COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CARMELLA HOSBACH, DENISE MADONNA, TERESA WEED, DONNA DEPIANO, and SALLY ANN CONDO, Complainants	:	
v.	:	Dockets Nos. E-43993
	:	E-43994
RISTORANTE DIGIOVANNI, Respondent	:	E-43995 E-43996
	:	E-45605

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CARMELLA HOSBACK, DENISE MADONNA, TERESA WEED, DONNA DE PIANO, and SALLY ANN CONDO,	:	DOCKET NOS. E-43993-96 and E-45605
Complainants	:	
v.	:	
RISTORANTE DIGIOVANNI, Respondent	:	

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required:

1. The Complainants herein are Carmella Hosback, Denise Madonna, Teresa Weed, Donna De Piano, Sally Ann Condo and all similarly situated females (hereinafter referred to as "Complainants", and/or "Complainant Hosback", etc.).

2. The Respondent herein is the Ristorante DiGiovanni, Broad and Porter Streets, Philadelphia, PA 19145.

3. The Respondent, at all times relevant to the instant case, has employed four or more individuals within the Commonwealth.

4. On April 26, 1988, the Complainants filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket numbers E-43993 through E-43996. A copy of the complaint is attached as Appendix "A" and will be included as a docket entry in this case at the hearing.

5. On or about October 6, 1988, the complaint was amended to include Commission docket number E-45605. A copy of the amended complaint is attached as Appendix "B" and will be included as a docket entry at the hearing.

6. By correspondence dated October 25, 1988, the Respondent was notified of the probable cause finding.

7. Subsequent to the determination of Probable Cause, the Commission attempted to resolve the matter in dispute between the Complainants and the Respondent through conference, conciliation and persuasion, but were unable to do so.

8. In correspondence, dated May 1, 1989, the Commission notified the Respondent that a public hearing had been approved in this matter.

9. Carmella Hosback, Denise Madonna, Teresa Weed and Sally Ann Condo were hired by Respondent as waitresses. They started their employment on March 28, 1988.

10. Donna De Piano was hired as a part time bus girl by the Respondent. Her employment commenced on March 28, 1988.

The Stipulations of Fact, together with all appendices, will become a part of the official record of this case and will be incorporated into the transcript prepared during the course of any subsequent public hearing in this matter.

Cynthia M. Williams — 2/8/90

Cynthia M. Williams
(Counsel for the Commission)

Date:

Natale F. Caralello, Jr.
(Counsel for the Respondent)

2/8/90.

Date:

FINDINGS OF FACT

1. Complainant Carmella Hosbach, a female, filed a complaint against Ristorante DiGiovanni which was docketed at E-43993. (S.F. 1, 4; N.T. 6, 7)

2. Complainant Denise Madonna, a female, filed a complaint which was docketed at E-43994. (S.F. 1, 4; N.T. 6, 7)

3. Complainant Teresa Weed, a female, filed a complaint which was docketed at E-43995. (S.F. 1, 4; N.T. 6, 7)

4. Complainant Donna DePiano, a female, filed a complaint which was docketed at E-43996. (S.F. 1, 4; N.T. 6, 7)

5. Complainant Sally Ann Condo, a female, filed a complaint which was docketed at E-45605. (S.F. 1, 5; N.T. 6, 7)

6. The Respondent herein is Ristorante DiGiovanni. (S.F. 2)

7. The Respondent, at all times relevant to the instant case, has employed four or more individuals in the Commonwealth. (S.F. 3)

8. Complainants Hosbach, Madonna, Weed and DePiano filed their complaints against the Respondent on April 26, 1988. (S.F. 4)

9. On October 6, 1988, the complaints were amended to include Complainant Condo's complaint. (S.F. 5)

10. The Respondent was notified of the probable cause findings by correspondence dated October 25, 1988. (S.F. 6)

Abbreviations:

C.E. - Complainants' Exhibit
R.E. - Respondent's Exhibit
N.T. - Notes of Testimony
S.F. - Stipulations of Fact

11. Subsequent to the determination of probable cause, the Commission attempted to resolve the matter in dispute between the Complainants and the Respondent through conference, conciliation and persuasion, but was unable to do so. (S.F. 7)

12. By correspondence dated May 1, 1989, the Commission notified the Respondent that the five cases had been approved for public hearings. (S.F. 8)

13. Anthony DeJohn is the owner of Ristorante DiGiovanni which is located at Broad and Porter Streets. (S.F. 2; N.T. 317)

14. Until September 1987, Anthony DeJohn operated a bar, Sharkey's, at Broad and Porter Streets. (N.T. 318-319)

15. After the bar was closed in September 1987, E. Leon (Bud) Jordan convinced Anthony DeJohn to open a restaurant in the building. (N.T. 319)

16. Jordan developed the concept and format for the restaurant, supervised the renovations, bought the equipment, hired and supervised the employees. (N.T. 261-263, 319-321)

17. Anthony DeJohn permitted Jordan to design the restaurant and hire the personnel because DeJohn did not know anything about the restaurant business or hiring employees. (N.T. 320, 323)

18. Since Jordan claimed to have an extensive background in opening restaurants, DeJohn asked Jordan to be the manager of Ristorante DiGiovanni. (N.T. 262, 320)

19. Jordan hired each of the Complainants (Hosbach, Madonna, Weed, DePiano and Condo) and Drew Arndt.(N.T. 14, 66, 80, 124, 153, 198, 265, 279, 322)

20. Jordan never told the Complainants that they were part of a start up crew. (N.T. 80, 153, 205, 284)

21. Jordan hired all of the employees except Joe DeJohn, Anthony DeJohn's son. (N.T. 322)

22. When Ristorante DiGiovanni opened on March 28, 1988, Jordan was responsible for hiring, firing and scheduling the employees and supervising the kitchen. (N.T. 261)

23. At Ristorante DiGiovanni, the waitresses pooled their tips and paid 10 percent to the busperson and a percentage to the bartender. (N.T. 18-19, 126)

24. Complainant Hosbach commenced employment at Respondent restaurant on March 28, 1988. (S.F. 9)

25. Complainant Hosbach was hired to work the 4 p.m. until closing shift at Respondent restaurant. (N.T. 14)

26. At the time she was hired, Complainant Hosbach had approximately fifteen years of experience as a waitress.

27. In addition to the 4 p.m. until closing shift, Complainant Hosbach worked as a waitress and bartender at lunch two or three times a week. (N.T. 14)

28. Mr. Jordan permitted the person who worked lunch to return at 5:00 p.m. instead of the normal 4 p.m. time. (N.T. 288)

29. When Complainant Hosbach worked at lunch, she and Complainant Condo were the only waitresses on the job. (N.T. 18)

30. Complainant Hosbach was never given any written rules by the Respondent. (N.T. 26)

31. Mr. Jordan, Respondent's manager, orally stated that employees were required to be at work 15 minutes before their shift started and employees were not allowed to smoke on the floor. (N.T. 15-16)

32. Complainant Hosbach, as well as the other Complainants, was required to wear a uniform consisting of brown or tan pants, white tuxedo shirt, green bowtie, and brown Docksider shoes. (N.T. 17)

33. Complainant Hosbach paid $132 for two shirts, two pairs of pants, one pair of shoes and one bowtie. (N.T. 17)

34. Complainant Hosbach's salary was $2.01 per hour plus tips. (N.T. 18)

35. While at the Respondent's restaurant, Complainant Hosbach was never informed that there were complaints regarding her work. (N.T. 19)

36. Complainant Hosbach was never reprimanded by the manager, Bud Jordan or Anthony DeJohn, the owner of the restaurant. (N.T. 19)

37. Complainant Hosbach was never told that she was terminated because she failed to record drinks on checks. (N.T. 33)

38. Complainant did not work with Anthony Pack. (N.T. 398)

39. Complainant Hosbach did not talk with Anthony Pack about giving away free drinks in the restaurant. (N.T. 358)

40. When Complainant Hosbach called Jordan, on or about April 18, 1988, to inquire about her schedule, she was told that her services were not needed any longer. (N.T. 19, 20, 33-34, 301)

41. After this conversation, Complainants Hosbach, Madonna and Condo went to the restaurant to get their pay. (N.T. 39)

42. All other Complainants had also been told that they were not needed any longer. (N.T. 42)

43. When Complainant Hosbach was discharged she observed male waiters working in Respondent's restaurant. (N.T. 41)

44. While at Respondent's restaurant Complainant Hosbach worked 80 hours and made $635 in tips. Her total wages and tips equals $795.80 (80 hours x $2.01 = $160.80 + $635 tips = $795.80. (N.T. 18, 21)

45. After her discharge, Complainant Hosbach began to look for employment. (N.T. 21)

46. Bud Jordan gave Complainant Hosbach a reference letter which stated that she left Respondent's restaurant "due to a change in company requirements for waitresses." (N.T. 301, C.E. 6)

47. For two weeks Hosbach worked as a waitress at Chip's Restaurant on Street Road for $2.00 an hour plus tips. She worked three days a week for six hours a day. Her daily tips at Chip's can be estimated by averaging her tips at Ristorante DiGiovanni ($211.67 a week divided by 5 = $42.33) and her tips at the Corned Beef Academy ($38.90). $42.33 + $38.90 = $81.23 divided by 2 = $40.62. (N.T. 21-24)

48. Hosbach made $315.72 in wages and tips at Chip's Restaurant. (N.T. 22)

49. From September to December 1988 Hosbach worked as a waitress at Russo's for eight hours a day, three days a week at the rate of $2.00 an hour plus tips. (N.T. 22-23)

50. Peter D'Oliva (T'Alleva [sic]), the manager of Marco Polo's, formerly Russo's, hired and supervised Hosbach when she worked at Russo's. (N.T. 346)

51. Hosbach did excellent work at Russo's, caused no trouble, was always punctual and was well liked by the customers. (N.T. 346)

52. Hosbach left Russo's voluntarily because the restaurant's business was slow and she was not making enough money. (N.T. 346)

53. In 1988 Hosbach made $2,887.62 at Russo's. (See Appendix "A")

54. Based on the average wages and tips received by Hosbach during her employment at Respondent's restaurant, it is estimated that she would have made $9,549.72 from April 20, 1988 - December 31, 1988. (See Appendix "A")

55. From January to March 1989 Hosbach was employed by Russo's. Her wages and tips amounted to $2,208.18. (N.T. 22-23)

56. Between June and December 31, 1989, Hosbach was a waitress at Corned Beef Academy. She made $1.85 per hour and worked six hours per day, five days a week. Her average tips amount to $38.90 per day. She earned $9,708.18 at Corned Beef Academy in 1989. N.T. 23-24)

57. Hosbach's projected wages and tips from Ristorante DiGiovanni for the period between January 1, 1990 and March 21, 1990 are $3,183.24. (N.T. 24)

58. Hosbach was not paid by the Corned Beef Academy for the two days, March 21, and 22, 1990, that she appeared at the hearing. Her wages and tips for one day equal $50. (N.T. 24).

59. The difference between Hosbach's projected wages and tips from the Respondent and Hosbach's interim wages and tips added to the amount that she paid for the uniform ($132) and compensation for the two days of hearing ($100) amount to $10,847.48. (N.T. 24)

60. Complainant Madonna worked as a waitress at Respondent's restaurant from March 28, 1988 until April 17, 1988. (S.F. 9)

61. Complainant Madonna worked the dinner shift (4:00 p.m. until closing). (N.T. 83)

62. Complainant Madonna was required to wear a uniform consisting of: beige pants, white tuxedo shirt, green bowtie and brown Docksider shoes. (N.T. 81)

63. Complainant Madonna paid $132 for her uniforms and shoes. (N.T. 82)

64. Complainant Madonna's salary was $2.01 an hour plus tips. (N.T. 81)

65. Complainant Madonna was never reprimanded by either the manager, Mr. Jordan, nor the owner, Mr. DeJohns. (N.T. 62)

66. Complainant Madonna did not miss a day of work while employed by the Respondent. (N.T. 83, 92)

67. When Complainant Madonna called Respondent on April 19, 1988, to inquire about her schedule, she was told by Mr. Jordan that her services were no longer needed. (N.T. 83)

68. Complainant was never informed that there were any complaints about her work from either customers or her employers. (N.T. 82)

69. Madonna worked the following hours during the three weeks that she worked at Respondent's restaurant: 26½ hours the first week, 29 hours the second week and 23 hours the third week. She made $570.25 in tips during her employment. (N.T. 86; C.E. 1)

70. The weekly average of Madonna's wages and tips for the three weeks is $242.68. (C.E. 1)

71. On April 19, 1988, the day that Jordan told Madonna that she was no longer employed, she went to Ristorante DiGiovanni to get her wages from Anthony DeJohn. (N.T. 93)

72. Madonna was not told that she was discharged due to her performance. (N.T. 83-84)

73. Madonna looked for employment at various restaurants after she was terminated by the Respondent. (N.T. 85)

74. When she was unable to find a position as a waitress, Madonna worked part-time answering phones at Santoro's during November and December 1988. (N.T. 86-87, 118)

75. At Santoro's Madonna made $60 a week. In 1988, she made $540. (N.T. 86-87)

76. Predicated on Madonna's average wages and tips at Ristorante DiGiovanni, Madonna would have made $8,736.48 between April 20, 1988 and December 31, 1988. (See Appendix "B")

77. In 1989 Madonna worked part-time at Santoro's during January and she earned $240. (N.T. 87)

78. Although Madonna continued to look for employment from February through December 1989, she was unable to find a job. (N.T. 87)

79. If Madonna had been working at Ristorante DiGiovanni during 1989, she would have made $12,619.36 in wages and tips. (See Appendix "B")

80. Between January 1, 1990 and March 21, 1990, the first day of the hearing, Madonna sought employment. Nevertheless, she was unable to secure work. (N.T. 87)

81. If Madonna had been working at Ristorante DiGiovanni from January 1 to March 21, 1990, she would have made $2,912.16 in wages and tips. (N.T. 87)

82. Madonna's projected wages from Ristorante DiGiovanni for April 1988 - March 1990 minus her interim wages plus the cost of her uniform ($132) amounts to $23,620. (N.T. 87)

83. Complainant Weed worked at Respondent's restaurant from March 28, 1988 to April 10, 1988. (S.F. 9)

84. Complainant Weed was not told that the position at Respondent's restaurant was temporary. (N.T. 205)

85. Complainant Weed worked the dinner shift (4 p.m. until closing) at Respondent's restaurant. (N.T. 199)

86. Complainant Weed was required to wear the following uniform: tan pants, white tuxedo shirt, green bowtie and tan shoes. (N.T. 200)

87. Complainant Weed paid between $130 and $138 for the uniforms and shoes. (N.T. 200)

88. Complainant Weed was paid $2.01 per hour plus tips. (N.T. 199)

89. Complainant Weed was never reprimanded by Mr. Jordan or Mr. DeJohn for threatening to hit a customer or for any other reason. (N.T. 200, 356)

90. Claudio LaRocca, Respondent's witness, could not identify Complainant Weed as the waitress who allegedly threatened his wife. (N.T. 258)

91. On April 8, 1988, Complainant Weed checked the schedule and observed that she was not on the schedule for April 9, but was scheduled for April 10, 1988. (N.T. 201)

92. When Complainant Weed reported for work on April 10, 1988, Mr. Jordan terminated her. (N.T. 201)

93. The reason given for Complainant Weed's termination was that she did not report to work on April 9, 1988.

94. Weed worked 60-70 hours during the two weeks that she was employed by the Respondent and she made $435 in tips. (N.T. 200-201)

95. The average of Weed's wages and tips is $191.90. (N.T. 200-201)

96. Subsequent to her termination, Weed sought employment in neighbor restaurants. (N.T. 202)

97. Between June and December 1988 she performed catering work on a part-time basis. She worked one day a week. (N.T. 202)

98. Weed's income from her catering work can be estimated by using her average daily wages and tips from Respondent's restaurant. Her income after April 10, 1988 equals $1,727.10 ($287.85 divided by 5 = $57.57). (N.T. 202-204)

99. If Weed had continued to work at Ristorante DiGiovanni in 1988, she would have made $10,650.45 in wages and tips. (See Appendix "C")

100. Although Weed looked for work in 1989, she was unable to find employment. (N.T. 205)

101. Weed's projected wages and tips from Ristorante DiGiovanni in 1989 are $3,454.20. (N.T. 202-204)

102. From mid-February to March 21, 1990 Weed worked at the Grape Vine. She worked three shifts a week and made $15 per shift plus tips. During 1990 Weed earned $702. (N.T. 204-205)

103. Weed's projected wages and tips from Ristorante DiGiovanni less her interim wages plus the cost of the uniforms amounts to $26,781.75. (See Appendix "C")

104. Complainant DePiano is employed full-time by Wills Eye Hospital as a research technician. (N.T. 123)

105. Complainant DePiano was only interested in a part-time position. (N.T. 124)

106. Complainant DePiano had no experience as a waitress, therefore, she was hired as a busperson. (N.T. 124)

107. Complainant DePiano was the only busperson employed by the Respondent. (N.T. 127)

108. Complainant DePiano worked as a busperson at Respondent's restaurant from March 27, 1988 to April 20, 1988. (S.F. 10)

109. Complainant DePiano also was required to wear a uniform consisting of tan pants, white tuxedo shirt, green bowtie and brown shoes. (N.T. 124)

110. Complainant DePiano paid $130 for her uniform and shoes. (N.T. 124)

111. Complainant DePiano agreed to work two or three nights a week. (N.T. 126)

112. Complainant DePiano, when she was hired, worked for twelve consecutive days without a day off. (N.T. 126)

113. Complainant DePiano did miss two days of work when she gave a seminar at her full-time job. (N.T. 126-127)

114. Complainant DePiano returned from the seminar and worked for six consecutive days. (N.T. 127)

115. Neither the manager, Mr. Jordan, nor Mr. DeJohn, the owner, reprimanded Complainant DePiano for any reason. (N.T. 129)

116. Complainant DePiano was in an automobile accident and was immobilized for two days. (N.T. 127)

117. Complainant DePiano was not scheduled to work those two days. (N.T. 127)

118. Complainant DePiano was paid $2.01 per hour plus ten percent of the waitresses pooled tips. (N.T. 18, 19, 126)

119. When Complainant called for her schedule on April 18, 1988, she was told that her services were no longer needed. (N.T. 127)

120. The reason given to Complainant DePiano was that the Respondent now employed waiters who would bus their own tables. (N.T. 127)

121. When Complainant DePiano was terminated, a male was hired as a busperson. (N.T. 268, 332)

122. During the three weeks, (18 days) that DePiano was employed by the Respondent she earned $541.98. (N.T. 126)

123. In the event that DePiano had worked three days a week at Ristorante DiGiovanni from April 20 to December 31, 1988, she would have made $3,251.88. (N.T. 126-130)

124. DePiano looked for part-time employment in 1988 after she was discharged by the Respondent. (N.T. 130)

125. In November 1988 DePiano earned $89.25 from Norell Services. (N.T. 130; C.E. 2)

126. During 1989 and 1990 DePiano did not seek part-time employment. (N.T. 130-131)

127. The difference between DePiano's projected wages and tips from Respondent minus her interim part-time wages in 1988 plus the cost of the uniform equals $3,162.63. (N.T. 130-131)

128. Complainant Condo commenced employment at Respondent's restaurant on March 28, 1988. (S.F. 9)

129. Complainant Condo had ten years of experience as a waitress and as a licensed casino dealer. (N.T. 152)

130. Complainant Condo was not given any rules or policies when she commenced employment with the Respondent. (N.T. 154)

131. Complainant Condo worked both the lunch and the dinner shifts. (N.T. 156)

132. The lunch shift was 9:45 a.m. until 3:00 p.m. and the dinner shift was 4:30 until 11:00 p.m. or midnight on weekends. (N.T. 155)

133. Complainant Condo was late to work one day because of a dental appointment. (N.T. 156)

134. Complainant Condo missed one day of work due to an emergency root canal. (N.T. 156)

135. Complainant Condo was required to wear a uniform consisting of tan pants, white tuxedo shirt, green bowtie and tan shoes. (N.T. 154)

136. Complainant Condo paid between $130 and $138 for the uniforms and shoes. (N.T. 154)

137. Complainant Condo was paid $2.01 per hour plus tips. (N.T. 156)

138. Complainant Condo was never reprimanded by Mr. Jordan or Mr. DeJohn concerning her work. (N.T. 159)

139. Complainant Condo was never told that there were any complaints about her job performance. (N.T. 159)

140. Complainant Condo did indicate to the chef that customers were complaining about the slowness of the food coming out of the kitchen. (N.T. 180)

141. Complainant Condo did not know Anthony Pack and did not work with him. (N.T. 351)

142. Complainant Condo did not discuss giving away free drinks with Anthony Pack. (N.T. 351)

143. Complainant Condo did discuss the system of ordering drinks with Joseph DeJohn. (N.T. 351)

144. The bartender at Respondent's restaurant would not make a drink unless it was written on a piece of paper. (N.T. 354)

145. The pieces of paper were retained by the bartender and matched with the checks at the end of the night. (N.T. 354)

146. Complainant Condo did not discuss any discrepancies in the check recordation with Mr. Jordan, the Manager. (N.T. 355)

147. Complainant Condo was terminated when she called Mr. Jordan for her schedule. (N.T. 301)

148. Complainant Condo was told that her services were no longer needed because the Respondent had decided to employ males. (N.T. 160)

149. At no time was Complainant Condo told that she was dismissed because of her job performance. (N.T. 160)

150. Condo worked 127 hours during the three weeks that she worked at Ristorante DiGiovanni and she made $800 to $900 in tips. (N.T. 158; C.E. 3)

151. The average of Condo's wages for the three weeks in $368.42. (N.T. 158)

152. After she was terminated by the Respondent, Condo looked for employment in neighborhood restaurants and grocery stores. (N.T. 160-161)

153. Condo worked at Chip's Restaurant on Street Road for a month for $2 an hour plus tips. She worked five days a week for 5-6 hours a day. Her tips at Chips were less than the average tips per day she received at Respondent's restaurant. (N.T. 161)

154. Condo made $1,040 at Chip's Restaurant. (N.T. 161)

155. Condo has been employed as a dealer at the Showboat Casino in Atlantic City since the end of September 1988. (N.T. 163)

156. At the Showboat Casino, Condo makes $13 an hour in wages and tips. (N.T. 163)

157. From the end of September 1988 to December 31, 1988, Condo earned $514.54 a week. (C.E. 4)

158. Based on the average wages and tips received by Condo during her employment at Respondent's restaurant, she would have made $13,263.12 from April 20 to December 31, 1988. (C.E. 4)

159. In 1989 Condo's income tax from the Showboat Casino was $26,755.83 while her projected wages from Respondent's restaurant equals $19,157.84. Thus, Condo's income exceeds the amount that she would have made at Ristorante DiGiovanni. (N.T. 164-165; C.E. 4;)

160. Between January 1 and March 21, 1990, Condo's income from the Showboat Casino was $6,337.67 and her projected wages and tips from Ristorante DiGiovanni equal $4,421.04. Consequently, Condo's income is greater than her projected wages and tips from Respondent's restaurant. (N.T. 165; C.E. 5,)

161. Condo was not compensated by the Showboat Casino for one of the two days (March 21 and 22) that she attended the public hearing in this matter. Her wages and tips for one day amount to $115. (N.T. 166-167)

162. Drew Arndt was employed by the Respondent from the second week in April 1988 until May 20, 1988. (N.T. 65)

163. After all of the Complainants were terminated, Arndt worked with two other male waiters, Mapino & Luigi, who had been hired.

164. Bud Jordan, Manager for the restaurant, did not prepare a work schedule for the week of April 17, 1988. (N.T. 335)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainants and subject matter jurisdiction over the complaint in the instant case.

2. All parties have complied with the procedural prerequisites to a public hearing, pursuant to Section 9 of the PHRA. 43 P.S. §959

3. Respondent is an employer within the definition of the PHRA.

4. The Complainants are individuals pursuant to Section 5(a) of the Act. 43 P.S. §955(a)

5. Each of the five Complainants has established a prima facie case of unlawful discrimination with respect to her termination by showing:

   1) that she is a member of a protected class, female;

   2) that she was qualified to perform the duties of the position;

   3) that she was terminated; and

   4) that she was replaced.

6. With regard to each Complainant, the Respondent articulated legitimate nondiscriminatory reasons for the Complainant's termination.

7. Each Complainant has proven, by a preponderance of the evidence, that the Respondent's reason for terminating Complainants was pretextual.

8. Each Complainant has satisfied her burden of persuasion by demonstrating, by a preponderance of the evidence, that the Respondent's conduct violated Section 5(a) of the Act. 43 P.S. §955(a)

9. When the Commission determines that a Respondent has engaged in unlawful discriminatory conduct, the Commission may issue a cease and desist order and it may order affirmative action which will effectuate the purposes of the Act. 43 P.S. §959(f)

OPINION

This case arises from a complaint filed by Carmella Hosbach, Denise Madonna, Teresa Weed, Donna DePiano, Sally Ann Condo (all Complainants) against Ristorante DiGiovanni ("Respondent"), Docket Nos. E-43993, E-43994, E-43995, E-43996, and E-45605, with the Pennsylvania Human Relations Commission. On April 26, 1988, the Complainants filed complaints with PHRC docketed at E-43993 through E-43996 alleging that the Respondent violated Section 5(a) of the Pennsylvania Human Relations Act by terminating them due to their sex, female. On or about October 6, 1988, the complaint was amended to include Commission Docket Number E-45605.

PHRC staff conducted an investigation of the allegations and found probable cause to credit the allegations of discrimination based on their sex, female. Thereafter, the Commission endeavored to conciliate these matters, however efforts were unsuccessful. The Respondent did not participate in the conciliation efforts, therefore, a Public Hearing in these matters was approved on May 1, 1989.

The consolidated Public Hearing was held on March 21 and 22, 1990 with Phillip A. Ayers, Esquire, serving as Permanent Hearing Examiner. Cynthia M. Williams, Esquire appeared on behalf of the complaints and Natale F. Carabello, Jr., Esquire, appeared on behalf of the Respondent. Both parties submitted post-hearing briefs.

At the Public Hearing, the focus was appropriately placed on a disparate treatment analysis of the allegations made and the evidence received. The order and allocation of proof in a disparate treatment case

was first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and recently clarified by the PA Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 PA 124, 532 A.2d 315 (1987) No. 32 W.D. Appeal Docket 1986. The PA Supreme Court's guidance indicates that the Complainant must first establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, the burden of production then shifts to the Respondent to "simply...produce evidence of a 'legitimate, non-discriminatory reason' for...[its action]." Id at 320. If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. Id at 318.

A Complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In order to do so, the Complainant need not necessarily offer evidence beyond that offered to establish a prima facie case. Id at 255 n.10. The trier of fact may consider the same evidence that a Complainant has introduced to establish a prima facie case in determining whether a Respondent's explanation for the employment decision is pretextual. Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1358-59 (9th Cir. 1985).

In McDonnell Douglas the Court noted that a Complainant in a race-based refusal to hire case could establish a prima facie case by showing:

(1) that the Complainant belongs to a racial minority;

(2) that the Complainant applied for a job for which the Respondent was seeking applicants;

(3) that, despite the Complainant's qualifications, he was rejected; and

(4) that, after the rejection, the position remained open and the Respondent continued to seek applicants from persons of Complainant's qualifications.

This general four-step process was later adopted for use by Pennsylvania Courts in General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976).

The present matters differ from the refusal to hire circumstances in McDonnell Douglas. In McDonnell Douglas, the allegation was race-based, the Complainant's application was rejected and the Respondent continued to seek applicants of equal qualifications. In the instant case, the Complainants were discharged.

The McDonnell Douglas Court wisely anticipated that facts of different cases will necessarily vary and that the four prong prima facie requirement articulated would not be applicable to differing factual situations. McDonnell Douglas at 802 n.13. The Court made it clear that the general process it was creating would appropriately need adaptations to adjust the process to the facts presented. Accordingly, some adaptation of the required prima facie showing must be done in this instance.

At the outset, several things should be noted. First, in Burdine at 250, the U.S. Supreme Court declared, "The burden of establishing a prima facie case of disparate treatment is not onerous." The PA Supreme Court has adopted this standard in Allegheny Housing Rehab. Corp., Slip at 8. Second,

it is apparent that the U.S. Supreme Court intended that the four parts of the prima facie showing are non-subjective and susceptible to objective proof. In other words, the elements set forth in McDonnell Douglas are intended to be flexible, and formulated with the particular facts of the matter.

With this in mind, in the instant cases each Complainants must meet their burden of establishing a prima facie case. In order to establish a prima facie case in this discharge case, each Complainant must show:

1) she is a member of a protected class;
2) she was performing duties that she was qualified to perform;
3) she was discharged; and
4) that the employer replaced her with someone outside the protected class.

As indicated above, once each Complainant has established a prima facie case, the burden of production then shifts to the Respondent to simply produce evidence of a legitimate, non-discriminatory reason for its action. Once the Respondent meets this burden, the Complainant must demonstrate by a preponderance of the evidence that the Respondent's proffered explanation is unworthy of credence.

We must now go through this analysis for each of the five Complainants in these cases. Complainant Hosbach has proven a prima facie case by showing:

1) she is a member of a protected class; e.g. female
2) she was qualified for the position of waitress;

3) she was terminated; and

4) that she was replaced by someone outside the protected class.

The record does not dispute the facts indicating the prima facie case. The Respondent has produced evidence of a legitimate non-discriminatory reason for its action in regard to Complainant Hosbach. The Respondent asserts that Complainant Hosbach was terminated because she did not record drinks on checks and gave free drinks to her friends. The Respondent also stated that Complainant Hosbach was late for work.

Now that the Respondent has met its burden, the Complainant must show by a preponderance of the evidence that the proffered reasons are unworthy of credence or pretextual. The Commission, as fact finder in these matters, clearly has the authority to resolve any conflicts concerning credibility. Pennsylvania State Police v. Pennsylvania Human Relations Commission, 116 Pa. Cmwlth. 89, 542 A.2d 595 (1988). Most of the testimony regarding Complainant Hosbach was given by Anthony Pack, who testified that he was a relief bartender. Neither of the Complainants who worked the lunch shift (Hosbach & Condo) remember Mr. Pack ever working with them. Also, Mr. Pack's testimony contradicts Respondent's other witnesses. Another witness, Joe DeJohn, testified that he worked seven days a week during the relevant time period. While Mr. Pack asserts that he worked 12 - 14 hour days, he also admitted that he did not work when Joe DeJohn worked. It is difficult to conceive how Mr. Pack did not work at any time Mr. DeJohn was in the restaurant. Mr. DeJohn testified that he worked from 2 p.m. in afternoon until closing. As Regional Counsel notes, this is an obvious inconsistency in the testimony.

Furthermore there is a real question as to whether Mr. Pack ever worked at the Respondent restaurant. When the other employees stated the names of other individuals who worked at the restaurant, Mr. Pack was not mentioned. Also Mr. Pack, upon questioning, was unable to recall names of employees, and could not identify the two Complainants who he supposedly worked with. Also Mr. Pack would not even give the color of the uniform that the waitresses wore at the Respondent restaurant. In addition, Complainants Hosbach and Condo did not remember ever seeing Anthony Pack until the day of the hearing.

The other reason for terminating Complainant was that she allegedly gave away free drinks and did not record drinks. Complainant Hosbach states, and Respondent witnesses agreed, she was never reprimanded by Respondent for anything, including failing to record drinks. The Respondent's witness, Joe DeJohn, stated that he marked and saved checks to illustrate that Complainant Hosbach was not recording drinks and giving free drinks. (N.T. 239, 248).

Next we come to the Respondent's allegation that Complainant Hosbach was terminated because of lateness. Once again, Complainant Hosbach was never reprimanded, or even spoken to, about being late. On the contrary, the record shows that Respondent provided a letter of reference for Complainant when she was terminated. The letter stated that the Complainant was terminated due to a change in company requirements.

Upon review of the record, the Complainant has shown that the proffered explanations for terminating her are merely pretextual. The Complainant has shown, by a preponderance of the evidence that she was the victim of intentional discrimination.

The second Complainant in this matter is Denise Madonna. Complainant Madonna has established a prima facie case by showing:

1) that she is a member of a protected class;
2) that she was qualified to work in Respondent's restaurant;
3) that she was discharged; and
4) that she was replaced by someone outside the protected class.

Now that there is a prima facie showing, as aforementioned, the burden of production shifts to the Respondent to state a legitimate, non-discriminatory reason for the termination of Complainant Madonna. The Respondent states that Complainant Madonna was terminated because she was missing too much work due to personal problems. Furthermore, the Respondent asserted that it was forced to hire another employee, Drew Arndt, when Complainant Madonna was unable to come in. The Respondent also asserted that the Complainant was inattentive to customers. The above reasons clearly satisfy the Respondent's burden of production.

Now we move to whether Complainant Madonna can show, by a preponderance of the evidence, that the proffered reasons are pretextual. It is undisputed that Complainant Madonna worked for the Respondent from March 28, 1988 to April 19, 1988. It is also undisputed that during this time period, the Complainant's sister was terminally ill. The record does not indicate any specific dates when Complainant Madonna missed work and the other employee, Mr. Arndt, took her place. A review of the record indicates that Mr. Arndt had only worked three days, over a weekend, while Complainant Madonna was employed by the Respondent. Mr. Arndt testified that he did work with the Complainant over that weekend.

The record indicates that Complainant Madonna was a good waitress. She was never reprimanded by the Respondent. It is interesting that although the Respondent does provide two reasons for its action, at the time of discharge Complainant Madonna was not given any reason for her discharge. She was simply told that her services were no longer needed. When Complainant Madonna returned for her pay, male waiters were working in the restaurant. After reviewing all of the evidence in this matter regarding Complainant Madonna, the Complainant has shown, by a preponderance of the evidence, that the proffered reasons presented by the Respondent are pretextual.

The next Complainant in this matter is Teresa Weed. Complainant Weed has shown a prima facie case by demonstrating:

1) she is a member of a protected class;
2) that she was qualified to work in Complainant's restaurant;
3) that she was terminated; and
4) that she was replaced by someone outside the protected class.

Using the same analysis as before, the Respondent has stated legitimate non-discriminatory reasons for terminating the Complainant. The Respondent asserts that Complainant Weed was rude to customers, threatened to hit a customer, and failed to come to work on a scheduled day. The Respondent presented a witness, Claudio LaRocca, who testified that the waitress working his table was rude and threatened to hit wife with a plate of spaghetti.

The Complainant must now show, by a preponderance of the evidence, that the proffered reasons are unworthy of credence or pretextual.

Upon review of the evidence, there appears to be conflicting testimony in regard to this issue as well. Mr. LaRocca contends that he complained to the manager, Mr. DeJohn, after his waitress threatened to hit his wife with a plate of spaghetti. The manager then allegedly admonished the waitress. However, Mr. LaRocca, at the time of the hearing, did not recognize Complainant Weed and could not even describe generally his waitress that particular evening. It is interesting to note that even though Mr. DeJohn identified Complainant Weed as the waitress at LaRocca's table, he did not ask her to apologize or reprimand her for allegedly threatening a customer. In addition, the waitress continued to serve his table without any further complaints from Mr. LaRocca. Furthermore Complainant Weed was still employed by the Respondent after this alleged incident. Given the testimony of Mr. LaRocca on this issue, we cannot attach much credibility to his testimony. The Commission does have the authority to resolve any conflicts in the testimony. Pennsylvania State Police v. Pennsylvania Human Relations Commission supra.

Now we turn to the Respondent's contention that Complainant Weed failed to show up for work on a day that she was scheduled to work.

There is a clear conflict in the record in that Respondent contends that Complainant Weed was scheduled to work on April 9 but did not report to work. The Complainant asserts that when she left work on April 8, she reviewed the posted schedule and observed that she was to report for work on April 10. When Complainant Weed reported on April 10, the schedule reflected that she had been scheduled to report on April 9, contrary to her observation two days earlier. Furthermore Complainant Weed stated that it appears as if the schedule had been altered. Once again, any conflict in

testimony shall be resolved by the Commission and, in this instance, the conflict shall be resolved in favor of Complainant Weed.

Therefore Complainant Weed has shown, by a preponderance of the evidence, that the proffered reasons are unworthy of credence and pretextual.

The next Complainant in this matter is Donna DePiano. Complainant DePiano has shown a prima facie case by demonstrating

1) that she is a member of a protected class;

2) that she was qualified for the position;

3) that she was terminated; and

4) that she was replaced by someone outside of the protected class.

Since there is no dispute that a prima facie showing exists, we now move to the Respondent's burden to produce evidence of a legitimate, non-discriminatory reason for discharging Complainant DePiano. The Respondent asserts that Complainant DePiano was terminated because she was unavailable for work.

The record indicates that Complainant is employed full time as a research technician, and she applied for a part-time position as a busperson at the Respondent restaurant. Complainant DePiano testified that, when hired, she agreed to work two or three nights a week. After working twelve nights consecutively, Complainant took two days off for a seminar in regard to her permanent position at Wills Eye Hospital. After returning from the seminar, Complainant DePiano worked for six consecutive nights before being involved in an automobile accident. The accident incapacitated the

Complainant for two days, however, the Complainant was not scheduled to work those two days. When she telephoned to inquire about her schedule, she was told that she was terminated.

The record clearly shows that Complainant DePiano was available and willing to work. In fact, as Regional Counsel notes, at one point Complainant DePiano worked eighteen days over a three-week period.

The Complainant (DePiano) has shown, by a preponderance of the evidence, that the proffered explanation given by the Respondent is unworthy of credence or pretextual.

Lastly, we come to Complainant Sally Ann Condo. Complainant Condo has shown a prima facie case by showing:

1) that she is a member of a protected class;

2) that she was qualified to work in the position;

3) that she was terminated;

4) that she was replaced by someone outside the protected class.

The Respondent has met its burden of production by asserting a legitimate non-discriminatory reason for its termination of Complainant Condo. The Respondent contends that Complainant Condo was terminated because she gave away drinks, argued with the chef and came to work late.

Firstly we will turn to the issue of giving away free drinks. Two of Respondent's witnesses (Anthony Pack and Joe DeJohn) allegedly saw Complainant Condo giving away drinks. As indicated with the analysis concerning Complainant Hosbach, it is unclear whether Anthony Pack worked as a bartender during the relevant time period March 28, 1988 - April 20, 1988. Also, as aforementioned, the procedure for accounting for drinks was not clear. The Respondent's witness, Joe DeJohn, stated that he would write the

drink on a separate piece of paper and on the back of the check. At the end of the night, the pieces of paper and the check would be matched. Complainant Condo stated that she was never reprimanded for giving away drinks or for any other reason.

The next reason for the termination of Complainant Condo was that she was arguing with the chef. Apparently, as Respondent witnesses agreed, the food was slow coming out of the kitchen. The record does not indicate that the Complainant was arguing with the chef, but rather was relaying the dissatisfaction of the customers with waiting for their meals. Once again Complainant was never reprimanded for arguing with the chef.

In regard to the Respondent's argument that Complainant Condo was late for work, Complainant Condo states that she was late one time in order to go to the dentist. The Complainant, on that date, worked the dinner shift instead of the lunch. The Respondent did not offer any other evidence indicating any other dates or times when Complainant Condo was late for work. In fact, when Complainant Condo called for her schedule, she was simply told that she was no longer needed at Respondent's restaurant. There was no mention of the Complainant giving away drinks, arguing with the chef, or coming to work late.

The record shows that Complainant Condo was terminated along with the other Complainants, in order to hire male waiters. Complainant Condo has shown, by a preponderance of the evidence, that the Respondent's proffered reason is unworthy of credence or pretextual. Complainant has met her ultimate burden of persuasion by showing that she is a victim of intentional discrimination.

Having shown that all Complainants (Hosbach, Madonna, Weed, DePiano and Condo) have met their burden of persuasion by showing, by a preponderance of the evidence, that the Respondent's conduct violated Section 5(a) on the Pennsylvania Human Relations Act, we now move to the issue of damages. Once there is a finding of unlawful discrimination, a remedy shall be fashioned to grant a Complainant "make whole relief" and to deter future discrimination. PHRC v. Alto Reste Park Cemetery Assn., 453 Pa. 124, 306 A.2d 881 (1973). The Pennsylvania Human Relations Commission has broad discretion when it fashions an award to a Complainant. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985). In the instant case, the Complainants are entitled to back pay awards. In computing any back pay award, the fact that the amount of back pay may not be precise does not warrant denial of back pay. Rasimas v. Michigan Department of Mental Health, 714 F.2d 614 (6th Cir. 1983) cert. denied. 466 U. S. 950 (1984) Furthermore the averaging method may be used to calculate a back pay award. Sennello v. Reserve Life Insurance Company, 872 F.2d 393 (11th Cir. 1989)

Once the Complainant demonstrates damages in the context of a back pay, the Respondent has the burden of proving by affirmative defense that the Complainant failed to mitigate damages. In order to do so, the Respondent must show:

1) the Complainant did not exercise reasonable diligence to mitigate his damages; and
2) there was a reasonable likelihood that Complainant could have secured comparable work by exercising reasonable diligence.

Hanna v. American Motors Corp., 724 F.2d 1300 (7th Cir. 1984) In the instant case the Respondent has not shown that the Complainants have failed

to exercise reasonable diligence in mitigating damages nor has the Respondent indicated any available positions for Complainants.

Therefore we must now move forward to the calculation of damages. It is readily apparent that each of the Complainants should be awarded the cost of their uniform since each Complainant had to purchase a specific type of uniform to work at Respondent's restaurant. The price of the uniform varied with each Complainant.

Each Complainant is entitled to receive back pay from the date of termination April 20, 1988 to March 21, 1990, the first day of the public hearing. The Regional Counsel in this matter has offered in evidence specific figures in reference to the back pay award. The Respondent has not offered any damage evidence in rebuttal. Consequently the back pay award for each Complainant is calculated as the amount each Complainant would have received at the Respondent's restaurant minus any interim wages. In addition, each Complainant shall be reimbursed for the cost of their uniform. Since the Respondent has chosen not to present any figures to rebut Complainant's figures, the back pay awards will be as follows:

Carmella Hosbach, E-43993

Complainant Hosbach shall receive $10,615.48 which is equivalent to the wages and tips she would have received at Respondent's restaurant minus her interim wages at Chip's Restaurant, Russo's and Corned Beef Academy. This figure also includes $132.00 for her uniform and also $100 for the two days of hearing.

Denise Madonna, E-43994

Complainant Madonna shall receive $23,008 which is equivalent to the wages and tips she would have received at Respondent's restaurant minus

her interim wages at Santoro's. The evidence in the record indicates that Complainant Madonna did continue to look for employment. Also the Respondent did not show that the Complainant did not use reasonable diligence.

Teresa Weed, E-43995

Complainant shall receive $26,643.75 which is equivalent to the wages and tips that she would have received at Respondent's restaurant minus her interim wages from catering and the Grape Vine. Complainant Weed also paid $138 for her uniforms. In the public hearing Complainant Weed testified that she was continually seeking employment, and the Respondent did not show that she failed to use reasonable diligence in seeking employment.

Donna DePiano, E-43996

Complainant DePiano shall receive $3,162 which is the equivalent to the wages and tips she would have received at Respondent's restaurant as a part-time employee minus her part-time interim wages. Complainant DePiano paid $130 for her uniforms.

Sally Ann Condo, E-45605

Complainant Condo is entitled to back pay from April 20, 1988 to December 31, 1988. Her wages at the Showboat Casino in Atlantic City exceeded her projected income at Respondent's restaurant. Complainant Condo shall receive $5,019.56 which is the equivalent of her wages and tips at Respondent's restaurant minus her interim earnings at Chip's Restaurant and the Showboat Casino in 1988. She also paid $138 for her uniforms and she shall receive $115 for loss of work in connection with this hearing.

Having found that all Complainants have met their ultimate burden of proving discrimination by a preponderance of the evidence, and having found the appropriate amount of damages, an appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CARMELLA HOSBACH, DENISE MADONNA, TERESA WEED, DONNA DEPIANO, and SALLY ANN CONDO, Complainants	:	
v.	:	Dockets Nos. E-43993
	:	E-43994
RISTORANTE DIGIOVANNI, Respondent	:	E-43995 E-43996
	:	E-45605

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds the Respondent violated Section 5(a) of the PHRA by terminating the Complainants due to their sex, female. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Joint 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 Orders.

By: Phillip A. Ayers
Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CARMELLA HOSBACH, DENISE MADONNA, TERESA WEED, DONNA DEPIANO, and SALLY ANN CONDO, Complainants	:	
v.	:	Dockets Nos. E-43993 E-43994
RISTORANTE DIGIOVANNI, Respondent	:	E-43995 E-43996 E-45605

FINAL ORDER

AND NOW, this 26th day of April 1991, 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 Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S

1. Ristorante DiGiovanni shall pay to Complainant Carmella Hosbach within 30 days of the effective date of this Order, the lump sum of $10,615.48, which amount represents backpay for the period beginning April 20, 1988 and ending March 21, 1990 plus an additional amount of interest of 6% per annum calculated up to the month during which the Public Hearing was held.

2. Ristorante DiGiovanni shall pay to Complainant Denise Madonna within 30 days of the effective date of this Order, the lump sum of $23,000, which amount represents backpay for the period beginning April 20, 1988 and ending

March 21, 1990 plus an additional amount of interest of 6% per annum calculated up to the month during which the Public Hearing was held.

3. Ristorante DiGiovanni shall pay to Complainant Teresa Weed within 30 days of the effective date of this Order, the lump sum of $26,643.75, which amount represents backpay for the period beginning April 20, 1988 and ending March 21, 1990 plus an additional amount of interest of 6% per annum calculated up to the month during which the Public Hearing was held.

4. Ristorante DiGiovanni shall pay to Complainant Donna DePiano within 30 days of the effective date of this Order, the lump sum of $3,162.00, which amount represents backpay for the period beginning April 20, 1988 and ending March 21, 1990 plus an additional amount of interest of 6% per annum calculated up to the month during which the Public Hearing was held.

5. Ristorante DiGiovanni shall pay to Complainant Sally Ann Condo within 30 days of the effective date of this Order, the lump sum of $5,019.56, which amount represents backpay for the period beginning April 20, 1988 and ending March 21, 1990 plus an additional amount of interest of 6% per annum calculated up to the month during which the Public Hearing was held.

6. Ristorante DiGiovanni shall pay additional interest of 6% per annum calculated from the effective date of this Order until payment is made.

7. That within 30 days of the effective date of this Order, Ristorante DiGiovanni shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Pamela Darville in the PHRC Philadelphia Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Robert Johnson Smith
Chairperson

ATTEST:

_____
Russell S. Howell, Assistant Secretary