confine the qualification issue to those areas where Drew's record poses a problem for him.

Instead, we find that, overall, Drew was at least as qualified as both Adams and Weston. Accordingly, Drew established a sufficient, but thin, *prima facie* case. Having so found, we move to the question of whether the police department has articulated a legitimate, nondiscriminatory reason for not promoting Drew. On this question we find that the police department has met its burden of production.

The police department offered testimony regarding the development and implementation of the selection process utilized to select four individuals to fill the four traffic division lieutenant vacancies. Initially, Chief DeDionisio and Captain Kovacs met to discuss appropriate selection criteria for consideration of candidates for promotion to lieutenant. A review of the promotion criteria developed reflects a commitment to selection of the best qualified applicants. The criteria list contained the following factors:

1. Education.
 - a. Formal: college, specialized schools, management courses.
 - b. Self-acquired: seminars, conferences, state police training sessions attended on own time, etc.
2. Experience.
 - a. Patrol operations.
 - b. Management positions held.
3. Management Skills.
 - a. Assignment of personnel.
 - b. Inspecting and reviewing quality of work.

- c. Evaluating and rating work performance.
 - d. Making decisions.
 - e. Evaluating the need for training of subordinates.
 - f. Determining the need for disciplinary actions.
 - g. Counseling subordinates.
4. Leadership Skills.
- a. Ability to use chain of command.
 - b. Loyalty to chain of command.
 - c. Ability to enforce policy and procedure.
5. Organizational and Planning Skills.
- a. Planning manpower deployment.
 - b. Using directed patrol activities.
 - c. Determining problem traffic areas and deploying traffic enforcement assets to problem areas.
 - d. Planning crowd control operations.
 - e. Planning and organizing patrol assets to suppress criminal activity.
6. Interpersonal Skills.
- a. Ability to work with other bureau personnel.
 - b. Ability to project a professional bearing.
 - c. Ability to motivate subordinates.
 - d. Ability to be assertive with subordinates.

7. Communication Skills.
 - a. Ability to write effectively.
 - b. Ability to speak effectively.
 - c. Ability to organize thoughts and ideas into logical sequences and have subordinates understand expressed ideas.
8. Physical Fitness. Use of sick time over period of time.
9. Knowledge of Law.
10. Knowledge of Bureau Procedures.

To afford those desiring consideration for promotion an initial opportunity to place their individual attributes in front of the promotion board, the posted notice of vacancies informed interested individuals to include the following information in their requests for promotion.

1. Date of hire.
2. Experience.
3. Education (formal and job-related).
4. Career development participation.
5. Specialized skills.
6. A statement of goals and objectives.
7. A statement of why the applicant felt he or she was the most qualified for a promotion.

Also, once empaneled, the promotion board not only had access to the personnel files of individual candidates, they formulated a questionnaire to be asked

equally of each candidate during individual interviews. At the conclusion of the interviews, the promotion board members fully discussed each candidate then separately listed their choices of six candidates in order of choice. Unrebutted testimony indicated that Drew had not been named on a single promotion board member's list of six finalists.

At the public hearing, three of the four members of the selection panel testified on behalf of the police department regarding their individual reasons for their non-selection of Drew for recommendation for promotion to one of the four lieutenant vacancies. Collectively, the promotion board articulated several reasons Adams and Weston were promoted instead of Drew.

First, each board member spoke of the relative experience in the patrol division of Drew, Adams, and Weston. While each of these candidates may have joined the police department in 1974, their job assignments were different.

Adams' entire career was spent in the patrol division where in 1982 he was promoted to corporal, and promoted again in 1988 to sergeant. In fact, for the six months immediately preceding the promotions, Adams was an acting lieutenant in the patrol division. Weston's assignments included ten years in the patrol section.

Drew's experience was principally in the crime prevention/police community relations division and in CID. Drew spent only several initial years and approximately four years preceding the promotions in the patrol division.

Captain Mattocks and Captain Serafini each directly asserted that because Drew had been in the patrol division far shorter than the others, they were of the

opinion that Adams and Weston were better qualified for promotion to the position of lieutenant in the patrol division.

A second general reason given why Drew was not selected for promotion was the fact that in 1987, Drew was transferred out of CID after the Erie County district attorney communicated his extreme displeasure at Drew's investigatory handling of several cases. In effect, the district attorney had asked that Drew be demoted and transferred out of CID for negligent and incompetent handling of several investigations. Drew was transferred and nearly demoted by the police department.

A third factor expressed was an awareness of Drew's refusal to comply with department procedures. Drew himself testified regarding his failure to complete a required vehicle checklist because he felt there was a better way to monitor vehicle maintenance. Kovacs testified that not only was it a problem that Drew failed to complete this five-minute procedure, but as a sergeant, Drew failed to enforce this requirement on other officers under his command.

A fourth element goes hand in hand with the third factor just reviewed. Mattocks observed that, in Drew's case, the information candidates were instructed to provide in their request for consideration for promotion was both inaccurate and incomplete. Drew's request inaccurately reflected where he had been assigned during the period 1984 to 1987. Also, his request did not make any reference to his assignment between 1987 and 1991.

In effect, Mattocks indicated that he believed those errors to have been unintentional, yet they still suggest, as does the third factor previously covered, a lack

of attention to detail which is obviously of critical import with respect to a police lieutenant in charge of the work of other police officers.

Fifth, promotion board members noted that both Adams and Weston have college degrees. Adams has a degree in law enforcement with a minor in juvenile justice, and Weston has a bachelor's degree in criminal justice administration and a master's degree in human resource management/organizational development and police administration. Drew has approximately 50 college credits from several schools. While promotion board members indicated that higher education was not a major consideration, it was still a factor.

Finally, each promotion board member who testified specifically indicated they neither bore Drew any ill will nor harbored any racial animus towards him. All of these proffered justifications for the police department's failure to promote Drew constitute legitimate, nondiscriminatory reasons. The police department has therefore satisfied its burden of articulation.

At this point, the burden shifts back to Drew "to prove by a preponderance of the evidence that the legitimate reasons offered by [the police department] were not its true reasons, but were a pretext for discrimination." Burdine, *supra* at 253. During the entire analysis, of course, the ultimate burden of persuasion has remained with Drew. *Id.* Drew's burden of proving pretext simply merges with his ultimate burden of proof. To satisfy his burden on the pretext issue, and ultimately his burden of persuasion, Drew could have presented either direct evidence that "a discriminatory reason more likely motivated [the police department]," or indirect

evidence that the police department's proffered explanations are unworthy of belief. *Id.* at 256.

One issue which is noted here is the recognition that promotion decisions should be subjected to particularly close scrutiny where promotion board members utilize a subjective evaluation process and board members themselves are not members of the protected group. See Henry v. Lennox Industries, 42 FEP 771 at 774 (6th Cir. 1985), citing Grano v. Dept. of Development of City of Columbus, 31 FEP 1 (6th Cir. 1983). Here, much of the evaluation criteria was objective; however, of necessity, part of the process was left to the subjective appraisal of individual promotion board members. Although the objective factor of work experience was subjectively evaluated, there has been no evidence presented to suggest this factor was weighed in a manner other than in good faith or in a way reflective of race discrimination. See Estrada v. Siros Hardware, 39 FEP 597 at 601 (S.D. Tex. 1984). Generally, when an open position is a management position, an employer is more likely to use subjective criteria to fill that position. See Burrows v. Chemical Corp., 32 FEP 851 (E.D. Mo. 1983). In the absence of additional evidence of a discriminatory intent, the use of subjective criteria in an employment decision does not alone establish discrimination. Proof of a discriminatory motive is essential.

Here, Drew has literally offered no evidence that any member of the promotion board was hostile to the idea of promoting a black to the rank of lieutenant. Similarly, Drew offered no evidence that there had ever been discriminatory attitudes in the police department.

In effect, Drew simply points to the fact that those selected were white. The seniority issue upon which Drew appears to have rested his claim does not question the qualification of those selected for lieutenant, but rather simply notes that he had one thing which made his qualifications different. No evidence was adduced to show that seniority afforded a candidate any particular advantages. Instead, taken as a whole, the evidence reflects a process that sought the highest qualified candidates and weighed Drew's qualifications with the other candidates'.

"The law does not require that minorities be treated more favorably than non-minorities. Rather it requires that they not be treated less favorably." Johnstown Redevelopment Authority, *supra* at 501. Here, the evidence reveals that the screening process was calculated to obtain a full presentation of all the qualifications of each candidate. The chief of police requested that interested candidates provide specific applicable information in their requests for consideration. A comprehensive list of promotion criteria was developed, and a probing questionnaire was formulated from which each applicant was asked the same questions. Promotion panel members had a degree of advance knowledge of all the candidates, as each member was a department captain. No one was restricted from putting forth their full qualifications. Consistently, descriptions of the actual promotion board process, both in interviews and deliberations, was described as fair, placing Drew in no different posture than any other candidate. Each promotion board member had the advantage of the insights of other members, expressed during deliberation before individual members constructed their individual list of selectees.

In summary, the promotion board's recommendations appear to be based on genuinely and sincerely held unbiased, professional views which constitute reasonable, fair and logical judgments in which Drew's overall qualifications fell short of Adams' and Weston's.

With any promotion scenario, the number promoted will invariably be less than the number of qualified candidates. Here, the record is devoid of any proof that race played any part in the challenged non-promotion decisions.

As a final observation, some attempt has been made to rely on statistical evidence concerning a historical predicate behind the promotion situation, and the percentage of black officers generally, and the percentage of blacks in preferred positions.

Statistics come in an infinite variety, and their usefulness depends on all the surrounding facts and circumstances. See Marsh v. Eaton Corp., 25 FEP 64 (6th Cir. 1981), citing Teamsters v. U.S., 431 U.S. 324 (1977). Here, the manner of presentation of the statistical issue lacked a meaningful focus. The statistical evidence presented in this case is entirely inconclusive. The small number of statistical samples presented in a vacuum are too small to be meaningful. See Morita v. Southern California Permanente Medical Group, 13 FEP 505 (9th Cir. 1976).

Our role in this case was not to determine which candidate we might feel should have been chosen. See Cooper v. City of North Olmstead, 41 FEP 425 (6th Cir. 1986). Rather, we appropriately examined the evidence presented regarding the

promotion decisions to insure that those motivations were not impermissible. Here, Drew presented essentially no direct evidence of discriminatory intent, and virtually no persuasive circumstantial evidence from which a discriminatory intent could be reasonably inferred.

The police department proffered considerable credible justification for its promotion decisions which Drew did not refute. Drew seemed to have felt the promotion system failed to recognize his special talents. Hopefully, Drew will not perceive that his failure to be promoted somehow deprecates his fine record of public service. Clearly, Drew has been a faithful, dedicated public servant. He simply made some serious errors in judgment at unfortunate junctures in his career which other candidates did not make.

As Drew has not met his burden of proof, his complaint should be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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Complainant

v.

CITY OF ERIE,
DEPARTMENT OF PUBLIC SAFETY,
Respondents

DOCKET NO. E-56948-AD

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, 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 Permanent Hearing Examiner recommends issuance of the attached Final Order.

By:



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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CITY OF ERIE,
DEPARTMENT OF PUBLIC SAFETY,
Respondents

FINAL ORDER

AND NOW, this 30th day of July, 1996, 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 Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own finding 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 complaint in this case be, and the same hereby is, dismissed.

By: 
Robert Johnson Smith, Chairperson

Attest:


Gregory J. Celia Jr., Secretary