

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

HARRY MAUGHAN,  
Complainant

v.

WESTMORELAND COUNTY DETENTION CENTER,  
Respondent

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Docket No. E-44080-A

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

HARRY R. MAUGHAN,	)	
Complainant,	)	
	)	Docket No. E-44080-A
v.	)	
	)	
WESTMORELAND COUNTY	)	
DETENTION CENTER,	)	
Respondent.	)	

STIPULATIONS OF FACT

The Pennsylvania Human Relations Commission and Respondent admit the following facts:

1. Complainant, Harry R. Maughan, is an adult male with a reported residence of 405 Cherry Street, New Stanton, Pennsylvania.

2. Complainant is an "individual" within the meaning of §5(a) of the Human Relations Act.

3. Respondent is an employer with more than four (4) employees in the Commonwealth of Pennsylvania.

4. Complainant was employed by Respondent as a part-time and/or a PRN (temporary) corrections officer from June 1986 until June 1988.

5. Complainant filed a complaint with the Pennsylvania Human Relations Commission alleging he was not promoted due to age discrimination.

6. The complaint was filed on February 18, 1988.

7. The Commission made a prompt investigation in connection with the complaint filed by the Complainant.

8. The Commission determined that probable cause existed for crediting the allegations of the complaint.

9. The Commission thereafter endeavored to attempt settlement of the alleged discriminatory practice complained of by conference, conciliation, and persuasion.

10. Kurt Scalzott has been the warden of the Westmoreland County Detention Center since February 1985.

11. There are four (4) areas at the Detention Center: control center, guard station area, intake area, and the day work release center.

12. The day work release center was opened after Complainant was terminated.

13. Duties of the Control Center include inter alia dealing with inmates' visiting family members, screening all incoming calls, placing all outgoing calls; and opening exterior door of the prison.

14. Duties of the Guard Station area include inter alia making cell checks every twenty (20) to thirty (30) minutes; supervising the serving of meals.

15. Duties of the Intake area include inter alia fingerprinting, photographing, strip searching; showering the inmates and logging inmates' valuables; checking the disciplinary segregation lockup cells every fifteen (15) minutes; preparing inmates to go to hearings and checking them in upon return.

16. Before February 1988, Respondent had no written policy regarding the promotion of part-time employees to full-time status and this situation was not covered by contract.

17. Neither County policy nor contract requires promotion by

seniority.

18. Openings for full-time positions are posted by Respondent at the prison, Human Resources Office, Courthouse and Manor.

19. Applicants for a full-time position obtain a bid form from one of the deputies or the Human Resources Offices, complete it, and submit it for consideration. The bidding period is ten (10) days.

20. The County has never evaluated full-time employees.

21. On January 5, 1988, Respondent posted job openings for five (5) full-time Correction Officers.

22. The following is a list of the nine (9) individuals who were employed by the prison and submitted job bid forms, along with their hire dates and birth dates:

		<u>Birth Date</u>	<u>Hire Date</u>
a.	C. Fetchero	08-17-54	02-20-86
✓b.	H. Fontana	08-29-62	08-29-85
c.	G. Gilmore	02-04-50	08-18-85
d.	R. Lowther	03-27-48	06-20-86
e.	H. Maughan	06-18-35	06-08-86
✓f.	C. Perry	02-09-51	03-04-87
✓g.	D. Pilipovich	11-26-56	03-11-87
h.	R. Santia	9-6-50	07-01-87
i.	P. Shadd	04-05-52	12-09-85

23. A total of forty-four (44) County employees bid on the job including nine (9) from the prison.

24. Respondent hired the following five (5) individuals to

fill the full-time Corrections Officer vacancies:

- a. C. Fetchero
- b. H. Fontana
- c. G. Gilmore
- d. C. Perry
- e. P. Shadd

25. All those selected for full-time positions are younger than the Complainant although the exact ages of the applicants were unknown to Warden Scalzott at the time of the selection process.

26. Except for Perry, all others selected for full-time status had more service time than Harry Maughan.

27. At the time of the complaint, the Westmoreland County Prison Board was comprised of the following individuals:

- a. Commissioner Richard E. Vidmer
- b. Commissioner Ted Simon
- c. Commissioner Terry R. Marolt
- d. Sheriff Regis Kelly
- e. President Judge Gilfert M. Mihalich
- f. District Attorney John J. Driscoll
- g. Controller Thomas Tangretti

WESTMORELAND COUNTY  
DETENTION CENTER

Debra M. Nicholson  
Debra M. Nicholson, Counsel  
for Respondent

Betsy E. Griffin  
Betsy E. Griffin, Co-counsel  
for Respondent

DATED Sept 16, 1991

PENNSYLVANIA HUMAN  
RELATIONS COMMISSION

BY Vincent A. Circone  
Vincent A. Circone, Ass't Chief Counsel  
Type/Print Name & Title

DATED September 17, 1991

FINDINGS OF FACT\*

1. The Westmoreland County Detention Center, (hereinafter the "prison"), is a maximum security facility. (N.T. 148)
2. From February 1985 to the present, the warden of the prison has been Kurt Scalzott, (hereinafter, "Warden Scalzott").
3. Warden Scalzott first began working at the prison in 1976 as a part-time correction officer. (N.T. 92)
4. At the time of the Public Hearing, Warden Scalzott was 35 years old. (N.T. 127)
5. There are three categories of correction officers at the prison: full-time, part-time, and per diem. (N.T. 11)
6. Per diem and part-time positions were the same except for schedule differences. (N.T. 95)
7. Part-time officers had set schedules designed to fill schedule gaps and per diem officers filled in when someone was sick or on vacation and were on call 24 hours a day, 7 days a week. (N.T. 15, 94-95)
8. Part-time and per diem officers differed in several ways from full-time officers: (a) part-time and per diem officers were not under a collective bargaining agreement and full-time officers were; (b) only full-time officers had medical benefits; and (c) full-time officers could carry weapons. (N.T. 33, 95)
9. The only requirement to initially become a full-time correction officer was that an applicant have a high school diploma. (N.T. 128)

\* The foregoing "Stipulations of Facts" are hereby 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 Facts. The following abbreviations will be utilized throughout these Findings of fact for reference purposes:

N.T. Notes of Testimony  
R.E. Respondent Exhibit  
S.F. Stipulations of Fact  
J.E. Joint Exhibit

10. The Complainant, Harry Maughan, (hereinafter "Maughan"), began working for the prison in June 1986 as a per diem officer. (N.T. 15)
11. Maughan was a per diem officer for approximately 1 year at which time he became a part-time officer. (N.T. 15)
12. Part-time and per diem officers are periodically evaluated by their supervisors. (N.T. 134, 137; J.E. 5)
13. Prison supervisors who did evaluations consisted of 4 sergeants and two lieutenants. (N.T. 137)
14. Evaluators did not evaluate an officer who had not worked under their supervision during an evaluation period. (N.T. 134)
15. When an officer had "seldom" worked under an evaluator's supervision, an evaluator had broad discretion regarding whether to evaluate or not. (N.T. 134)
16. Evaluators were given no guidelines regarding the evaluation process. (N.T. 135)
17. Although Warden Scalzott testified that evaluations were done every 3-4 months, (N.T. 143), there had been only three evaluation periods between June 1986 and January 1988: approximately (a) September 1986; (b) August 1987; and (c) September 1987. (J.E. 5)
18. Warden Scalzott agreed that many evaluations were done sloppy. (N.T. 133)
19. Many evaluations were unsigned and undated. (N.T. 133; J.E. 5)
20. In effect, Warden Scalzott testified that the evaluations were designed to be general and to provide an evaluator with an opportunity to include a lot of information especially in the comment section. (N.T. 123)
21. Once evaluations were done, they were forwarded to a lieutenant who computed a score. (N.T. 105)

22. The lieutenant then turned the evaluations over to the deputy of operations, Edward A. Nicola, (hereinafter "Nicola") (N.T. 105)
23. Nicola then forwarded the evaluations to Warden Scalzott who reviewed them and returned them to Nicola. (N.T. 105)
24. At this point Nicola was assigned the task of interviewing the evaluated officers. (N.T. 105)
25. The interview was designed to indicate an officer's strong and weak areas, answer questions, and get both sides of the performance pictures painted by the evaluators. (N.T. 124, 136)
26. Evaluations were not shown to persons evaluated. (N.T. 132, 136)
27. Maughan was neither told who was evaluating him nor ever given an opportunity to contest an evaluation. (N.T. 28)
28. Maughan testified without contradiction that he had only been called to Nicola's office on one occasion, at which time he was told his evaluation score was 97, that he was doing a good job - keep it up, and that there is room for improvement. (N.T. 27)
29. Maughan was never told he was not satisfactorily performing his assigned duties. (N.T. 12)
30. Warden Scalzott's testimony indicated Maughan was doing his job in a satisfactory manner. (N.T. 122, 128)
31. Maughan testified that he had had an opportunity to work with all other per diem and part-time officers and that, in his opinion, he did as good a job as the others. (N.T. 52)
32. Maughan termed his performance as doing a "fair job - a decent job." (N.T. 42)



33. Maughan further testified that although inmates had complained about other officers, Maughan was unaware of an inmate complaint about him. (N.T. 15)

34. Maughan was never informed there had been any complaints against him, or that he had a problem with appearance or attitude. (N.T. 12-13, 29)

35. January 5, 1988, the prison posted job openings for five full-time correction officers. (N.T. 96; S.F. 21)

36. A total of 44 individuals bid on the openings. (S.F. 23)

37. The 44 individuals bidding were listed on a bid summary sheet. (J.E. 3tt)

38. Of the 44 individuals bidding, 9 were part-time/per diem correction officers at the prison, the remaining 35 were county employees from other departments. (S.F. 23)

39. The bid summary sheet listed the 9 officers separate from the other 35 applicants. (J.E. 3tt)

40. In effect, Warden Scalzott only considered the 9 officers for the 5 full-time positions. (N.T. 99, 152)

41. The bid summary sheet listed an applicant's seniority date/date of hire. (J.E. 3tt)

42. Article XVI, Section 1 of the collective bargaining agreement between Westmoreland County and AFSCME, AFL-CIO, Council 83 (Prison), states:

As far as practical, vacancies shall be filled by the promotion of employees already in county service who possess the established minimum qualifications for the positions. The promotion of an employee shall be in recognition of the employee's demonstrated competence to perform more responsible

work and shall be based upon his actual assignment to a position of increased difficulty and responsibility. A promotion shall not take place solely on the basis of seniority or primarily to increase an employee's pay.

(J.E. 11)

43. Warden Scalzott testified that the criteria he used to reach his decision about who would be recommended for promotion included:

- (a) reviewing performance evaluations, including any comments made; and
- (b) his and Nicola's personal observations regarding an applicant's:
  - (1) ability to get along with peers and inmates;
  - (2) initiative;
  - (3) appearance; and
  - (4) ability to learn and understand the job.

(N.T. 102, 103-104, 121)

44. Warden Scalzott's recommendations are reviewed by the 3 County Commissioners who either approve or disapprove the warden's recommendations.

(N.T. 101-102)

45. The prison had no written policy regarding a promotion process. (N.T. 124)

46. Warden Scalzott testified that at the time he was considering who to recommend for promotion, he reviewed the bid summary sheet, each applicant's job interest form, and a packet of evaluations for each of the 9 officers who had applied for a promotion. (N.T. 99, 152)

47. Warden Scalzott testified that he ignored the seniority information on the bid summary sheet. (N.T. 100, 116, 125)

48. In order of seniority, the bid summary listed the following nine officers:

Name	Date Hired
(a) G. Gilmore	08-18-85
(b) H. Fantana	08-29-85
(c) P. Shadd	12-09-85
(d) C. Fetchero	02-20-86
(e) H. Maughan	06-08-86
(f) R. Lowther	06-20-86
(g) C. Perry	03-04-87
(h) D. Pilipovich	03-11-87
(i) R. Santia	07-01-87

(J.E. 3tt)

49. Warden Scalzott recommended the following five officers for full-time positions:

- (a) Gilmore
- (b) Fantana
- (c) Shadd
- (d) Fetchero
- (e) Perry

(S.F. 24)

50. At the time of the recommendation, the age of the five officers recommended by Warden Scalzott was as follows:

- (a) Gilmore - 37
- (b) Fontana - 25

(c) Shadd - 35

(d) Fetchero - 33

(e) Perry - 37

(S.F. 22)

51. Warden Scalzott testified that a new employee's first evaluation did not carry much weight. (N.T. 142)

52. Warden Scalzott further testified that he looked more for a steady increase in an officer's scores. (N.T. 142)

53. Between 1976 and just prior to the January 1988 promotions, 17 of 20 promotions to full-time correction officer were of employees with seniority. (J.E. 6)

54. Of the 5 promotions in January 1988, 4 were of employees with seniority. (S.F. 22, 24, 26)

55. Only Perry had less seniority than Maughan and Lowther, another employee not selected. (S.F. 22)

56. At the time of the promotions, Maughan was 52 years old and Lowther was two months short of 40 years old. (S.F. 22)

57. Overall, a comparison of the Evaluations of Maughan and of Perry reflect that Maughan's scores were at least as good if not better than Perry's. (J.E. 5)

58. Only one of Maughan's first evaluations, dated September 11, 1986 contained a performance related comment. (J.E. 5A-4)

59. This September 11, 1986 evaluation was conducted by Sgt. Kamer, a supervisor who indicated Maughan had seldom worked for him in the evaluation period. (J.E. 5A-4)

60. Sgt. Kamer noted Maughan "is a know it all, not very well accepted by other officers." (J.E. 5A-4)

61. After learning they had not been selected for promotion Maughan, Pilipovich and Lowther went to the Chairperson of the Commission, Mr. Vidmer, to ask why they had not been promoted. (N.T. 18, 74, 75)

62. At one point in his testimony Maughan indicated Vidmer did 99% of the talking and that Maughan had said only a few words and was polite. (N.T. 74, 75)

63. Later in his testimony Maughan indicated he did not say anything to Vidmer. (N.T. 76)

64. A portion of an affidavit submitted by Pilipovich states:

"Once Commissioner Vidmer arrived he and his secretary entered his office and when his secretary came out of his office we entered. Mr. Maughan and Mr. Lowther sat in the two (2) chairs across the desk from the Commissioner and I sat in a chair by the door. Mr. Lowther and Mr. Maughan questioned the Commissioner. After a few questions and responses [sic] the exchange became louder. Commissioner Vidmer then stood up behind his desk and made a very loud comment. At this time Mr. Maughan also stood and loudly responded to the Commissioner. They were both slightly leaning over the desk and were facing each other. Commissioner Vidmer then excused us because he was late for a meeting and we left.

Later in the day we saw Warden Scalzot [sic], and a day or two later I went into Warden Scalzot's [sic] office and apologized."

(R.E. 1)

65. Warden Scalzott testified that Vidmer told him that Maughan had threatened him. (N.T. 118)
66. Warden Scalzott also testified that upon learning of what occurred at the meeting with Vidmer, Warden Scalzott told Vidmer he would fire all three for insubordination, however, Vidmer said to hold off. (N.T. 118)
67. Shortly after their meeting with Vidmer, Maughan, Pilipovich and Lowther met with Warden Scalzott who was cooperative and let them see their hiring dates and evaluations. (N.T. 21)
68. At this meeting, Warden Scalzott told Pilipovich "You of all people have no right to question, you know, why you weren't hired. You weren't even as old as Perry." (N.T. 21)
69. Approximately 5 months after Maughan was not promoted, another full-time correction officer position came open. (N.T. 23)
70. Maughan bid on the opening and approximately 2-3 days later was terminated. (N.T. 23)
71. On or about June 15, 1988, Warden Scalzott informed Maughan he was being terminated because of his insubordination at the prior meeting with Vidmer. (N.T. 24)
72. Warden Scalzott told Maughan he had threatened Vidmer. (N.T. 24)
73. Prior to terminating Maughan, Warden Scalzott spoke to Vidmer who told Warden Scalzott that he would not approve a promotion for Maughan. (N.T. 119, 131)
74. Warden Scalzott advised Vidmer that the purpose of part-time is to train individuals to move up to full-time and that if Maughan was never going to be promoted it was not a good idea to keep him because, by doing so, Maughan would be taking a training position from someone else. (N.T. 131, 132)

75. With that, Vidmer agreed to Maughan's termination. (N.T. 132)

76. On June 20, 1988, following his termination, Maughan filed a PHRC complaint alleging his termination was in retaliation for previously filing the age-based allegation of failure to promote. (J.E. 12)

77. By letter dated June 17, 1990, Maughan was notified that after an investigation of the retaliation allegation, his claim was being closed because probable cause could not be established. (J.E. 13)

78. By letter dated August 29, 1990, EEOC notified Maughan that after a review of the PHRC's findings, the EEOC was discontinuing its processing of Maughan's retaliation allegation. (J.E. 14)

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and the PHRC have fully complied with the procedural prerequisites to a public hearing in this case.
3. Harry Maughan is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. Westmoreland County Detention Center ("the Prison") is an employer within the meaning of the PHRA.
5. Maughan has established a prima facie case of an age-based refusal to promote by showing:
  - (a) he is a member of a protected class;
  - (b) he was qualified for an available full-time correction officer position;
  - (c) he was not promoted despite his qualifications; and
  - (d) a full-time position was filled by an individual under the age of 40 who had either less or comparable qualifications.
6. The Prison articulated a legitimate nondiscriminatory reason why Maughan was not promoted.
7. Maughan established that the Prison's articulated reasons for not promoting Maughan were a pretext for age-based discrimination.
8. Section 9 of the PHRA gives the PHRC broad discretion to order relief after a finding of discrimination.



## OPINION

This case arises on a complaint filed on or about February 18, 1988 by Harry R. Maughan, (hereinafter "Maughan") against Westmoreland County Detention Center, (hereinafter "the Prison") with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). Maughan's complaint alleged that he was not selected for promotion to a full-time position because of his age. This age-based allegation alleges a 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").

PHRC staff investigated the allegation and at the investigation's conclusion, informed the prison that probable cause existed to credit Maughan's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion but such efforts proved unsuccessful. Subsequently, the PHRC notified the prison that it had approved a Public Hearing.

The Public Hearing was held on September 25, 1991, in Greensburg, PA., before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Vincent Ciccone, Esquire. Betsy Griffin, Esquire, and Debra Nicholson, Esquire, appeared on behalf of the prison. Following the Public Hearing, the parties were afforded an opportunity to submit briefs. Both the post-hearing brief on behalf of the complaint, and the brief for the prison were received on February 18, 1992.

Regarding Maughan's substantive allegation, we recognize that the nature of his claim presents an allegation of disparate treatment. In a disparate treatment case, in the case of Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the PA Supreme Court clarified the order and allocation of burdens first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The PA Supreme Court's guidance indicates that a Complainant must first establish a prima facie case of discrimination. If a 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]." If the Respondent meets this production burden, in order to prevail, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. 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. Burden, 450 U.S. 248, 256 (1981).

The PA Supreme Court also indicated that if a Complainant "produces sufficient evidence that, if believed and otherwise unexplained indicates that more likely than not discrimination has occurred, the [Respondent] must be heard in response." If the Respondent fails to respond the presumption of discrimination created by the prima facie showing stands determinative of the factual issue and the Complainant must prevail. However, when a Respondent offers a non-discriminatory explanation for its actions, the presumption of discrimination drops off. Allegheny Housing Authority, Supra

Following its instruction on the effect of a prima facie showing, and a successful rebuttal thereof, the PA Supreme Court then articulated principles which are useful in the ultimate resolution of this matter. The Court stated that:

[A]s in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes." Aikens, 460 U.S. at 716, 103 S.Ct. at 1482. The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does preponderate to prove discrimination. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." Allegheny Housing Authority, Supra at 319.

In this court designed tripartate burden allocation, Maughan must, of course, first establish a prima facie case by a preponderance of the evidence. Since McDonnell Douglas, Supra, was a race-based refusal to hire case, the literal phrasing of the prima facie burden articulated in McDonnell Douglas does not precisely fit the act of harm alleged by Maughan. Accordingly, the McDonnell Douglas proof pattern must be slightly adapted to fit the factual variance presented by the allegation raised in the instant case.

To establish a prima facie case of a failure to promote Maughan into a full-time correction officer position, Maughan must establish:

1. That he is a member of a protected class;
2. That he was qualified for a position which was available;
3. That despite his qualifications, he was not promoted to a full-time position; and
4. That an available full-time position was filled by an individual with either less or comparable qualifications who was not a member of the protected class.

PHRC v. Johnstown Redevelopment Authority, Pa. , 588 A.2d 497 (1991).  
See also, Stancil v. Clayton, 30 FEP 730 (DCDC 1978); and Garner v. Boorstin, 690 F.2d 1034, 29 FEP 1765 at 1767 n. 4 (D.C. Cir. 1982).

Clearly, Maughan is a member of a protected class, as he was 52 at the time he was not selected in January, 1988. Maughan also applied and was qualified for a full-time correction officer position as the only initial requirement for the position was a high school diploma.

Clearly, there had been five openings for full-time correction officers and despite being qualified, Maughan was not selected for promotion. Accordingly, Maughan easily meets the first three elements of the requisite prima facie showing.

The fourth element of Maughan's prima facie showing requires a detailed analysis. The five correction officer openings were filed by five individuals who were either part-time or per diem correction officers at the prison. Although there had been 44 applicants, only 9 were either part-time or per diem correction officers. The remaining 35 applicants were county employees from other departments and facilities. Effectively, unless an applicant had been a part-time or per diem correction officer, they were not even considered.

Of the 9 applicants who were considered, Maughan's prima facie burden is to prove by a preponderance of the evidence that he was either more qualified or at least as qualified as at least one of the five who had been selected for a full-time position. In order of date of hire, the nine individuals considered for full-time employment were:

<u>Name</u>	<u>Date of Birth</u>	<u>Date of Hire</u>
1. G. Gilmore	02-04-50	08-18-85
2. H. Fontana	08-17-54	08-29-85
3. F. Shadd	04-05-52	12-09-85
4. C. Fetchero	08-17-54	02-20-86
5. H. Maughan	06-18-35	06-08-86
6. R. Lowther	03-27-48	06-20-86
7. C. Perry	02-09-51	03-04-87
8. D. Pilipovich	11-26-56	03-11-87
9. R. Santia	09-06-50	07-01-87

The five part-time or per diem correction officers selected for full-time positions were: Gilmore; Fontana; Shadd; Fetchero, and Perry. While Maughan was over 40, all of the selectees were under 40.

The evidence presented at the Public Hearing established that the method of selecting persons to fill the full-time correction officer positions was highly subjective. On this account, it is well settled that subjective standards applied to the evaluation of employees are subject to close scrutiny and to be viewed with "particular suspicion." Newport Township v. P.H.R.C., 551 A.2d 1142 (Pa. Commonwealth Ct. 1988); U.S. v. Hazelwood School Dist., 534 F.2d 805, 12 FEP 1161 (8th Cir. 1976).

In effect, Warden Scalzott testified that evaluations of employees prepared by himself and supervisors at the prison were the single most important factor in the promotion process. However, in preparing evaluations, supervisors had been given no instruction on what to look for when evaluating an employee. Supervisors evaluated employees for periods when they had "seldom" supervised an employee, and some evaluations were both unsigned and undated. In general, even Warden Scalzott had to agree that the evaluation process could be termed "sloppy".

Of the evaluations submitted as evidence in this case, a comparison of Maughan with Perry reveals that Maughan was at least as qualified if not better qualified than Perry for promotion to a full-time correction officer position. Maughan was first hired in June 1986 while Perry was not hired until March, 1987.

Prior to the promotions in January 1988, there had been several general evaluation periods applicable to Maughan and Perry: August and November 1987. Additionally, before Perry was hired, Maughan had also been evaluated in September 1986.

Beginning with dated and signed evaluations which were closest to the promotions, useful evaluations for Maughan in November 1987 reflect overall evaluation scores of 81 and 90, for an average score of  $85\frac{1}{2}$ . Perry's November useful evaluation scores were 96, 84, 55, and 67, for an average score of  $75\frac{1}{2}$ . Dated and signed evaluations for August 1987 reflect scores for Maughan of 97, 98, and 100, for an average of  $98\frac{1}{3}$ . Perry's useful August scores were 84, 65, 97, and 99 for an average score of  $86\frac{1}{4}$ .

Of particular interest is the score of 55 given to Perry just two months before he was promoted. Warden Scalzott testified that a person's first evaluation does not carry much weight and what he looked for was a steady increase in scores. Applying this criteria to Perry's evaluation scores, three of Perry's supervisors reduced Perry's scores from August 1987 to November 1987: Matsey scored Perry at an 84 in August 1987 and a 55 in November 1987; Whirlow scored Perry at 97 in August and 84 in November; and Stepanovich's score in August of 99 went to 96 in November.

Some of Maughan's scores also fell during this period but, arguably, not as far: Matsey in August scored Maughan at 97 and a 90 in November; Whirlow reduced Maughan from a 98 to an 81. Numerically, Maughan's scores did not fall as far as Perry's scores. Furthermore, unlike Perry, Maughan had not been given a really low score 2 months before the promotions occurred.

When evaluating whether each element of a prima facie case has been shown, we are mindful that "the burden of establishing a prima facie case of disparate treatment is not onerous." PHRC v. Johnstown Redevelopment Authority, Pa. , 588 A.2d 497 (1991), citing, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). As a whole, the evidence presented in this case is sufficient to establish the fourth element of the requisite prima facie showing. Accordingly, Maughan successfully established a prima facie case.

Having determined that a prima facie case has been shown, we turn to the question of whether the Respondent has articulated a legitimate non-discriminatory reason for not promoting Maughan. Warden Scalzott's testimony arguably meets the Respondent's production burden in this regard.

Warden Scalzott testified that his recommendation was based on more than the scores of an employee's performance evaluation. Warden Scalzott testified that he also considered his personal observations and the observations of his deputy of operations, Edward A. Nicola. Additionally, Warden Scalzott indicated the following factors were also considered: (1) ability to get along with co-workers and inmates; (2) initiative; (3) appearance; and (4) ability to learn and understand the job.

First, we recognize that the additional articulated criteria depends almost entirely upon the subjective evaluation of Warden Scalzoff and his deputy. Second, we also recognize that subjective criteria like that, said to have been applied to the applicants for promotion in this case, can provide a ready mechanism for discrimination, much of which could easily be covertly concealed and unknown to an ultimate decision maker. Despite these potentially justifiable concerns, however, we find that the



Respondent has met its burden of production and has articulated a legitimate non-discriminatory reason for not promoting Maughan.

At this point, we turn to an inquiry of whether Maughan can meet his ultimate burden of persuasion that the Respondent's articulated reasons are pretextual. On this issue, the totality of the evidence presented leads to the conclusion that Maughan has met his ultimate burden.

There are a number of factors which guide us to this result. First, there is the compelling evidence that when Warden Scalzott was contemplating who to recommend for promotion, he was provided with specific information regarding each applicant's date of hire. Although Warden Scalzott indicated he ignored this information, no reason was attempted regarding why this information was put on the bid summary sheet if it was not deemed useful information.

Warden Scalzott's testimony about seniority was that it would only be used as a last resort when there was a virtual tie. This position varies significantly with a provision in the union contract which indicates promotions shall not take place solely on the basis of seniority. Clearly, seniority is intended to play a role in the promotion process, just not the only role. The evidence, while not exact, points out that between 1976 and January 1988, 21 of 25 promotions to full-time correction officers were awarded to individuals with seniority. Of the 5 January 1988 promotions 4 of 5 went to officers with the greatest amount of seniority. Maughan, age 52, and another officer, 2 months shy of age 40, were passed over while a less senior individual, age 37 was promoted.

Added to this factor, is the testimonial evidence given by Warden Scalzott regarding Maughan's work performance. Warden Scalzott on two occasions noted that he considered Maughan's work performance to be satisfactory. In fact, Warden Scalzott even noted that although Maughan's evaluation scores had been reduced by several of his supervisors, Warden Scalzott perceived no change in Maughan's satisfactory performance.

This testimony is significant when compared to Warden Scalzot's articulation of the factors he used as criteria for promotion. Warden Scalzott's testimony suggests that along with a review of all of an applicant's evaluations, Warden Scalzott also weighed his own personal observations. Apparently, Warden Scalzott had personally perceived Maughan's performance was better than the perceptions held by several of Maughan's supervisors. Clearly, Warden Scalzott noted a reduction in several scores but he himself felt Maughan's satisfactory performance had not changed.

Along the same line, Warden Scalzott made some attempt to articulate how certain extra factors he said he considered differed from factors already covered in the evaluation forms used by his supervisors. For instance, Warden Scalzott indicated added factors he considered were initiative and appearance. Evaluation forms already contained categories for willingness to work, overall ability to work...without direct supervision, and personal appearance on duty. There appears to be little, if any, difference between the factors that Warden Scalzott said were additional factors and factors already covered by the evaluation forms. Warden Scalzott's effort to distinguish factors fell completely apart when

he noted that the evaluation forms were intended to be general and that the comment section was designed to provide evaluators with the opportunity to include a lot of additional information.

Maughan gave un rebutted testimony that Vidmer told him, Pilipovich and Lowther that the criteria for promotion was an officer's evaluations. Had there been extra criteria, Vidmer would certainly have known of it and, when asked, he would have told Maughan what it was. We recognize that the use of subjective measures of qualifications allow the person conducting the qualification analysis to inject his or her own impermissible biases, whether intentionally or unintentionally, into the qualification determination. Here, close scrutiny must be given to the prison's entire evaluation process. The process was run literally with no guidance. Supervisors were given no instructions on completing evaluations. The fact that supervisors who seldom supervised officers were afforded the use of their personal discretion whether to evaluate an officer or not can easily be a fertile ground for covert forms of discrimination. In the prison's evaluation process there were no real safeguards designed to uncover and avert discriminatory practices.

In the words of Warden Scalzott, the evaluation process was sloppy. Evaluations were unsigned and undated. Warden Scalzott offered some general approaches he took when looking at evaluations. In effect, Warden Scalzott said that new hires first evaluations carried little weight. What he was interested in was an indication of steady progress. Warden Scalzott also indicated evaluations were done approximately every 3-4 months.

Regarding the timing of evaluations, Warden Scalzott's recollection differs significantly from the evidence presented. Basically, Joint Exhibit 5 reveals three instances of evaluations before the January 1988 promotions: September 1986, August 1987, and November 1987, (far less than every 3-4 months). Both Perry and Maughan were evaluated in August and November 1987. The comparisons made earlier in this opinion reveal that Maughan's scores both exceed Perry's and did not fall as far between August and November 1987. Generally, for some unexplained reason, a careful review of the August and November 1987 evaluations of all those who were promoted reflects declining scores for everyone. To single Maughan out for falling scores totally ignores the simple fact that everyone's scores had fallen.

Regarding the idea that an officer's first scores carry little weight, it was a first evaluation given to Maughan which contained an arguably negative comment. If Warden Scalzott's own description of the impact of that evaluation had been applied, the negative comment should have carried very little weight. Furthermore, the weight of the comment should have been further reduced because it was given by a supervisor who had indicated he seldom supervised Maughan.

One would believe that a much more significant evaluation incident occurred with Perry. In his November 1987 evaluations, one of his supervisors, Sgt. Matsey, had reduced his score to 55. Matsey had given Perry an 84 in August 1987. Clearly, Warden Scalzott could not have overlooked the point that Perry had received such a low score just 2 months before he was promoted.

Finally, there is one additional piece of testimony which needs to be mentioned on the question of pretext. Maughan testified without rebuttal that after he was not promoted and after his meeting with Vidmer, Maughan, Pilipovich, and Lowther met with Warden Scalzott. Maughan indicated that when speaking to Pilipovich, Warden Scalzott stated, "you of all people have no right to question, you know, why you weren't hired you weren't even as old as Perry." (N.T. 21). At the time of the promotions, Perry was 37 and Pilipovich was 31.

The precise impact of Warden Scalzott's statement is unclear, however, it does support the idea that he was generally aware of the ages of those up for consideration for promotion. Furthermore, the Warden's comment can be read to suggest that he was aware that Pilipovich did not have the basis for a complaint, but Warden Scalzott recognized Maughan did.

For all these reasons, we determine that Maughan has met his ultimate burden of proof in this case. Accordingly, we turn to the issue of appropriate damages.

Section 9(f) of the PHRA provides in pertinent part that if the PHRC finds discrimination, the PHRC may require a Respondent both to cease and desist from an unlawful discriminatory practice and to take affirmative action, including, reinstatement or upgrading an employee, with or without backpay. The general function of fashioning a remedy is to place a victim of discrimination in the position he/she would have attained absent an incident of discrimination. Abermarle Paper Company v. Moody, 422 U.S. 405 (1975); PHRC v. Transit Casualty Insurance Company, 478 Pa 430, 387 A.2d 58

(1978). Further, the PA Supreme Court has declared that the PHRC has broad discretion when fashioning an award. Murphy v. PHRC, 506 Pa 549, 486 A.2d 388 (1985).

First, it is clear that a general cease and desist order is appropriate. What is generally unclear in this case are the issues of whether backpay should be awarded, and if so how much, and whether reinstatement into a correction officer position is appropriate.

In this case, the point at which Maughan began to be affected by the discriminatory denial of a promotion was January 18, 1988, the date he was notified that he had not been selected for promotion. The real questions in this matter are when should the period of back pay terminate, and for the period of back pay determined to be appropriate, how much wages did Maughan actually lose.

The PHRC regional office brief on behalf of the complaint generally argues that the Complainant is entitled to back pay from January 1988 to the date of the PHRC's final order. The Respondent's brief generally argues that if discrimination is found, the Respondent should not be liable for damages after June 1988 when Maughan was terminated.

Factually, this gigantic split of opinion between the parties arises because Maughan's employment was terminated by the prison in June 1988. At the Public Hearing, and in the form of argument in a brief, some effort was made by PHRC counsel to suggest that the reasons the prison gave for Maughan's termination "do not withstand scrutiny." The Respondent's brief argues that Maughan's termination was not the subject of the Public

Hearing's litigation. The circumstances surrounding Maughan's termination had been previously investigated by the PHRC and Maughan's complaint regarding his termination was dismissed because probable cause could not be established.

Clearly, the evidence reveals that Maughan had filed a PHRC complaint alleging his termination had been discriminatory. Equally clear is the fact that after an investigation by the PHRC, a determination was made that cause could not be established regarding the alleged discriminatory termination.

The Public Hearing on the promotion issue cannot now become a back door entrance for litigation over the alleged discriminatory termination. The Respondent's evidence indicating the termination allegation had been previously closed is sufficient to establish that Maughan's termination was done for reasons which were non-discriminatory. We have no alternative but to be consistent with the PHRC's prior assessment and now find Maughan's termination was for cause which was non-discriminatory.

The PHRC regional office brief cites the case of Brady v. Thurston Motor Lines, Inc. 753 F.2d 1269 (4th Cir.) which generally addressed the issue of whether a back pay period should be cut off when an individual, who was discriminatorily discharged, is subsequently fired for cause from a job which had been found after the discriminatory discharge. Although not found exactly on point, this case illustrates some good reasons why back pay liability should cease in this case at the point of Maughan's termination in June 1988.

One unimportant yet fundamental difference between this case and Brady is simply that in Brady, the Complainants were discharged from subsequent employment, while Maughan still worked for the same employer which had discriminated against him. The important similarity is that in each case an individual who had suffered discrimination was subsequently discharged for cause.

In effect, Brady termed discharges from subsequent employment as a failure of the duty to exercise reasonable diligence to mitigate damages. More precisely, a discharge for cause amounts to a lack of reasonable diligence in maintaining employment.

The Brady court's reasoning for limiting back pay liability in cases of discharges for cause is sound. Back pay is essentially designed as a make whole remedy. Discriminating employers are made responsible only for losses suffered by a Complainant as a result of an act of discrimination. Back pay liability should not increase as a result of a loss incurred as a result of a Complainant's conduct. To hold that an employer is liable for losses incurred due to an employee's subsequent non-discriminatory termination for cause would render such a holding punitive. Back pay provisions of the PHRA are designed to be compensatory and remedial in nature and not punitive.

Before applying these principles to the facts of this case we must observe one additional factor. At the time of Maughan's discharge, the prison was about to promote another part-time correction officer to a full time position. Arguably, Maughan may have been selected had he not had the earlier conflict with Commissioner Vidmer in January 1988. However, it is also arguable that Maughan may not have been selected in June 1988.



Evidence in this case reveals that the position of part-time officer was used as a training mechanism before promotion to full-time. Some part-time officers whose performance negated the potential for promotion had been discharged. Maughan's performance would have ultimately resulted in his promotion. The only question is when. Applying our discretion, we conclude Maughan's promotion would have occurred no later than January 1989. This factor is important because in June 1988 Maughan's wages were, of course, less as a part-time correction officer than they would have been had he been properly promoted in January 1988. Accordingly, between June 1988 and January 1989, the prison's back pay liability for compensatory reasons is the difference between what Maughan was earning at the time of his discharge and the amount he would have been earning had he been a full-time officer.

From the limited evidence submitted, a discretionary estimate of the back pay difference must be computed. In making this computation, two major principles are entertained: (1) unrealistic exactitude is not required; and (2) uncertainties should be resolved against a discriminating employer. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 7 FEP 1115 (5th Cir. 1974).

Of course, full-time correction officers work a full week. Part-time officers work less than a full week. Looking at Perry and Maughan's W-2's for tax year 1988, a back pay remedy can be fashioned. In 1988, Maughan earned \$2,476.54 for part-time work at the prison between January 1988 and June 1988: Approximately  $\frac{1}{2}$  of a year. Perry's 1988 wages were \$18,578.77. Of course, Perry was a full-time officer for nearly all of 1988.

We find that had Maughan been promoted in January 1988 his 1988 wages would have been \$18,578.77. Since Maughan did earn \$2,476.54 between January 1988 and June 1988, we must first reduce the \$18,578.77 by \$2,476.54: this equals \$16,102.23. Next, we must again reduce the back pay amount by the approximate amount Maughan would have earned had he not been terminated for cause. Accordingly, we find that had Maughan not been terminated he would have made an additional \$2,476.54. Reducing \$16,102.23 by the additional \$2,476.54, Maughan lost a total of \$13,625.69 in awardable back pay in 1988. Accordingly, this amount reflects wages lost by reason of the Respondent's discrimination.

Since we previously observed that had Maughan not had the negative confrontation with Vidmer he would have been promoted to full-time not later than January 1989, this effectively cuts off the prison's back pay obligation at that point. Obviously, this date could be earlier but, as noted, this uncertainty has been resolved against the prison.

On another back pay remedial issue, the evidence reveals that had Maughan been promoted in January 1988 he would have received medical benefits. As a part-time officer, medical benefits were not provided. In 1988, Maughan incurred hospital expenses. Had Maughan been promoted, these expenses would have been paid by the prison's insurance. In May/June 1988 Maughan was hospitalized for approximately 1 week for pneumonia. Of the total bill of \$3,566.68, assistance paid \$2,881.64 leaving Maughan with an out-of-pocket medical expense of \$685.04. This amount added to the lost wages equals Maughan's total back pay award. Additionally, the PHRC is authorized to award interest at the rate of 6% per annum. Goetz v. Norristown Area School District, 16 Pa Commonwealth Ct. 389, 328 A.2d 579 (1975).

Joint Exhibits 7 and 17 list numerous prescriptions obtained by both Maughan and his wife, however, no occasion of a bill for prescriptions listed on Joint Exhibits 7 and 17 was prior to 1989. Once again, since Maughan's own actions resulted in his not being ultimately promoted to full-time not later than January 1989, medical expenses incurred beyond January 1989 will not be awarded in this case.

As a final matter, Maughan's termination for cause in June 1988 also prevents an order mandating his instatement as a full-time officer. Relief is, therefore, ordered as specified in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

HARRY MAUGHAN,  
Complainant

v.

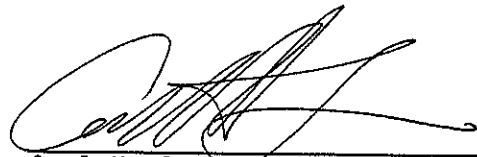
WESTMORELAND COUNTY DENTENTION CENTER,  
Respondent

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Docket No. E-44080-A

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 proven discrimination in violation of §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.



Carl H. Summerson  
Permanent Hearing Examiner

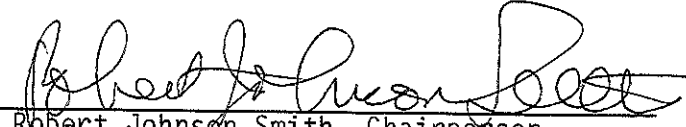


3. That the Respondent shall pay additional interest of 6% per annum calculated from January, 1988 until payment is made.

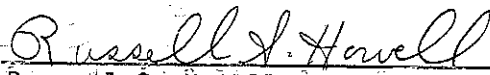
4. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Vincent Ciccone, Esquire, in the PHRC Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

  
Robert Johnson Smith, Chairperson

ATTEST:

  
Russell S. Howell, Assistant Secretary