COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RENEE JOHNSON, **Complainant**	:	
	:	**PHRC CASE NO. 200603303**
PHILADELPHIA PRISON SYSTEM, **Respondent**	:	

STIPULATION

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Renee Johnson	:	PHRC Case No. 200603303
	:	
v.	:	EEOC No. 17F200760867
	:	
Philadelphia Prison System	:	

STIPULATION

The parties, by and through undersigned counsel, hereby stipulate to the following facts:

1. On October 3, 1988, the Complainant began working for the Philadelphia Prison System as a Correctional Officer.

2. On March 10, 2003, the Complainant filed a Complaint with the PHRC alleging race and sex discrimination in connection with an alleged failure to promote.

3. On July 15, 2003, the Respondent filed an Answer to Complainant's complaint.

4. On June 6, 2006, the Complainant filed an Amended Complaint with the PHRC alleging race and sex discrimination in connection with an alleged failure to promote.

5. On July 5, 2006, the Respondent filed an Answer to Complainant's amended complaint.

6. On September 20, 2004, the Complainant was arrested and charged with Criminal Conspiracy, Aggravated Assault, Recklessly Endangering Another Person, Riot, Failure to Disperse, and Disorderly Conduct.

7. On May 8, 2006, the Complainant was acquitted of all charges except for resisting arrest, a second degree misdemeanor, for which she received a conviction.

8. On December 17, 2006, the City of Philadelphia Prison System dismissed the Complainant from employment.

Charles Nier, Esquire
Counsel for the PHRC

Jeffrey B. First, Esquire
Counsel for the Respondent

FINDINGS OF FACT *

1. The Complainant herein is Renee Johnson, (hereinafter "Johnson"), an adult African-American female residing at 1324 South 28th Street, Philadelphia, PA 19146. (N.T. 26).

2. The Respondent herein is the Philadelphia Prison System, (hereinafter "Prison System"). (C.E. 2, 3, 4, 5).

3. In 1987, Johnson was hired by the City of Philadelphia where she worked for approximately six months in the Streets Department, and then for three or four months as a meter reader for the city's Water Department. (N.T. 26, 27).

4. In September 1988, Johnson was hired as a Corrections Officer for the Prison System. (N.T. 27).

5. In or about September 1996, Johnson was promoted to the rank of Sergeant. (N.T. 27).

6. Although Johnson's performance evaluations generally rated her satisfactory, in 1989, Johnson was twice disciplined: a 30 day suspension for sleeping on duty; and a 10 day suspension for disobeying a lawful order. (N.T. 29; C.E. 1).

7. In 2002, Johnson applied for a promotion to the rank of Lieutenant. (N.T. 31).

* The foregoing "Stipulation" is 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 Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
J.E. Stipulation

8. Johnson was not selected and was told that she would not be promoted because of punctuality and attendance issues. (N.T. 31).

9. On March 10, 2003, Johnson filed a PHRC complaint alleging that she was not promoted because of her sex and race. (N.T. 33; C.E. 2; J.E. 1).

10. On December 19, 2002, Leon A. King, II, (hereinafter "King"), became the Prison System's Commissioner. (N.T. 72, 73).

11. King had been an employee of the City of Philadelphia for approximately 17 years. (N.T. 73).

12. King's office had been located at the Prison System for the ten years immediately preceding his appointment as Commissioner. (N.T. 73)

13. Prior to becoming Commissioner, King had been the Prison System's General Counsel since 1997. (N.T. 73, 74).

14. King had also held the positions of Assistant City Solicitor and Deputy City Solicitor in the Civil Rights Division. (N.T. 73.)

15. When King was General Counsel for the Prison System, he was involved in the discipline process and developed policy and procedures for handling complaints. (N.T. 74, 86).

16. King testified that when he was General Counsel, he had heard from women employees about alleged discrimination. (N. T. 75).

17. King further testified that upon becoming Commissioner, he initiated changes to combat such comments and perceptions. (N.T. 75, 85).

18. On or about July 15, 2003, the Prison System answered Johnson's PHRC Complaint. (N.T. 35; C.E. 3).

19. On September 20, 2004, a neighbor came to Johnson's door and informed her that her daughter was in the process of being arrested. (N.T. 35).

20. At approximately 5:30 p.m. on the evening of September 20, 2004, a crowd of approximately 200 people had gathered outside of Johnson's home and approximately 40 to 50 police officers were attempting to disperse the crowd. (C.E. 6, 7, 8, 9).

21. The police report of the incident indicates that the police officer who was arresting Johnson's daughter was punched in the face by Johnson. (C.E. 6, 7).

22. Johnson offered that while she felt the officer's were being abusive to her daughter, she had not punched the officer, but that the officer had punched her. (N.T. 36, 38, 64).

23. In stark contrast to Johnson's version of events, the police report indicated that four police officers had to separate Johnson from the officer who had been arresting her daughter. (C.E. 6, 7, 8, 9, 15).

24. Johnson was arrested and charged with criminal conspiracy, aggravated assault, recklessly endangering another person, riot, failure to disperse, and disorderly conduct. (N.T. 44; J.E. 1).

25. Under the Prison System's Administration and Management, Personnel, General Orders Policy, paragraph 91, an employee who has been arrested is supposed to notify the Prison System. (C.E. 13).

26. Once the police or the employee had notified the Prison System of an arrest, either the Prison System's Internal Affairs Division (hereinafter "IAD") is dispatched to the location of the arrested employee, or the employee is asked to come to IAD for an interview after their release. (C.E. 13).

27. In Johnson's case, the police called Johnson's shift commander to advise the Prison System of Johnson's arrest. (N.T. 40).

28. Sergeant Skaziak (hereinafter "Skaziak") of IAD was dispatched to speak with Johnson. (N.T. 40).

29. Skaziak informed Johnson that King was placing her on immediate suspension. (N.T. 40, 97).

30. On or about October 13, 2004, Skaziak prepared an internal IAD memo outlining the criminal charges against Johnson. (N.T. 97).

31. As Johnson was a member of a collective bargaining unit, her Union President set up a meeting with King to ask him to return Johnson to work pending the resolution of the criminal charges. (N.T. 41).

32. Regarding the meeting with King, Johnson observed that King seemed curious and open-minded, and she felt that she had been treated fairly. (N.T. 42, 59).

33. After approximately three months on suspension, King allowed Johnson to return to work pending the resolution of the criminal charges against her. (N.T. 41, 60).

34. King testified that, from experience, he knew that police did not always tell the truth, thus he gave Johnson the benefit of the doubt. (N.T. 93, 94, 99).

35. King found that Johnson's version of events was neither ridiculous nor outlandish, and that her story appeared to have some credibility. (N.T. 99).

36. In early May 2006, Johnson was found guilty of resisting arrest, a second degree misdemeanor, and she was sentenced to one year of non-reporting probation. (N.T. 43, 44).

37. Johnson informed Skaziak that she had been found guilty of resisting arrest and of her intention to appeal. (N.T. 44, 45; C.E.16).

38. Shortly thereafter, on June 9, 2006, Johnson filed an Amended Complaint with the PHRC, once again alleging that she had been denied a promotion to Lieutenant because of her sex and race and also in retaliation for having filed her initial PHRC Complaint on March 10, 2003. (N.T. 45, 46, 63; C.E. 4).

39. On July 5, 2006, the Prison System answered Johnson's Amended Complaint. (N.T. 46; C.E. 5).

40. After filing her Amended Complaint, Johnson received notice that a Disciplinary Hearing had been scheduled. (N.T. 46).

41. A Disciplinary Hearing was held on September 14, 2006 to address Skaziak's charges against Johnson that she had violated Policy 1.C11.1 Employee Code of Conduct and the Prison System's General Order #6 which states in pertinent part:

> Employees are responsible for maintaining professional deportment at all times... Employees will refrain from engaging in unprofessional or illegal behavior... off-duty that could in any manner reflects negatively on the [Philadelphia Prison System].

(C.E. 13, 16).

42. The Prison System categorizes disciplinary infractions according to four levels: Level One – minor offenses; Level Two – more severe offenses not necessarily resulting in significant consequences; Level Three – more serious offenses resulting in significant consequences; and Level Four – typically warrants dismissal for a first offense, but a multi-day suspension may be imposed instead of dismissal, depending on the nature of the offense and mitigating circumstances. (C.E. 14).

43. Johnson's alleged violation of General Order #6 was categorized as a Level Four offense. (C.E. 13, 16).

44. During Johnson's Disciplinary Hearing, Skaziak read the police report regarding the events of September 20, 2004, and reported that Johnson had been found guilty of resisting arrest and sentenced to one year non-reporting probation. (N.T. 47; C.E. 16).

45. Johnson presented her version of events to the Disciplinary Hearing Board, and on September 18, 2006, the Board sustained the charges of violation of General Order #6, and Policy 1.C.11.1 and recommended a 20-day suspension with time served. (N.T. 48; C.E. 16).

46. Disciplinary Hearing Board recommendations are forwarded to King, who had the discretionary power to accept, reject or modify a recommendation. (N.T. 82).

47. King testified that he used his independent judgment when reviewing a Disciplinary Hearing Board's recommendation. (N.T. 83).

48. King offered that, along with the recommendation, he would also consider the charge for which a person had been convicted and the employee's record. (N.T. 95).

49. The Prison System's Policy # 1.C.13, regarding implementation of Corrective and Disciplinary Action at paragraph I. Dismissal states in part:

> Dismissal is the most severe penalty in the employee disciplinary process and shall be reserved for situations when an employee has repeatedly demonstrated an inability to follow agency and/or unit directives, procedures or orders when other forms of disciplinary action have been exhausted or for first offenses which threaten the security or integrity of the PPS or conduct of such a serious nature that dismissal is warranted.

(C.E. 14).

50. King testified that he was aware that it is hard to act as you might otherwise when you are witness to the arrest of a family member, and that he had not found Johnson's version of the events to be ridiculous or outlandish. (N.T. 98, 99).

51. King then offered that, in his mind, resisting arrest involves putting hands on a police officer and requires an officer to be injured. (N.T. 111, 156).

52. King modified the Disciplinary Hearing Board's recommendation and caused Johnson to be dismissed. (N.T. 48; C.E. 16).

53. On or about December 1, 2006, Johnson received a telephone call from the Prison System informing her not to report to work on December 2, 2006, that she had been suspended for 10 days and following the suspension, she was to be dismissed. (N.T. 48; C.E. 6).

54. A formal Notice of Suspension with a Notice of Intention to Dismiss was issued by King and forwarded to Johnson or December 1, 2006. (C.E. 6, 7).

55. Johnson appealed her dismissal to the Civil Service Commission, which sustained Johnson's appeal in a July 5, 2007 opinion and ordered Johnson to be reinstated with full back pay. (N.T. 51, 52; C.E. 8).

56. Rather than reinstate Johnson, the Prison System appealed the Civil Service Commission's Order to the Philadelphia Court of Common Pleas. (N.T. 53, 109).

57. By a February 21, 2008 order of the Common Pleas Court, the order of reinstatement was overturned and Johnson's termination was upheld. (N.T. 53, 109; C.E. 9).

58. Johnson is presently awaiting the resolution of her appeal of this ruling to the Commonwealth Court. (N.T. 53).

59. The Prison System's Administration and Management Policy Number 1.C.11.2 lists 72 General Orders, which include in part:

(a) General Order #1 – Responsibility to know policies and procedures; Violation Level One.

(b) General Order #2 – Lack of knowledge is NO excuse; Violation Level Two.

(c) General Order #6 – Illegal behavior off duty; Violation Level Four.

(d) General Order #21 – Involvement with illegal drugs while off duty; Violation Level Four.

(e) General Order #26 – Sexual harassment; Violation Level Three.

(f) General Order #28 – Must maintain a current driver's license; Violation Level Two.

(g) General Order #34- An arrested employee must report the arrest; Violation Level Three.

(h) General Order #62. – Associate with former inmates; Violation Level Four.

60. Other correction officers have committed crimes in violation of the Prison System's General Orders. (N.T. 118-141; C.E. 18-31).

61. On April 29, 2004, the Prison System IAD issued a report about Sergeant Robert Segal (hereinafter "Segal"), outlining the reason behind Segal's arrest on April 1, 2004. (C.E. 28).

62. Segal had been charged with possession of an instrument of crime, simple assault, aggravated assault, and recklessly endangering another person stemming from a purported "road rage" incident on Interstate 95. (C.E. 28).

63. The arrest report indicated that Segal cut off another driver, who happened to be an off-duty police officer, allowed the off-duty officer to then pass him, commenced tailgating him and then, as the two vehicles proceeded down I-95, Segal is reported to have pulled along side of the officer and pointed a loaded holstered handgun at the officer. (C.E. 28).

64. The report also indicates that the off-duty officer called 911, Segal was arrested, and a registered, loaded handgun was recovered from Segal's vehicle. (C.E. 28).

65. In effect, Segal blamed the incident entirely on the off-duty police officer. (G.E. 28).

66. King did not suspend Segal pending an investigation, but allowed Segal to take a Leave of Absence until the criminal charges were resolved. (C.E. 28).

67. On March 31, 2005, Segal was convicted of recklessly endangering another person and Segal was sentenced to one year non-reporting probation and ordered to pay costs. (C.E. 29).

68. By Notice of Suspension dated May 11, 2005, Segal was informed that he was suspended for 30 days covering the period April 7, 2004 to May 6, 2004. (C.E. 29).

69. Since Segal had already served the 30 day suspension, Segal received no further discipline for the violations of Policy 1.C.11.1 and General Orders 1, 2, and 6. (C.E. 28).

70. On June 27, 2004, Corrections Officer Tyric Robinson (hereinafter "Robinson"), was arrested for presenting a fraudulent prescription for 90 Oxycontin to a pharmacy and charged with criminal conspiracy, intent to deliver a controlled substance, possession of a controlled or counterfeit substance, fraudulently obtaining a controlled substance, and insurance fraud. (C.E. 20).

71. Robinson's criminal charges included two first degree misdemeanors and two third degree misdemeanors. (C.E. 21).

72. Robinson was convicted on one court of forgery, one count of criminal conspiracy, and two counts involving a controlled substance; he was sentenced to one year probation and ordered to pay restitution and costs, to perform community service and to complete the Philadelphia County Accelerated Rehabilitation Disposition Program (ARD). (C.E. 21, 23).

73. On May 30, 2005, a Prison System Employee Violation Report was prepared advising Robinson that he was in violation of General Orders 1, 2, 6, 21, and 62 and Policy 1.C11.1. (C.E. 20).

74. On June 16, 2005, a Disciplinary Hearing was held, at which time Robinson admitted to all the charged violations of General Orders and Policy 1.C11.1. (C.E. 22).

75. The Disciplinary Hearing Board recommended a 30 day suspension, counseling, and that Robinson undergo drug testing and a physical. (C.E. 22).

76. King accepted the Board's recommendation, giving Robinson a 30 day suspension with time already served and subjecting him to periodic fitness for duty evaluations. (N.T. 23).

77. An IAD investigative memo dated April 19, 2005 revealed that Correction Officer Harry Bolton (hereinafter "Bolton") had failed to inform the Prison System that his driver's license had been suspended after having been found guilty of DUI on October 11, 2003. (C.E. 18, 19).

78. Upon learning of Bolton's failure to report his arrest and conviction, IAD charged Bolton with violations of General Orders, 1, 2, 6, 27, 28, and 31. (C.E. 18, 19).

79. Following a Disciplinary Hearing a three-day suspension was recommended, which King approved as appropriate. (C.E. 19).

80. On December 16, 2004, Sergeant Angelo Fergone (hereinafter "Fergone"), was arrested and charged with recklessly endangering another person, criminal mischief, carrying an unlicensed firearm, carrying a firearm on public streets, and DUI. (C.E. 24).

81. Fergone had lost control of his vehicle, struck a parked car and pushed it into a house. (C.E. 24).

82. Upon learning of Fergone's arrest, King allowed Fergone to return to work awaiting the outcome of the pending criminal charges. (C.E. 24).

83. Fergone requested and was accepted into the ARD program, he also received a one year probation, was ordered to pay a fine, and had his license suspended for 60 days. (C.E. 25).

84. After investigation, IAD charged Fergone with violations of General Orders 1, 2, 6 and 28 and Policy 1.C11.1. (C.E. 25).

85. A Disciplinary Hearing Board memo dated December 22, 2005 recommended that Fergone be suspended for 10 days, however, King modified the recommendation to a 15-day suspension, because a 10-day suspension was not within the guidelines for discipline. (C.E. 25).

86. On June 28, 2003, Corrections Officer Lawrence J. Murphy, Jr. (hereinafter "Murphy"), was arrested and charged with DUI and fleeing a police officer. (C.E. 26, 27).

87. At the time of his arrest, Murphy was already serving probation for an earlier DUI. (C.E. 26).

88. Murphy was sentenced to 2 years probation, one year reporting and one year non-reporting, a 30-day suspension of his driver's license, and was required to attend an out-patient program and a safe driving school. (C.E. 26).

89. Murphy was charged by IAD with violations of General Orders 1, 2, 6, 11, 16, and 35, and Policy 1.C.11.1. (C.E. 26).

90. King approved the Disciplinary Board's recommendation of a thirty day suspension. (C.E. 27).

91. On March 2, 2007, Corrections Officer Robert Lewis, Jr. (hereinafter ""Lewis") was arrested and charged with insurance fraud, criminal conspiracy, and false reports to law enforcement authorities. (C.E. 30).

92. There were two felony charges filed against Lewis. (C.E. 30).

93. In short, Lewis' insurance fraud charge involved the disposal of a vehicle for the purpose of submitting an insurance claim. (C.E. 30).

94. After hearing charges that Lewis had violated General Orders 1, 2, and 6, and Policy 1.C11.1, the Disciplinary Hearing Board recommended Lewis' discharge. (C.E. 31).

95. In making the discharge recommendation, the Board reviewed Lewis' record, which revealed over 20 disciplinary actions between 1999 and 2006, and an unsatisfactory performance evaluation. (C.E. 31, 32).

96. King approved the Board's recommendation and Lewis was discharged. (N.T. 140; C.E. 31).

97. In 2006, Johnson was paid $43,449.21 by the Prison System. (C.E. 10).

98. Following her termination, Johnson secured a taxi license and a CDL license to drive trucks. (N.T. 54).

99. Johnson took civil service tests and applied to approximately 20 employers seeking employment. (N.T. 55).

100. Johnson also read newspaper ads, networked with friends, and researched potential jobs on the internet. (N.T. 55).

101. Johnson interviewed with probation and parole and attempted to become a liquor control clerk. (N.T. 55).

102. In February 2008, Johnson obtained employment with Durham School Services where she worked for 20 hours a week earning $12.40 per hour. (N.T. 56; C.E. 12).

103. Subsequently, Johnson obtained a bus driver position working 20 hours a week, earning $16.00 per hour. (N.T. 57; C.E. 12).

104. From the time of her discharge, Johnson has continued to seek full-time employment. (N.T. 57).

OPINION

This case arises on a verified complaint filed with the Pennsylvania Human Relations Commission (hereinafter "PHRC") on December 17, 2006 by Renee Johnson (hereinafter "Johnson"), against the Philadelphia Prison System (hereinafter "Prison System"), assigned Case No. 200603303. Johnson's complaint alleges that she was terminated in retaliation for filing a PHRC Complaint on March 10, 2003, which was subsequently assigned Case No. 200207251. Johnson's March 10, 2003 PHRC claim alleged that she was denied a promotion because of her race and sex. On June 9, 2006, Johnson amended her Complaint in Case No. 200207251, adding allegations of a continuing denial of promotion because of race and sex, and in retaliation for the filing of Case No. 200207251. Johnson's retaliation allegation in Case No. 200603303 alleges retaliation, which is a violation of Section 5(d) 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 retaliation allegation in Case No. 200603303, and at the investigation's conclusion the Prison System was informed that probable cause existed to credit Johnson's retaliation 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 parties that it had approved a Public Hearing.

The Public Hearing was held on November 18, 2008 in Philadelphia, Pa., before a two-member panel of Commissioners consisting of J. Whyatt Mondesire, Panel Chairperson and Daniel L. Woodall, Jr., Panel Member. The parties effectively waived the requirement that there be a three-member panel. Phillip A. Ayers, Esquire, served as Panel Advisor. PHRC staff attorney Charles L. Nier, III, Esquire, represented the state's

interest in the complaint. Jeffrey First, Esquire, appeared on behalf of the Prison System. Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. The Prison System's post-hearing brief was received on February 26, 2009. The post-hearing brief on behalf of the state's interest was received on March 3, 2009.

Section 5(d) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice... [f]or any... employer... to discriminate in any manner against any individual because such individual has... made a charge... under this act.

To establish a *prima facie* case of retaliation, Johnson must show:

(1) that Johnson engaged in a protected activity;

(2) that the Prison System was aware of the protected activity;

(3) subsequent to the protected activity, Johnson was subjected to an adverse employment action; and

(4) that there is a casual connection between Johnson's protected activity and the adverse employment action.

Robert Wholey Co. v. PHRC, 606 A. 2d 982 (Pa. Cmwlth. 1992); Brown Transportation Corp. v. PHRC, 133 Pa. Cmwlth. 545, 578 A. 2d. 555 (1990).

If Johnson can sufficiently establish a *prima facie* case, the burden of production would shift to the Prison System to attempt to articulate a legitimate non-discriminatory reason for terminating Johnson. Wholey, at 984. Then, if the Prison System successfully articulates a legitimate reason for terminating Johnson, the burden of proof returns to Johnson, who may attempt to establish that the Prison System's offered reason is pretextual and that the true animus was retaliation against Johnson, because of her PHRC complaint.

The first element of the requisite *prima facie* showing is clearly met, since Johnson filed a PHRC claim on March 10, 2003, at PHRC Case No. 200207251, which she

subsequently amended. Initially, Johnson alleged that the Prison System denied her a promotion to the rank of Lieutenant because of her sex and race. In her amendment, Johnson re-stated her original claims, adding that she was not promoted from the Prison System's 2004 promotional list because of her sex, race, and in retaliation for the filing of her initial PHRC claim. Obviously Johnson has established that she engaged in activity that is protected by the PHRA.

Next, as the post-hearing brief on behalf of the state's interest notes, an act of retaliation can only be proven when it is shown that the individual who actually made the adverse employment decision was aware of the claimant's protected activity. *See* Pomales v. Celulares Telefonica, Inc., 447 F.3d 79 (1st Cir. 2006) and Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018 (9th Cir. 2006). In the present case, it is abundantly clear that Commissioner King was solely responsible for the decision to terminate Johnson. Accordingly, the inquiry turns to an evaluation of whether King likely knew of Johnson's Complaint and/or the Amended Complaint.

In general, King's testimony can be characterized as an ineffectual attempt to distance himself from knowledge of either Johnson Complaint or Amended Complaint. Considered in totality, a preponderance of the evidence supports the conclusion that King knew about both Johnson's initial Complaint and her Amended Complaint. First, in telling respects, King's work history involved significant external and internal contact with the complaint processes of various civil rights agencies, including the PHRC. For instance, for two summers King had worked as a fact finder for the Massachusetts Commission Against Discrimination, Massachusetts' counterpart to the PHRC. (N.T. 142-143). Also, while attending law school, King worked for the EEOC, where he assisted in responding to complaints. (N.T. 143). Further, in his 17 years with the City of Philadelphia, King was an Assistant City Solicitor, a

Deputy City Solicitor and then, in 1997, King became General Counsel for the Prison System. (N.T. 73, 74). In these jobs, King noted that he had even represented the City before the PHRC on matters. (N.T. 145). He also noted that he had been in the City's Labor and Employment Department for 1 ½ years. (N.T. 145).

King testified that prior to becoming Commissioner, he had occasion to talk about discrimination complaints and associated problems with the previous Commissioner. (N.T. 144). Additionally, King recalled that as General Counsel for the Prison System, he heard allegations of discrimination from female employees. (N.T. 74), King revealed that he not only trained staff, but that he also developed a policy and procedure for handling complaints. (N.T. 86, 146). Further, King stated that after becoming Commissioner, employment issues were a "big thing" for him. (N.T. 145). On December 19, 2002, King became the Prison System's Commissioner. Less than three months later, Johnson filed her initial PHRC Complaint. Indeed, at the moment King became Commissioner, he had knowledge that there were discrimination complaints challenging the promotion of men over women. (N.T. 145). King indicates that when he became Commissioner, the first thing he did was to make a statement about discrimination and to promote an African-American woman to the position of Deputy Commissioner. (N.T. 145).

Clearly, one of King's paramount interests was his recognition of employee perception of discrimination. Under these circumstances, King's attempt to distance himself from knowledge of Johnson's PHRC Complaint rings hollow. When directly asked whether he knew about Johnson's Complaint, King faltered. For example, King testified that he had initiated a policy that whenever someone complained, he was to receive a copy of IAD's letter to the complaining employee acknowledging receipt of the Complaint. (N.T. 90). Next, King unquestionably equivocated regarding whether someone would speak to him about

complaints. With one breath, King indicated there was no reason he would be contacted to get his version of what occurred regarding the substantive allegations of a complaint. (N.T. 81, 89). In the next breath, King offered that if he was personally involved, sometimes he would be contacted, and sometimes he would not. (N.T. 90). More specifically, when asked at the Public Hearing whether he would occasionally receive PHRC complaints, King testified, "I don't remember getting those, but I could have been. Generally speaking, I would say I did not get them." (N.T. 87) When the question to him focused on whether he would receive complaints where he was personally involved, King basically offered that complaints were handled by others. (N.T. 88-89). After this Public Hearing testimony, King was effectively impeached with previous deposition testimony. King had testified during his deposition that, "if it personally involved me, then at some point somebody would talk to me..." (N.T. 89). Clearly, King offered glaringly inconsistent testimony regarding his involvement and knowledge of complaints generally and Johnson's Complaint and Amended Complaint specifically.

Also, in at least two instances, Johnson's personnel file was available to King. First, during the promotion process, in which King fully participated, personnel files were present. (N.T. 87). Secondly, and of particular significant to Johnson's retaliation claim, King's Notice of Intent to Dismiss states that there had been a "careful review of your personnel record." (C.E. 7). Finally, prior to her termination, the Prison System filed answers to Johnson's initial Complaint and Amended Complaint. Clearly, the focus of Johnson's complaint was a failure to promote. Equally clear is the fact that King was the final decision maker with respect to promotions. It simply defies fundamental logic that King would not have been fully aware of Johnson's allegations, and engaged in discussions regarding his role, prior to the Prison System filing answers to Johnson's Complaint and Amended Complaint. Accordingly, we find

that Johnson successfully established that King was aware that she had filed a PHRC Complaint and a subsequent amendment.

The third requisite element of a *prima facie* is easily met by Johnson. Clearly she was terminated effective December 12, 2006 and termination is an adverse employment action. Accordingly, we turn our attention to the fourth element of *prima facie* case of retaliation: whether Johnson can sufficiently establish a casual connection between the filing of her Complaint and Amended Complaint and her termination.

In the Prison System's post-hearing brief, an argument is generally made that Johnson cannot establish this element. The Prison System suggests that other than by direct evidence, there are two ways causation can be shown: (1) close "temporal proximity"; or (2) temporal proximity plus evidence of intervening antagonism. While causation is often shown using the two methods referenced by the Prison System, these methods are not exhaustive. Indeed, the question of causation should be viewed with a wide lens that reviews a record for evidence from which causation can be inferred. See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 82 FEP Cases 464 (3d Cir. 2000). The emphasis must be on causation and not temporal proximity or antagonism, as these are merely indications which provide several of many possible evidentiary bases for an inference of causation. In the case of Clover v. Total System Svcs., Inc., 176 F.3d 1346, 79 FEP Cases 1500 (11th Cir. 1999), the question of what is necessary to establish a causal connection was answered by the principle that "a plaintiff need only show 'that the protected activity and the adverse action were not wholly unrelated.' " Id. at 1354, citing Simmons v. Camden Cty. Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985); *see also* Meeks v. Computer Assocs. Intl., 15 F.3d 1013, 1021 (11th Cir. 1994).

Also, on evidence similar to that presented in this case, the court in DeCintio v. Westchester Cty. Medical Ctr. declared that proof of causal connection can be established indirectly by temporal proximity, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct. DeCintio v. Westchester Cty. Medical Ctr., 821 F.2d 111, 44 FEP Cases 33 (2d Cir. 1987), citing Simmons, *supra* at 1188-89; *see also* DuBois v. The State of New York, 966 F.Supp. 144, 74 FEP Cases 718 (N.D.N.Y. 1997). Further, in the case of Coates v. John H. Dalton, a four year lapse between the protected activity and the adverse action was found not to be legally conclusive. Coates v. John H. Dalton, Sec. Dept. of the Navy, 927 F. Supp. 169, 72 FEP Cases 15 39 (E.D. Pa. 1996). While a time lapse may be a consideration, a time lapse should only be one consideration among many. Robinson v. SEPTA, 982 F.2d 892, 895 (3d Cir. 1998).

Here, Johnson filed her initial Complaint on March 10, 2003, approximately 3 years and 2 months before her December 12, 2006 termination. Johnson also filed an Amended Complaint on June 9, 2006, 6 months before her termination.The post-hearing brief on behalf of the state's interest argues that a causal connection can be inferred from the close temporal proximity between Johnson's Amended Complaint and her termination. The brief continues to suggest that the decision to terminate Johnson occurred "on or around September 18, 2006," but what occurred on September 18, 2006 was not a decision to terminate Johnson, but merely a Disciplinary Board recommendation to suspend Johnson for 15 days. When King actually made his decision to reject the Disciplinary Board's recommendation and terminate Johnson is unclear. What is known is that on December 1, 2006, Johnson was served with a Notice of Intention to Dismiss. Accordingly, the shortest time lapse between when Johnson engaging in a protected activity and her termination is just under 6 months.

As noted earlier, the case of Coates v. John H. Dalton, illustrates that a lapse of time is not a conclusive indication that a successful *prima facie* case cannot be made. In Coates, a four-year lapse was not enough to prevent a showing of a causal connection. For instance, if the adverse action that occurs happens on the first possible occasion following protected activity, a causal connection can still be shown. Id. at 170-171.

Applying this reasoning to the present case, shortly after Johnson filed her Amended Complaint, she was notified that she would face a Disciplinary Board. King could not immediately terminate Johnson after he became aware of Johnson's Amended Complaint. Instead, he had to wait until the Disciplinary Board process occurred. Only then was King able to reject the recommendation to suspend Johnson. Interestingly, the Disciplinary Board's recommendation is dated September 18, 2006, but the notice of Intent to Dismiss was not sent to Johnson until December 1, 2006. One has to wonder why there is a lapse of two and a half months between the board's recommendation and the actual notice of termination. Coates notes that a time lapse should not conclusively resolve the causal connection issue because, if it did, employers could avoid liability for retaliation simply by waiting to punish an employee who had engaged in protected activity. Id. at 170. Here, the unexplained two and a half month interval between the recommendation and the action of termination is suspect. Was King holding off on terminating Johnson until more time lapsed after Johnson's Amended Complaint in an attempt to weaken a retaliation claim? We simply do not know.

In the present case, temporal proximity may not be strong, however, something else is. Here, evidence was presented that shows that Johnson received much harsher treatment than five other Prison System employees who had also been charged with violating the same General Order that resulted in Johnson's termination. Indeed, Correction Officers Segal,

Robinson, Bolton, Fegone and Murphy had each committed various criminal offenses that led to Prison System discipline for several General Order violations.

While Johnson was found to have violated only General Order number 6, the five comparison correction officers were found to have violated Prison System General Orders and Policy as follows:

Segal	-	Policy 1.C.11.1 and General Orders 1, 2 and 6.
Robinson	-	Policy 1.C.11.1 and General Orders 1, 2, 6, 21 and 62.
Bolton	-	General Orders 1, 2, 6, 27, 28 and 31.
Fergone	-	Policy 1.C.11.1 and General Orders 1, 2, 6 and 28.
Murphy	-	Policy 1.C.11.1 and General Orders 1, 2, 6, 11, 16 and 35.

Although each listed correction officer was found to have violated more General Orders than Johnson, and four of the five were also in violation of Policy 1.C11.1, none of the five listed Correction Officers was terminated. Instead, Segal received a 30 day suspension with time served; Robinson received a 30 day suspension with time served, and was made to undergo periodic fitness for duty evaluations; Bolton received a three day suspension; Fergone received a 15 day suspension; and Murphy received a 30 day suspension.

Considered as a whole, the evidence reveals that Johnson has presented sufficient evidence of a causal link between the protected activity and her termination. Accordingly, each element of the requisite *prima facie* showing has been established. As a result, we turn to the question of whether the Prison System offered a legitimate non-discriminatory reason for the termination of Johnson. Here, the Prison System meets this production burden by offering that the reason Johnson was terminated was because King believed that Johnson's resisting arrest conviction was inconsistent with her duties as a Corrections Officer. King offered that in his opinion, the crime of resisting arrest involves putting hands on an officer.

In fact, King termed Johnson's resisting arrest charge as "assaulting another police officer." (N.T. 111-112).

With the Prison System having articulated a legitimate, non-discriminatory reason for Johnson's termination, we turn to the question of whether Johnson can establish by a preponderance of evidence that the reason offered is pretextual, and that the real reason Johnson was terminated was an act of retaliation. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Johnson's burden of showing that the Prison System's proffered reason was not the true reason for her termination now merges with Johnson's ultimate burden of persuading us that she has been the victim of retaliation. Thus, Johnson may show pretext either directly by persuading us that a discriminatory reason more likely motivated the Prison System or indirectly by showing that the Prison System's proffered explanation is unworthy of credence. Id. at 256. In any event, Johnson retains the burden of persuasion on the issue of retaliatory intent.

Johnson can establish that the proffered reason for her termination is a pretext for discrimination in a number of ways. First, Johnson can point to evidence that reasonably calls into question the honesty of King's belief that Johnson was convicted of an offense that involved striking or injuring a police officer. Another way is by showing weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reason, such that we can infer that King did not act for the asserted non-discriminatory reason. Santiago-Ramos v. Centennial P.R. Wireless, 83 FEP Cases 569, 575 (1st Cir. 2000) (citing Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998)); *see also* Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997). Yet another method Johnson can use to establish pretext is to show that Johnson received less favorable treatment than similarly situated individuals who had not filed PHRC cases.

Here, despite his extensive legal background, King suggests that he believed the crime of resisting arrest involved touching or injuring a police officer. (N.T. 102). King went on to describe resisting arrest as putting a hand on a police officer and assaulting a police officer. (N.T. 11-112, 122). Indeed, King went so far as to suggest that a resisting arrest conviction requires a showing that an officer be injured. (N.T. 156). The crime of resisting arrest is found at 18 Pa. C.S. §5104, which states:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a pubic servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

This statutory provision is clear. The offense of resisting arrest does not require the aggressive use of force such as striking or kicking an officer. Commonwealth v. Miller, 475 A.2d 145, 146 (Pa. Super. 1984). Resisting arrest is conduct that either creates a substantial risk of bodily injury to the arresting officer or requires substantial force to overcome the resistance. Indeed, passive resistance that requires substantial force to overcome supports a conviction for resisting arrest. Commonwealth v. Thompson, 922 A.2d 926, 928 (Pa. Super. 2007).

King knew what charges were initially brought against Johnson and that Johnson had not been convicted of criminal conspiracy, aggravated assault, recklessly endangering another person, riot, failure to disperse, or disorderly conduct. Further, King had heard Johnson's version of the events that led to her arrest and had found her version to have been neither ridiculous nor outlandish. (N.T. 99). In fact, King testified that he found Johnson's version to have some apparent credibility. (N.T. 99).

We find that King knew the resisting arrest conviction did not require an injury to an officer. King was familiar with the charge of resisting arrest and knew that Johnson had not

been convicted of so much as touching an officer, let alone assaulting one. Still, in effect, King ignored the recommendation of a Disciplinary Hearing Board that consisted of King's Deputy Commissioner, two Deputy Wardens, one of Johnson's peers, and a Board Secretary. (C.E. 16). The Disciplinary Hearing Board had recommended a 20-day suspension and approximately two and a half months later, King ordered Johnson's termination.

This reason alone allows us to find that Johnson has sufficiently established that King's proffered reason is not worthy of credence. To this showing we then add another basis for the conclusion that King's articulated reason is pretextual. In its post-hearing brief, the Prison System argues that Johnson's criminal conviction was entirely different from the evidence presented surrounding the convictions of six other correction officers. The Prison System contends that none of the offenses committed by others shows a blatant disregard for law enforcement authority. In effect, the Prison System argues that Johnson's conviction was unique.

Initially, we note that Johnson was purportedly terminated for the violation of the Prison System's General Order #6, not specifically for her conviction of a criminal offense. Thus, at the outset of making a comparison of Johnson's treatment with the treatment of the six Correction Officers with whom Johnson seeks to compare herself, we find that Johnson was charged with the violation of fewer General Orders than any of those with whom she compares herself.

The only General Order Johnson was charged with violating is General Order #6. As noted earlier, Segal was charged with violation of General Orders 1, 2 and 6; Robinson, General Orders 1, 2, 6, 21 and 62; Bolton, General Orders 1, 2, 6, 27, 28 and 31; Fergone, General Orders 1, 2, 6, and 28; and Murphy, General Orders 1, 2, 6, 11, 16 and 35. Lewis, a Correction Officer who, like Johnson, was fired, was charged with violations of General

Orders 1, 2, and 6. Accordingly, we find it sufficient that each of the comparison individuals was charged with acts of comparable seriousness. To be probative, acts need not be identical. *See* Rucker v. Frito Lay, 54 FEP Cases 1302, 1307 (D.C. Kan. 1990).

In the post-hearing brief on behalf of the state's interest in Johnson's Complaint, the general contention is made that several of the comparison individuals were convicted of crimes that carry harsher potential sentences than resisting arrest. A review of the criminal convictions of those with whom Johnson seeks to compare herself reveals that Segal was convicted of one second degree misdemeanor, sentenced to one year non-reporting probation and ordered to pay costs. Robinson was placed in ARD, given one year probation, ordered to pay restitution and costs and to perform community service. Fergone requested ARD and received one year on probation, a fine and a 60-day suspension of his license. Murphy was ordered to spend two years on probation, have his driver's license suspended for 30 days, and to attend an outpatient treatment program and safe driving school. Finally, Lewis pled no contest to two felonies and two misdemeanors.

A comparison of the circumstances behind the criminal charges brought against Johnson and two other Correction Officers shows that a reasonable observer would easily conclude that the events behind both Segal and Robinson's charges are at least as serious as the events that led to charges against Johnson. In fact, most, if not all, would agree that Segal and Robinson's actions reflected far more negatively on the Prison System than anything Johnson did. Segal's arrest came after a road rage incident during which Segal pointed a loaded pistol at another driver who happened to be an off duty police officer. Robinson's arrest followed his attempt to fill a fraudulent prescription for Oxycontin, a controlled drug. In attempting to gain access to the controlled substance, Robinson was also associating with a former inmate. Neither were terminated, in fact Segal and Robinson both

received time-served 30-day suspensions. In our opinion Segal and Robinson's actions reflected far more negatively on the Prison System than Johnson's actions.

Lewis, by comparison, committed insurance fraud. He had an accomplice get rid of his vehicle, then he reported his vehicle stolen. While Lewis was also terminated, there are significant disparities in Lewis' situation as compared to Johnson's. While Johnson had no disciplinary record since 1989, Lewis' record reveals 22 separate instances of discipline and the existence of an unsatisfactory evaluation. In fact, the Disciplinary Hearing Board recommended termination, specifically indicating that Lewis' previous employment record was key to the determination to terminate. (C.E. 31.)

Considering the evidence as a whole, we find that King's articulated reason for terminating Johnson is pretextual. We also find that the real reason Johnson was terminated is because she had filed a Complaint and Amended Complaint. Having found that the Prison System retaliated against Johnson, we turn to consideration of an appropriate remedy.

Section 9(f) of the PHRA provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement... with or without back-pay... and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice... as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice. *See* Albermarle

Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. 1973).

The first aspect we must consider regarding making Johnson whole is the issue of the extent of financial losses suffered. When complainants prove an economic loss, back pay should be awarded absent special circumstances. *See* Walker v. Ford Motor Company Inc., 684 F2d 1355, 29 FEP Cases 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the complainant] would probably have earned..." PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Cmwlth. 1975), aff'd. 387 A.2d 58 (Pa. 1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. *See* Green v. USX Corp., 46 FEP Cases 720 (3d Cir. 1988).

In this case, Johnson submits that she should be completely reimbursed for lost wages based upon established wage rates through the date of this order adjusted by subtracting her interim earnings. Additionally, Johnson seeks front pay until such time as the Prison System offers Johnson employment or Johnson reject such an offer.

Johnson asserts that she made reasonable attempts at mitigation. Courts consistently hold that it is a respondent's burden to produce evidence of a lack of diligence in pursuing other employment in mitigation. *See* Jackson v. Wakulla Spring & Lodge, 33 FEP Cases 1301, 1314 (N.D. Fla. 1983); Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP Cases 610, 619 (7th Cir. 1981); Maine Human Rights Comm. v. City of Auburn, 31 FEP Cases 1014, 1020 (Maine 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EPD 36,968 (Mich. Ct. App. 1986). Diligence in mitigating damages within the employment discrimination context

does not require every effort, but only a reasonable effort. It is a respondent, not a complainant, who has the burden of establishing that the complainant failed to make an honest, good faith effort to secure employment. Id. at 46,704.

Regarding whether Johnson mitigated her damages, the evidence shows that shortly after her termination Johnson began looking for full-time employment. Her job search included review of newspaper ads, networking with friends, and researching job openings on the internet. (N.T. 55). Johnson submitted applications for numerous jobs, took several Civil Service Exams, and interviewed for positions of parole office and liquor control clerk. (N.T. 54-56).

Eventually, Johnson obtained a license to drive a taxi and began working in that capacity. Johnson also obtained a commercial driver's license and began driving a school bus for Durham School Services in February 2008. Subsequently, Johnson also drove a school bus for the Philadelphia School District. (N.T. 55-58). At the time of the Public Hearing, Johnson was still working 20 hours a week driving a school bus for the Philadelphia School District. (N.T. 57).

Given the extent of Johnson's mitigation efforts, we find that she is entitled to a back pay award less her interim earnings. However, before we calculate Johnson's entitlement, we address the question of whether to offset amounts Johnson received as unemployment benefits and retirement benefits. Here, Johnson's 2007 Tax Return reflects that she received unemployment compensation benefits in the amount of $12,401 and a total of $41,110.00 in pension benefits: a 1099R from Orchard Trust Company for $36,814.24; and another 1099R from Monumental Life Insurance Co., for $4,296.38. (C.E. 11).

Regarding unemployment compensation benefits, we have often held that such benefits are "collateral benefits" and have not deducted amounts received as unemployment

compensation from back pay awards. *See* Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983). Similarly, we now hold that since the amounts Johnson received as retirement benefits were not received directly from the Prison System, they too are collateral benefits and will not be deducted. *See* McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 217-18, 35 FEP Cases 371 (3rd Cir. 1984), *vacated and remanded on other grounds,* 105 S.Ct. 1159 (1985); *see also* Guthrie v. J.C. Penney Co., 42 FEP Cases 185 (5th Cir. 1986); Cline v. Roadway Express, Inc., 689 F.2d 481 (4th Cir. 1982); Wise v. Olan Mills Inc. of Texas, 495 F.Supp. 257, 29 FEP Cases 1126 (D.C. Colo. 1980).

Johnson's 2006 earnings from the Prison System was $43,449.21. (C.E. 10). Despite her termination on December 12, 2006, Johnson continued to be paid into 2007 as she received a W-2 from the Prison System for wages earned in the amount of $1,355.15. To calculate lost earnings, we will simply divide Johnson's 2006 earnings by 52 weeks. This equals a weekly loss of $835.56. Using this figure, Johnson's lost wages to the date of this Order equal the following:

2006 – 3 weeks at $835.56 ..... $2,506.68

2007 – 52 weeks..... $43,449.21

2008 – 52 weeks..... $43,449.21

2009 – 19 weeks at $835.56..... $15,874.50

Total lost wages.....$105,279.60

Of course, from this amount we deduct Johnson's interim earnings. In the post-hearing brief on behalf of the state's interest in this case, Johnson's income was estimated as $16.99 per hour for 20 hours a week beginning in 2008. We accept this proposed method of calculation of Johnson's interim wages. Accordingly, the following amounts will be deducted:

2008 - $16.99 per hour x 20 hours x 52 weeks $17,669.60

2009 - $16.99 per hour x 20 hours x 19 weeks..... $6,456.20

Total interim wages.....$24,125.80

Total lost wages minus interim earnings..... $81,153.80

An award of interest on the back pay award is also appropriate, Goetz v. Norristown Area School District, 16 Pa. Cmwlth Ct. 389, 328 A.2d 579 (1975).

Johnson did earn income from Ross Stores after her termination, however, the hours Johnson worked at Ross Stores prior to her termination generally remained the same after her termination. Since the hours Johnson worked at Ross Stores during her employment with the Prison System did not increase after she was terminated, there will be no deduction for the hours Johnson worked at Ross Stores after being terminated from the Prison System. *See* Whatley v. Skaggs Cos., 707 F.2d 1129, 1139, 31 FEP Cases 1202 (10th Cir. 1983), *citing* Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973).

Next, Johnson is entitled to verifiable out-of-pocket expenses. The post-hearing brief on behalf of the state's interest in the complaint submits that the Prison System's act of retaliation caused Johnson to make an early withdraw of $41,110.00 from her pension. The post-hearing brief on behalf of the state's interest in the complaint contends that Johnson should be awarded $41,110.00, as an out-of-pocket expense. However, it is clear that Johnson has received this amount already. To award Johnson an additional $41,110.00 would result in a windfall. Instead, if a calculation can be made that takes into account the long-term effects of Johnson's early withdrawal from her pension plan, such a calculation shall be made and an appropriate amount shall be put into Johnson's pension account by the Prison System. An informed calculation regarding this complex issue is not possible given the lack of evidence presented on this issue. Within 60 days, the PHRC regional office shall

make a proposed calculation in this regard and the parties shall then engage in good faith discussions regarding the implications associated with Johnson's early withdrawal of pension funds.

Johnson also seeks reinstatement. We find that reinstatement is an appropriate remedy. Upon reinstatement, should Johnson accept reinstatement, Johnson's personnel records shall be adjusted in such a way as to reflect the restoration of any and all rights and benefits Johnson lost as a result of the discriminatory termination. Additionally, until the Prison System offers Johnson reinstatement or Johnson rejects such an offer, Johnson is entitled to front pay in the amount of $525.58 per week until either Johnson is reinstated or Johnson rejects an offer of reinstatement. The amount of $525.58 is the difference between what she would be earning had Johnson not been terminated and the amounts Johnson is likely to earn working for the Philadelphia School District.

Finally, the PHRC regional office post-hearing brief recommends an order requiring training of the Prison System's management employees designed to educate such employees regarding their responsibility to not retaliate against any employee who participates in the PHRC complaint process.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RENEE JOHNSON, **Complainant**	:	
	:	**PHRC CASE NO. 200603303**
PHILADELPHIA PRISON SYSTEM, **Respondent**	:	

RECOMMENDATION OF THE HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, we the two members of the Hearing Panel find that the Complainant has proven discrimination in violations of Section 5(d) of the Pennsylvania Human Relations Act. It is, therefore, our joint recommendation that the attached Stipulation, Findings of Fact, Conclusions of law, and Opinion be approved and adopted. We further recommend issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
J. Whyatt Mondesire
Chairperson

By: _____
Daniel L. Woodall, Jr.
Panel Member

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RENEE JOHNSON, **Complainant**	:	
	:	**PHRC CASE NO. 200603303**
PHILADELPHIA PRISON SYSTEM, **Respondent**	:	

FINAL ORDER

AND NOW, this 19TH day of MAY, 2009, 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 Stipulation, Findings of Fact, Conclusions of Law, and Opinion of the Hearing Panel. Further, the Commission adopts said Stipulation, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Stipulation, 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

ORDERS

1. That the Prison System shall cease and desist from retaliating against employees who participates in the PHRC's complaint process.

2. That the Prison System shall pay to Johnson within 30 days of the effective date of this order, the lump sum of $81,153.80, which amount represents back pay lost for the period December 12, 2006 and the date of this Order,

3. That the Prison System shall pay additional interest of 6% per annum on the back pay award, calculated from December 12, 2006 until payment is made.

4. That the Prison System shall offer Johnson reinstatement into the position she held at the time of her termination and should Johnson accept an offer of reinstatement, the Prison System shall restore to Johnson all rights and benefits Johnson lost as a result of the retaliatory termination.

5. That until either the Prison System offers Johnson reinstatement into the position she held at the time of her termination, or Johnson rejects such an offer, the Prison System shall pay Johnson front pay in the amount of $525.58 per week.

6. That within 2 months of the date of this Order, the Prison System shall facilitate training of all its management employees that is designed to educate such managers about their responsibility not to retaliate against any employee that has participated in the PHRC's complaint process.

7. That the Prison System shall report the means by which it will comply with this Order, in writing, to Charles L. Nier, III, Esquire, Assistant Chief Counsel, within 30 days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
Stephen A. Glassman, Chairperson

Attest:

_____
Daniel D. Yun, Secretary