COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

EUGENE J. COBBS, Complainant:

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Respondent

DOCKET NO. E-100377-AD

FINDING OF FACT

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OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

DISSENTING OPINION

FINDINGS OF FACT*

1. The Complainant herein is Eugene J. Cobbs, (hereinafter "Cobbs"), an African American. (S.F. 1#1)
2. The Respondent herein is Southeastern Pennsylvania Transportation Authority, (hereinafter "SEPTA") (S.F. 1#2)
3. SEPTA's hiring process generally includes assignment of a SEPTA recruiter; identification of a job opening; submission of a requisition to fill an opening to SEPTA's Administration Department; Administration sending the requisition to the Personnel Department; SEPTA's office of Equal Employment Opportunity/Affirmative Action, (hereinafter "EEO & AA"), reviewing requisitions to determine whether, under SEPTA's affirmative action goals, a vacancy is underutilized as to minority representation; if underutilization of minorities is noted, the requisition form is annotated with that information; the opening is posted* 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, February 20, 2003
N.T. 2	Notes of Testimony, March 25, 2003
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit
J.E.	Joint Exhibit
S.F. 1	Stipulations of Fact, dated November 1, 200
S.F. 2	Stipulations of Fact dated February 14, 2003
S.F. 3	Stipulations of Fact dated March 25, 2003

Inquirer want ads; applications are received and reviewed by the assigned recruiter to insure applicants meet the minimum qualifications; where appropriate, those applicants who meet the minimum qualifications are tested; for those passing the test, the recruiter does a driver's license check; those who check out are then called in for an interview; the personnel office prepares folders for applicants scheduled for an interview which contain an applicant's resume and application; interviewers are selected and all they know is what is in an applicant's resume and application and that they passed the initial test. (N.T. 119, 120, 152, 158, 165, 166, 167, 168).

4. In early 2000, one of SEPTA's twelve Plumbers-First Class retired creating an opening. (N.T. 150).
5. At the time, all of SEPTA's Plumbers were white. (N.T. 120, 121, 252; CE 9).
6. In 2000, the position of Plumber-First Class was part of SEPTA's job group 1st Class Mechanics. (N.T. 254).
7. SEPTA's recruiter for the 2000 open Plumber-First Class opening was Recruitment Manager Susan Flower, (hereinafter "Flower"). (N.T.164,168, S.F. 2 # 4, 5).
8. A requisition form was submitted for the open Plumber-First Class position. (N.T. 121; C.E. 10).
9. Cobbs, a master plumber with 33 years plumbing experience, learned of SEPTA's opening in the want-ads in the Philadelphia Inquirer. (N.T. 28, 29, 31, 34, 74-75; S.F. 2 # 3)
10. On January 16, 2000, Cobbs sent SEPTA his resume. (N.T. 34, 74-75, 171; S.F. 2 # 6).
11. John Antrim, (hereinafter "Antrim"), William King, (hereinafter "King"), and Kenneth Sonsini, (hereinafter "Sonsini"), also applied for the 2000 Plumber-First Class opening. (S.F. 2 # 7).
12. Antrim, King, and Sonsini are each white. (N.T. 140; S.F. 2 #'s 28, 33, 35).
13. Applicants for the Plumber-First Class position are required to take a written test. (S.F. 2 # 8).
14. Cobbs, Antrim, King, and Sonsini took SEPTA's Plumber-First Class written test. (N.T. 48; S.F. 2 #'s 11, 14, 15, 19).
15. Only Antrim initially passed the test. (S.F. 2 #'s 11, 14, 15, 19).
16. After being permitted to re-take the test, Cobbs, King, and Sonsini, passed the test. (N.T. 49; S.F. 2 #'s 13, 18, 21).
17. David Abell, (hereinafter "Abell") is SEPTA's Assistant Director of Maintenance. (N.T. 117; S.F. 2 # 22).
18. Abell was responsible for hiring four African Americans into SEPTA Building Trades Positions. (R.E. 1).

19. Abell has supervised 30 African Americans holding Building Trades Positions within SEPTA. (R.E. 1).
20. Abell supervises between 50 to 60 hourly SEPTA employees. (N.T. 119,165).
21. No employee under Abell's supervision ever lodged a race-based complaint about Abell. (N.T. 139).
22. John Blyler, (hereinafter "Blyler"), is a SEPTA Maintenance Manager.
23. Blyler supervised SEPTA Plumbers, HVAC Mechanics, and Building Repairmen. (N.T. 199).
24. Blyler's supervisor was Abell. (N.T. 201).
25. Like Abell, Blyler never had an internal complaint filed against him. (N.T. 214).
26. In conjunction with SEPTA's testing center, Abell and Blyler developed 9 questions to be asked of applicants. (N.T. 139, 151, 185).
27. Abell and Blyler interviewed Cobbs, Antrim, King, and Sonsini for the open 2000 Plumber-First Class position. (N.T. 124, 202, 232; S.F. 2 # 26).
28. All applicants were asked the same 9 questions. (N.T. 129, 139, 202, 211).
29. Cobbs was found to be considerably qualified and possessing a good deal of experience. (N.T. 124, 137).
30. Cobbs testified that he was looking for a stable opportunity with steady work and benefits. (N.T. 51, 91).
31. Abell testified that Cobbs had indicated he was looking for a place to cruise until he retired, and appeared only interested in a no lay-off clause and benefits. (N.T. 128, 136).
32. Shortly after Cobbs filed his PHRC complaint, Abell told an internal SEPTA investigator that in response to the last question asked of Cobbs, Cobbs replied that he had worked hard for 30 years and was now looking for somewhere to cruise. (N.T. 275).
33. Following the interviews, Abell and Blyler jointly decided to hire Antrim. (N.T. 96, 132, 202, 205, 223).
34. Sonsini was their second choice. (N.T. 220-221).
35. King was their third choice. (N.T. 221).
36. On a "Prospective Employee Processing Form" prepared on Cobbs, Abell indicated that Cobbs was rejected as an applicant. (J.E. 9).
37. Cobbs was notified by letter that he was not selected. (N.T. 53).
38. On or about June 2001, SEPTA had another opening for the position of Plumber-First Class. (S.F. 2 # 37).
39. Cobbs learned of the 2001 opening from a want-ad in the Philadelphia Inquirer. (N.T. 53; C.E. 1).
40. Cobbs applied for the 2001 position. (N.T. 53).
41. After applying, Cobbs called SEPTA to check on the status of his application and was told his resume could not be found. (N.T. 56-57).
42. Subsequently, Cobbs hand delivered his resume to SEPTA. N.T. 57, 75).
43. Cobbs asked if he had to re-take the Plumber-First Class test and was informed he did not. (N.T. 57, 180).
44. Before SEPTA placed a want-ad for the 2001 opening, Abell advised Flower that he was not interested in anyone not hired from the 2000 process. (N.T. 134, 144, 190-191).
45. Following Abell's instruction, when Cobbs and Sonsini applied for the 2001 position, Flower excluded them from the hiring process. (N.T. 180, 181, 190, 197-198).
46. King did not apply for the 2001 position. (N.T. 190).

47. In 2001, eleven applicants were invited to take the Plumber-First Class test, seven took the test and only one passed. (N.T. 175, 178, 184-185).
48. William Owens, (hereinafter "Owens"), a white applicant, passed the test. (N.T. 178; S.F. 2 #'s 46, 49).
49. Blyler interviewed Owens and subsequently, without telling Abell Owens' race, Blyler advised Abell he had interviewed an applicant, he liked him and thought he would work out. (N.T. 135, 145, 179-180; S.F. 2 # 47).
50. Abell advised Blyler to go ahead and hire Owens. (N.T. 145; S.F. 2 # 48).
51. Since their hires, both Antrim and Owens have been good employees. (N.T. 213-214).
52. Neither Abell nor Blyler were made aware that either the 2000 or 2001 openings had been designated as underutilized minority positions by SEPTA's EEO/AA Department. (N.T. 182, 210).
53. Although SEPTA had an Affirmative Action Hire/Promotion Concurrence Policy that stated the policy applied to both management and hourly employees, SEPTA did not apply the policy to hourly hiring's. (N.T. 169, 170, 183, 186, 187, 256-257, 264; J.E. 48).
54. Statistically, for the job group 1st Class Mechanics, SEPTA employed 772 individuals, 188 of which are listed as minorities, and 12 are women. (C.E. 11).
55. SEPTA's affirmative action goal in 2000 was to bring the percentage of minorities in job category 1st Class Mechanics up from 24.4% to 30.3%. (C.E. 11).
56. 30.3% reflects SEPTA's figures as to the percentage of minorities in the available geographic area. (C.E. 11).
57. As of 2002, SEPTA's affirmative action goal has not changed. (C.E. 14).

CONCLUSIONS OF LAW

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

OPINION

This case arises on a complaint filed by Eugene Cobbs (hereinafter "Cobbs") against the Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA"), on or about July 27, 2001, at Docket No. E-100377-AD. In his complaint Cobbs generally alleged SEPTA failed to hire him as a Plumber First Class. Cobbs alleged the refusal to hire him was both age-based and race-based discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA").

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated Cobbs' allegations, and at the conclusion of the investigation concluded that probable cause existed. Thereafter, the PHRC attempted to eliminate the alleged unlawful failure to hire through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified the parties that it had approved a public hearing of Cobbs' allegations.

The public hearing began on February 20, 2003, and concluded on March 25, 2003. The Public Hearing was held in Philadelphia Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Charles L. Nier III, Esquire. Debbie L. Goldberg, Esquire, appeared on behalf of Cobbs, and Gino J. Benedetti, Esquire and Jennifer A. Parda, Esquire, appeared on behalf of SEPTA.

Following the public hearing, the parties were afforded an opportunity to submit briefs. The post-hearing brief on behalf of the complaint, which was joined in by Attorney Goldberg, was received on July 7, 2003 and SEPTA's post-hearing brief was received on July 8, 2003.

Although Cobbs' complaint alleged both race and age-based discrimination, the post-hearing brief on behalf of the complaint focused solely on the race-based component of Cobbs' allegations. In effect, the age-based portion of Cobbs' complaint was abandoned. Accordingly, this opinion will address the race-based allegation only.

In his complaint, nearly all of Cobbs' allegations make reference to a failure to hire in or about July 2001. Generally, Cobbs' complaint also makes an indefinite reference to a prior failure to hire him. As the evidence developed at the Public Hearing, the complaint's vague reference to a prior failure to hire began to take form. Indeed, much of the evidence presented concentrated on circumstances surrounding SEPTA's failure to hire Cobbs for a Plumber-First Class position that Cobbs had applied for as early as January 16, 2000. In effect, the development of this case progressed with a focus on two separate instances of Cobbs having applied for and denied Plumber-First Class openings: one in 2000 and another in 2001.

In this disparate treatment case, Cobbs specifically alleges that on two occasions, SEPTA treated him less favorably than other applicants for open Plumber-First Class positions because of his race, African American. To prevail, Cobbs is required to prove that SEPTA had a discriminatory intent or motive in twice failing to hire him. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Cobbs must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, *supra*; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "*prima facie* case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer unlawfully discriminated against the employee. *Id*. at 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id*. It raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

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

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with Complainant's qualifications.

id. at 802. Although the McDonnell Douglas, test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802, n. 13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 263, 43 FEP 1018 (6th Cir. 1987).

Here under the guidance of the Pennsylvania Supreme Court, we slightly adapt the McDonnell Douglas test. To establish a *prima facie* case, Cobbs, must show:

1. that he is a member of a protected class;
2. that he applied for and he was qualified for a position for which SEPTA was seeking applicants;
3. that, despite his qualifications, Cobbs was not hired; and,
4. that the job opening was awarded to an applicant with either equal or fewer qualifications than Cobbs, and who is a different race than Cobbs.

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

If Cobbs establishes a *prima facie* case, the burden shifts to SEPTA "to articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. SEPTA must rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be "clear and reasonably specific," *Id*. at 285, and "legally

sufficient to justify a judgment" for SEPTA. *Id*. at 255. However, SEPTA does not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If SEPTA carries this burden of production, Cobbs must then satisfy a burden of persuasion and show that the legitimate reasons offered by SEPTA were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden now merges with the burden of persuading us that he has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that SEPTA intentionally discriminated against Cobbs remains at all times with Cobbs. *Id*. at 253.

On the initial question of whether Cobbs can establish a *prima facie* case with respect to either the 2000 or 2001 failures to hire, SEPTA's post-hearing brief simply observes that under a burden-shifting analysis, Complainant's have the initial burden of establishing a *prima facie* case. SEPTA's post-hearing brief offers no challenge regarding whether Cobbs is able to establish a *prima facie* case for either the 2000 or 2001 hiring. Instead, SEPTA devotes attention to their articulated reasons for not hiring Cobbs and argues that Cobbs can neither establish pretext nor ultimately show that SEPTA had a race-based motive for failing to hire Cobbs in either 2000 or 2001.

Perhaps SEPTA recognizes the simple principle that the establishment of a *prima facie* case is not an onerous task. Here, Cobbs easily accomplishes the establishment of the first element of the requisite *prima facie* showing in both the 2000 and 2001 hiring. Clearly Cobbs, as an African American, is a member of a protected class. Equally clear is the fact that Cobbs applied for an open Plumber-First Class position in both 2000 and 2001 and that he was qualified to be a Plumber-First Class. On the surface, Cobbs qualifications are at least equal to both the individual hired in 2000 as well as the individual SEPTA hired in 2001.

When a hiring selection process contains elements of subjective decision-making, as we find here, a Complainant is significantly disadvantaged in the requirement to establish that he was at least as qualified as an individual hired. Here, there were so many layers involved in the consideration of who would be hired, that a comparison of qualifications for the purpose of a *prima facie* showing should be an overall observation. A precise analysis of qualification comparisons made by those who make a hiring decision is more appropriate after the articulation of legitimate, nondiscriminatory reasons has occurred.

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

> There is bound to be confusion where, as here, part of the employer's explanation attacks the plaintiff's qualifications for the job. If a plaintiff must prove a *prima facie* case by producing evidence of her qualifications before the defendant is obligated to proceed with a defense, there will almost of necessity be, at the close of the plaintiff's case in chief, evidence that she was qualified sufficient to avoid dismissal. At that point no evidence has been admitted on the other side. When the employer then produces evidence of disqualification, this could be understood either as an attack on the elements of the *prima facie* case, or as an attempt to meet the employer's burden of

> offering a legitimate, non-discriminatory reason. Regardless of its characterization, however, its impact is the same. The employer, understandably, would prefer not to have to offer a defense at all until a more substantial case had been presented against it. Nevertheless, in the interest of having the ultimate question of discrimination resolved on the merits rather than for procedural failings such as lack of specificity, given the importance of circumstantial proof in such cases, it is appropriate to the remedial purpose of the Act that the *prima facie* case not be an onerous one.

Allegheny Housing at 318-319

Finally both individuals hired by SEPTA are a different race than Cobbs. Accordingly, Cobbs meets his initial burden of establishing a *prima facie* case.

Having so found, we move to the question of whether SEPTA has articulated a legitimate, nondiscriminatory reason for not hiring Cobbs. On this general question we find that SEPTA has met its burden of production.

Generally, with respect to the 2000 posting, SEPTA offered that the individual selected was more qualified than Cobbs. More specifically, SEPTA tenders that the choice to hire Antrim to the position of Plumber-First Class under the 2000 posting was made based upon Antrim's performance as compared to Cobbs' performance during SEPTA's interview process. Of nine questions asked of each applicant, five were designed to probe an applicant's plumbing experience and skill level. Of the five questions, interviewer Abell ranked Cobbs and Antrim equally on three areas. In the area of backflow preventor familiarity and testing, Antrim's score was three points higher than Cobb's score. On the question about experiences with using drain machines, Antrim was given four points greater than Cobbs.

These was no dispute that SEPTA was involved in both installing and testing of backflow preventors. SEPTA submits that Antrim's experience in this area was a plus factor for him. Antrim had a current license in this area, Cobbs did not.

SEPTA also offered that in response to the interview question, "what do you expect from SEPTA?", Cobbs responded that he was looking for a place to "cruise" until he retired. SEPTA submits that interviewer Abell considered Cobbs as an applicant interested in SEPTA's no-lay-off-clause and simply looking to get benefits, and take it easy.

While Cobbs objective credentials were recognized as being impressive, SEPTA offers that Antrim's credentials were superior especially when considering that an applicant would offer that they were only looking for a place to cruise.

With regards to the 2001 posting, SEPTA offered that even before SEPTA advertised the opening, Abell informed Flowers, SEPTA's recruiter for the open position, that he did not wish to consider any applicant who had applied in 2000. In doing this, SEPTA submits it excluded two similarly situated white applicants, who like Cobbs, also applied but were not hired in 2000.

These proffered justifications for SEPTA's failure to hire Cobbs constitute legitimate, nondiscriminatory reasons. SEPTA has therefore satisfied its burden of articulation.

At this point, the burden shifts back to Cobbs "to prove by a preponderance of the evidence that the legitimate reasons offered by [SEPTA] were not its true reasons, but were a pretext for discrimination." Burdine, *supra* at 253. During the entire analysis, of course, the ultimate burden of persuasion has remained with Cobbs. *Id*. Cobbs' burden of proving pretext simply merges with his ultimate burden of proof. To satisfy his burden on the pretext issue, and ultimately his burden of persuasion, Cobbs could have presented either direct evidence that "a discriminatory reason more likely motivated [SEPTA]," or indirect evidence that SEPTA's proffered explanations are unworthy of belief. *id*. at 256.

One issue which is noted here is the recognition that hiring decisions should be subjected to particularly close scrutiny where those who make a hiring decision utilize a subjective evaluation process and they themselves are not members of the protected group. See Henry v. Lennox Industries, 42 FEP 771 at 774 (6th Cir. 1985), citing Grano v. Dept. of Development of City of Columbus, 31 FEP 1 (6th Cir. 1983). Here, much of the initial evaluation criteria was objective, however, of necessity, part of the interviewing process was left to the subjective appraisal of individual white interviewers.

The post-hearing brief on behalf of the complaint submits three general arguments suggesting that SEPTA's articulated reasons are a pretext for race-based discrimination: (1) that SEPTA failed to follow its Affirmative Action Hire/ Promotion Concurrence Policy; (2) that Cobbs was better qualified than Antrim in 2000, and better qualified than Owens in 2001; and (3) that statistical evidence supports a finding of pretext.

Because the resolution of Cobbs' allegations principally rests on the second of the three arguments offered by the post-hearing brief on behalf of the complaint, this issue will be discussed first. On the question of qualifications, we turn to SEPTA's assertion that Cobbs did not perform well during his 2000 interview with Abell and Blyler.

Central to this question is whether, during his interview, Cobbs responded to the question, "what do you expect from SEPTA?," by stating he was looking for a place where he could "cruise" until retirement. Cobbs flatly denies making such a statement and Abell contends that such a comment was pivotal to his decision not to hire Cobbs. This present an obvious credibility issue.

The post-hearing brief on behalf of the complaint suggests Cobbs should be believed because Abell neither made a notation about such a comment on the question sheet he used while interviewing Cobbs, nor made such a notation on the "Prospective Employee Processing Form" completed after Cobbs' interview.

Closely scrutinizing the situation we find several interesting facts. First, Abell did write "it seems Mr. Cobbs is looking for a place to retire early" on the Prospective Employee Processing Form. (JE 9) Also, rather than rank Cobbs as he had with the three other interviewees, Abell noted that Cobbs was rejected as an applicant. Abell's scores for Cobbs on

the remaining eight questions appears to comport with the extent of Cobb's plumbing experience. Only the last question was rated a four by Abell.

SEPTA offered evidence which shows that Abell not only had previously hired African American applicants but that over the years, he supervised a significant number of African American employees and that no minority employee had ever complained about Abell. (RE1; N.T. 139; 146).

On the record of this case there was scant testimony which can be called directly contradictory. One such instance was Cobbs' testimony that he had previously worked on approximately 12 backflow preventors (N.T. 102), but in a prior deposition Cobbs had testified that he had worked on only 3 or 4. (N.T. 103).

The post-hearing brief on behalf of the complaint characterized Blyler's testimony as inconsistent. On the contrary, Blyler could barely remember that he had interviewed applicants for the 2000 opening. His faulty recollection was not shown to amount to concrete evidence of a lack of credibility. Observing Blyler's testimony, it was apparent that he simply did not recall the specifics of his participation in the 2000 hiring of Antrim.

Considering the totality of the circumstance, it is more likely that Cobbs made a comment at the 2000 interview with Abell and Blyler that caused Abell to set aside Cobbs' vast experiences and to form the opinion that Cobbs was more interested in job security, benefits, and taking it easy rather than being an employee that could be counted on to have a commitment to performing tasks to the best of his ability.

This single factor, more than any other, resulted in Abell not only out right rejecting Cobbs for the 2000 position but also in Abell not wishing to even consider Cobbs in 2001. The post-hearing brief on behalf of the complaint points to the circumstance that Flower did not tell Cobbs that he would not be considered when he called to ask if he needed to take another test for the 2001 opening. Instead Flower's communication to Cobbs was that he did not have to take the test.

Rather than reflective of a post-hoc fabrication of why Cobbs was not hired in 2001, Flower's action can easily be viewed as avoiding a possible verbal confrontation. It would be simply easier to just answer Cobbs question and tell him that he did not have to re-take the test, rather than volunteer that he would not be considered at all.

The thrust of SEPTA's articulated reasons for not hiring Cobbs in either 2000 or 2001 have not been shown to be a pretext for race-based discrimination. Cobbs' burden is to show by a preponderance of the evidence that SEPTA's reasons are a pretext. He has not.

Next we turn to that portion of the post-hearing brief on behalf of the complaint which observes that SEPTA did not follow its Affirmative Action Hire/Promotion Concurrence Policy. (JE 48) On this point, SEPTA indeed stipulated that it did not follow its policy regarding the two positions for which Cobbs applied. Interestingly, and important to this matter, all who offered testimony on the subject agreed that SEPTA's practice is to apply this policy only to supervisory

openings. While SEPTA's Director of Equal Employment Opportunity and Affirmative Action Department, Carla Elliott, testified that she periodically suggested to senior level managers that the policy be followed for hourly employee hires, it was clear that her suggestions on the issue were not followed.

Without question, SEPTA's policy was neither applied to the positions Cobbs applied for, nor to other hourly positions. While this may be troubling as a general point of interest, even if the policy had been followed in the 2000 or 2001 openings at issue here, it would not have made a difference. In no event does either SEPTA's policy or the law require SEPTA to require a hiring manager to select a minority candidate. Under the law, companies are not required to treat minorities more favorably than non-minorities. What the law does require is that minorities not be treated less favorably. Johnstown Redevelopment Authority, *supra* at 501. Under SEPTA's policy, when a job is designated as underutilized for minorities, a hiring manager is to consider affirmative action goals only when two applicants are equally qualified for a position.

Here, together Abell and Blyler jointly decided that Antrim was their first selection for the 2000 position and that Cobbs would not be their second, third or fourth choice but was wholly rejected as a potential employee.

As noted by SEPTA's post-hearing brief, the fact that SEPTA did not follow its policy is of no import in this particular case. Thus we turn to the attempt to rely on statistical evidence concerning the fact that SEPTA had no African American plumbers, had declared the openings in 2000 and 2001 as underutilized for minorities, and had an affirmative action goal to increase the number of minorities employed in the overall job group of 1st class mechanics.

Statistics come in an infinite variety, and their usefulness depends on all the surrounding facts and circumstances. See Marsh v.Eaton Corp., 25 FEP 64 (6th Cir. 1981), citing Teamsters v. U.S., 431 U.S. 324 (1977). Here, the simple fact remains that Cobbs has not established by a preponderance of evidence that Abell had not formed the opinion that Cobbs was less than an enthusiastic applicant.

The role of a fact finder in a case like this is not to determine which candidate a fact finder might feel should have been chosen. See Cooper v. City of North Olmstead, 41 FEP 425 (6th Cir. 1986). Rather an appropriate examination of the evidence presented is made regarding the hiring decisions to insure that the motivations in question were not impermissible. Here, Cobbs presented essentially no direct evidence of discriminatory intent, and insufficient circumstantial evidence from which a discriminatory intent could be reasonably inferred.

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

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RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

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

By: Carl H. Summerson, Permanent Hearing Examiner

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DOCKET NO. E-100377-AD

FINAL ORDER

AND NOW, this 25th day of November, 2003, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

that the complaint in this case be, and the same hereby is, dismissed.

BY: Stephen A. Glassman, Chairperson
Attest: Sylvia A. Waters, Secretary

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

EUGENE J. COBBS, Complainant:

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Respondent

DOCKET NO. E-100377-AD

DISSENTING OPINION

Upon review of the record in this matter, it is our opinion that the testimony of the Complainant was credible. We further opine that the Complainant's version of events is actually bolstered by the fact that Mr. Abell did not make a notation on the question sheet he used during the interview of the Complainant. Also, Mr. Abell did not make any notation in regard to an alleged comment on the "Prospective Employee Processing Form", that was completed immediately after the Complainant's interview.

Even if, assuming arguendo, the Complainant had made the disputed comment, we find that the Complainant was very qualified for the position in question. He was a master plumber with over thirty years of experience and was a member of the union. It is hard to believe that one word, "cruise", would erase all the years of experience and expertise accumulated by the Complainant. It is far more likely that the reasons offered by SEPTA for its action are pretextual, nor do we know that the word, even if used, was intended to infer something less than a full day's work for a full day's pay.

Next, we look at the statistical evidence that was presented in this case on behalf of the Complainant. The Complainant applied for the position of Plumber First Class. SEPTA employed 12 to 13 workers as Plumber First Class. At the relevant time period, all of the plumbers first class were white. Here, the Complainant is an African-American plumber with over 30 years of experience, and he was not hired. Respondent would have us believe this was based on the use of one disputed word. We do not. Further testimony showed that SEPTA's Affirmative Action office had earmarked the open Plumber First Class positions as underutilized for minorities. As such, SEPTA had developed a hiring policy for this job classification. The evidence adduced at public hearing clearly showed that SEPTA <u>did not follow</u> its own policy. The intent of the policy was to insure that affirmative action goals are to be considered when two applicants are equally qualified for a position. In the instant case, the Complainant was extremely well qualified.

It is clear from our review that statistics show that SEPTA does not support a non-discriminatory environment. SEPTA does not follow its own rules to insure an environment free

of discrimination. Accordingly, we respectfully dissent from the majority opinion of the Commission.

Sylvia A. Waters, Commissioner
Theotis W. Braddy, Commissioner