

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

NICOLE MATTHEWS, Administratrix, and :
MICHELLE L. MATTHEWS, :
Administratrix, Administrators of the :
Estate of GEORGE A. MATTHEWS, JR., :
Complainants :

v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF CORRECTIONS, :
STATE CORRECTIONAL INSTITUTION :
AT DALLAS, :
Respondent :

PHRC DOCKET NO. E-78141-D
PHRC CASE NO. 199504361
EEOC CHARGE NO. 17F962455

STIPULATIONS

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OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Nicole Matthews, Administratrix, and
Michelle L. Matthews, Administratrix,
Administrators of the estate of
George A. Matthews, Jr.,

Complainants

v.

Commonwealth of Pennsylvania,
Department of Corrections,
State Correctional Institution at Dallas,

Respondent

PHRC Docket No. E78141D
PHRC Case No. 199504361
EEOC No. 17F962455

STIPULATIONS

Pennsylvania Human Relations Commission Harrisburg Regional Office staff and Respondent hereby stipulate to the following.

Procedural Prerequisites

1. George A. Matthews, Jr. (hereinafter "Matthews") originally filed a Complaint in this matter with the Pennsylvania Human Relations Commission (the "PHRC") on May 21, 1996.
2. In his PHRC Complaint, Matthews alleged that on or about April 17, 1996, Respondent refused to promote him because of his race - white.
3. Matthews died intestate on January 29, 2004.
4. Nicole Matthews and Michelle L. Matthews are the daughters of George A. Matthews, Jr., and the Administrators of his estate pursuant to Letters of Administration issued by the Register for the Probate of Wills of Wyoming County, Pennsylvania, on February 3, 2004.

5. Respondent—Commonwealth of Pennsylvania, Department of Corrections—is an “employer” for purposes of the Pennsylvania Human Relations Act, with the following address: 2520 Lisburn Road, P.O. Box 598, Camp Hill, PA 17001-0598.
6. The employment actions challenged in the Complaint allegedly occurred in Luzerne County, Pennsylvania.
7. Matthews filed a timely Complaint with the PHRC alleging that Respondent denied him equal pay and refused to promote him because of his race, in violation of the Pennsylvania Human Relations Act.
8. PHRC Harrisburg Regional Office staff docketed the Complaint on June 29, 1996.
9. PHRC Harrisburg Regional Office staff served Respondent with a true and correct copy of the Complaint on July 23, 1996.
10. PHRC Harrisburg Regional Office staff served Respondent with a Probable Cause Finding on April 28, 2003.
11. By letter dated April 28, 2003, PHRC Harrisburg Regional Office staff invited Respondent to attend a Conciliation Conference.
12. Respondent attended a conciliation conference conducted by PHRC Harrisburg Regional Office Staff on June 10, 2003.
13. The case did not conciliate.
14. All jurisdictional prerequisites for a public hearing have been satisfied.

Facts Relating to the Merits

15. Matthews was Caucasian.
16. Respondent hired Matthews in July 1976 for a clerical position.
17. In 1980, Respondent promoted Matthews to “Administrative Assistant I.”
18. In 1981, Respondent promoted Matthews to “Administrative Assistant 2.”
19. In 1988, Respondent promoted Matthews to “Administrative Officer 1.”
20. On March 15, 1996, Respondent posted a “Management Position Vacancy” notice at SCI-Dallas stating that a Corrections Superintendent Assistant II (“CSA-II”) position was available and that the deadline for bids for the position was March 28, 1996.

21. At the time, Matthews was serving as "acting" CSA II.
22. Matthews had been appointed to "acting" CSA II on January 2, 1996, and served in that capacity through May 30, 1996.
23. The following individuals submitted bids for the vacant CSA-II position:
 - a. Kenneth Burnett, a black male;
 - b. George A. Matthews, Jr., a white male;
 - c. James Kaminski, a white male;
 - d. George Tucker, a black male;
 - e. Andy Rusnak, a white male;
 - f. Robert Perkowski, a white male; and
 - g. Peter Sukaloski, a white male.
24. After receiving the bids and applications, SCI-Dallas Superintendent David Larkins appointed a selection committee consisting of Superintendent Larkins, Deputy Superintendent for Centralized Services Thomas Stachelek, Deputy Superintendent for Facility Management Edgar Kneiss and Personnel Director Roy Van Why.
25. On April 12, 1996, the selection committee interviewed Matthews and six other candidates for the CSA II position.
26. On April 17, 1996, Respondent announced that it had chosen Kenneth Burnett to fill the CSA II position.
27. Mr. Burnett is African-American.
28. Three members of the selection committee (Larkins, Stachelek and Kneiss) ranked Mr. Burnett as their first choice and Matthews as their second choice.
29. The fourth member of the committee (Van Why) ranked Matthews first and Mr. Burnett second.
30. At the time of his promotion to CSA II, Mr. Burnett had been serving as a "Corrections Counselor."
31. Respondent had originally hired Mr. Burnett as a Corrections Officer on August 26, 1985 and, after the standard trainee period, made him a Corrections Officer I.
32. On April 4, 1990, Respondent promoted Mr. Burnett to Corrections Counselor I, effective April 15, 1990.
33. On February 8, 1991, Respondent promoted Mr. Burnett to Corrections Counselor II, the position he held at the time Respondent promoted him to the CSA II position on April 17, 1996.

Facts Relating to Damages

34. A print out, prepared by Respondent and attached hereto as Exhibit "1" sets forth the difference between the gross pay Matthews would have received had he been promoted to CSA II in April 1996 and the amount of gross pay he actually did receive working in his Administrative Officer I position.
35. The print out sets forth the difference in gross pay from May 5, 1996 (the first pay period after the effective date of the promotion in question) through May 2003, a total of \$57, 121.80.
36. The print out breaks out the gross pay differences in approximately one-half year periods.
37. From May 2003, until the date of his death on January 29, 2004, Matthews would have experienced an additional gross pay difference of \$ 6,969.58.

Ronald W. Chadwell
Ronald W. Chadwell, Esquire
PHRC Asst. Chief Counsel

Pa. Human Relations Commission
1101-1125 S. Front St., 5th Floor
Harrisburg, PA 17104-2515

Date: 6/11/2004

Michael J. McGovern
Michael J. McGovern, Esquire
Counsel for Respondent

Office of Chief Counsel
Pa. Department of Corrections
55 Utley Drive
Camp Hill, PA 17011

Date: 06/14/04

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FINDINGS OF FACT*

1. George A. Matthews, Jr. (hereinafter "Matthews"), was first hired by the Pennsylvania Department of Corrections at SCI-Dallas (hereinafter "SCI-Dallas"), as a clerk in the records department. (J.E. 65, p.5)
2. Matthews' highest educational level was high school. (J.E. 4)
3. After only a few months, Matthews was promoted to SCI-Dallas' Control Center and then progressed up the clerical ranks until in 1980, Matthews became an Administrative Assistant 1. (J.E. 65, p.5)
4. In 1981, Matthews was again promoted, this time to the position of Administrative Assistant 2. (J.E. 65, p.6)
5. In 1988, Matthews was promoted to Administrative Officer 1. (J.E. 65, p.6)
6. Since 1982, Matthews has been involved in SCI-Dallas' participation in the American Corrections Association accreditation process. (J.E. 63; J.E. 65, p.6)
7. The American Corrections Association accreditation process compares institutional operations of corrections facilities against a set of both mandatory and non-mandatory standards. (J.E. 68, p.8)

*The foregoing "Stipulations" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

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

8. Throughout the entire system, each separate facility within the Department of Corrections must undergo the lengthy accreditation process every three years. (J.E. 68, p.8)

9. Among Matthews' experiences working at SCI-Dallas, Matthews performed the following functions:

- a. Litigation Liaison
- b. One of several News Media Relations Officers
- c. Investigate, respond to and resolve inmate grievances
- d. State Correctional Analysis Network (SCAN) Coordinator
- e. Research Coordinator
- f. Hostage Negotiator
- g. Speaker Program Coordinator and Guest Speaker
- h. Assisted with litigation
- i. Involvement with labor relations issues

(J.E. 63; J.E. 65, p.7)

10. In 1982, Matthews worked for Deputy Superintendent Joseph Ryan (hereinafter "Ryan"), and once Ryan was promoted to Superintendent, Matthews continued to work for Ryan and also for then Deputy Superintendent John R. Stepanik (hereinafter "Stepanik"), Ryan's replacement. (J.E. 65, p.7)

11. When Ryan retired, Stepanik became the Superintendent and Matthews then worked for both Stepanik and Deputy Superintendent Davil Larkins (hereinafter "Larkins"). (J.E. 65 p.7)

12. While working for Superintendents Ryan and Stepanik, Matthews formed the impression that he was being groomed for the Corrections Superintendent Assistant II, (hereinafter "CSA-2") position. (J.E. 65, p.16)

13. Ryan did not specifically tell Matthews that he was "grooming" him for the CSA 2

position, but may have said, "you've got to understand, Figmik's not going to be here forever and that would be a good job for you...[and] I would recommend [you] for it." (N.T. 41)

14. Eventually, Stepanik also retired and Larkins became the Superintendent. (J.E. 65, p.7)

15. At that point, Matthews worked for both Larkins and Edgar M. Kneiss (hereinafter Kneiss"), who replaced Larkins in the Deputy Superintendent position. (J.E. 65, p.7)

16. Over this entire period, Thomas Figmik (hereinafter "Figmik") held the position of CSA 2 at SCI-Dallas. (N.T. 109)

17. On January 2, 1996, Figmik retired and Matthews was named as the acting CSA 2. (N.T. 107)

18. Approximately a month to a month and a half prior to the selection of Kenneth Burnett (hereinafter "Burnett"), as Figmik's replacement, Larkins came to Matthews and said, "If you don't get the position, don't be upset about it." (J.E. 65, p.8)

19. Larkins' comment led Matthews to feel that the decision on Figmik's replacement was made in advance of the interview process. (J.E. 65, p.8)

20. Subsequent to Larkins' comment to Matthews, Matthews contacted Ryan who advised him to write letters to people seeking their support. (J.E. 65, p.9)

21. On January 22, 1996, Matthews wrote to Raymond Clymer, Jr., the Department's Executive Deputy Commissioner seeking his support in attaining the CSA 2 position. (J.E. 63)

22. At the Public Hearing, several positive letters, that had been sent to Matthews'

supervisors during the period between 1984 and 1994 about Matthews' work performance, were introduced into evidence. (J.E. 23, 24, 34, 35, 36, 37)

23. On March 15, 1996, Roy Van Why (hereinafter "Van Why"), SCI-Dallas' Personnel Director, posted the notice for the CSA 2 opening. (J.E. 40)

24. Generally, the job description for the CSA 2 position lists the following duties:

- a. Accreditation Coordinator
- b. Administration of inmate complaint system
- c. Litigation – investigation of and reports on inmate complaints
- d. Public Information Officer – issues press releases and holds news conferences
- e. Chair of various committees
- f. Prepares correspondence and reports for the Superintendent
- g. Administrative Duty Officer with other Management Staff

(J.E. 40)

25. The job description lists 5 years required experience in a Commonwealth correctional institution in the area of counseling, education, security, vocational placement, vocational training, professional personnel management, or work of an administrative/managerial nature. Appropriate college level training may be substituted for experience on a year for year basis to a maximum of three years. (J.E. 40)

26. On March 15, 1996, Matthews submitted his Request for Promotion Consideration for the CSA 2 position. (J.E. 4)

27. In addition to the Request for Promotion Consideration form, Matthews also submitted an Application for Non-Civil Service Employment form and a Resume. (J.E. 4)

28. Collectively, the documents Matthews submitted informed the selection panel that he was a high school graduate, was a third-class petty officer in the U.S. Coast Guard,

and outlined his work experiences during his career at SCI-Dallas. (J.E. 4)

29. Burnett, the individual who was selected for the CSA 2 position had also submitted a Request for Promotion Consideration, an Application for Non-Civil Service Employment form and a Resume. (J.E. 39)

30. Collectively, the documents Burnett submitted listed his qualifications as:

- a. Bachelor's Degree in Social Work and Sociology
- b. Graduate Studies in Public Administration
- c. Religious Studies credits
- d. Pursuing a Master of Divinity degree
- e. SCI-Dallas employment history
 - (1) August 1985 – hired as Corrections Officer Trainee
 - (2) April 1990 – promoted to Corrections Counselor 1
 - (3) February 1991 – promoted to Corrections Counselor II
- f. Military veteran – E-6
- g. Assistant pastor of local church
- h. Vice-president of local Minority Educational Developmental Cultural Center
- i. Vice-president and Secretary of local NAACP

(J.E. 39)

31. Four other white males and one additional black male also applied for the CSA 2 position. (J.E. 5; J.E. 8)

32. Once all applications had been reviewed, Larkins appointed a selection committee consisting of himself, Deputy Superintendent for Centralized Services, Thomas Stachelek (hereinafter "Stachelek"), Kneiss and Van Why. (N.T. 86-87; J.E. 5))

33. On Friday, April 12, 1996, the selection committee interviewed the seven candidates. (J.E. 5)

34. A half hour prior to the beginning of the first interview, Van Why provided the other

three selection committee members with each applicant's application packet for advance review. (N.T. 85)

35. During the interviews, each applicant was asked the same series of questions. (N.T. 89-91, 132-133)

36. During the interviews, selection committee members made notes which reflected their impressions of each answer an applicant gave. (J.E. 5, 6, 7 and 8)

37. Kneiss generally noted that Matthews had the best interview but that Burnett had the greater education and public speaking and perceived ability to deal with Community based crisis. (J.E. 5)

38. During the interviews, Kneiss noted his impressions of an applicant's answers and designated plus signs for answers he liked. (J.E. 5)

39. Kneiss noted 15 plus signs as Burnett spoke. (J.E. 5)

40. Kneiss noted 11 plus signs as Matthews spoke. (J.E. 5)

41. While Kneiss recognized Matthews may have had more experience than Burnett, Kneiss noted that Burnett had written articles, been on TV, and had spoken at colleges. (N.T. 136)

42. Kneiss perceived that the CSA 2 position would often involve interacting with the public on corrections issues, and he concluded that Burnett would be a good representative of the institution. (N.T. 136)

43. Kneiss also liked Burnett's educational level, his community involvement, community awareness and understanding, and his ability to speak in the community. (N.T. 138)

44. Each selection committee member made a conscious effort to record their impressions of the answers given by the applicants. (J.E. 5, 6, 7, and 8)
45. The CSA 2 position was a high level management position. (N.T. 118, 121)
46. When the interviews concluded, the selection committee discussed each applicant. (N.T. 92)
47. After the discussion, rather than vote on who the committee wanted to promote, Larkins announced that the vote would be delayed until Monday. (N.T. 92)
48. Larkins informed the committee that Deputy Secretary William Love (hereinafter "Love") from the central offices in Camp Hill was scheduled to be at the institution on Monday and Love might have some input. (N.T. 95, 119)
49. Love is an African American and as a Deputy Secretary, he was responsible for overseeing several Corrections Department institutions, including SCI-Dallas. (N.T. 109)
50. Love testified that when he arrived at SCI-Dallas, he was told Burnett was to be selected as the new CSA 2. (J.E. 69, p.12)
51. In a questionnaire submitted to the PHRC, Matthews stated, "I feel I was recommended by a majority of the selection committee." (J.E. 65, p.12)
52. In the same questionnaire, Matthews also indicated that "I feel Deputy Commissioner Love persuaded the committee to select a minority candidate." (J.E. 65, p.13)
53. When Love arrived at SCI-Dallas on the Monday following the interviews, Larkins spoke with Love about wanting to promote Burnett, to which Love asked if Burnett was the best person for the job. (N.T. 95; J.E.69, p.12)

54. Larkins told Love that he thought Burnett was the better choice but that concern had been raised about things that might challenge Burnett's time and the fact that Burnett's involvement with the NAACP might compete with the responsibilities of the job. (J.E. 69, p. 12,13)
55. Love then asked Larkins if he thought Burnett understood the importance of the responsibility, to which Larkins indicated he thought Burnett understood. (J.E. 69, p.13)
56. Love indicated that he could speak with Burnett so Burnett was called to the office where Love spoke to him about responsibilities and inquired of him whether he felt he could handle them and whether he was prepared to make a commitment to the responsibilities of the positions of CSA 2. (J.E. 69, p. 14)
57. Burnett affirmed that he was. (N.T. 95-96; J.E. 69, p.14)
58. Love did not speak with any of the other applicants. (J.E. 65, p. 13-14)
59. Love testified that prior to the selection, he did not know either Matthews or Burnett and that he never expressed a preference to Larkins regarding the selection and that he would not have tried to influence the decision. (J.E. 69, p.15, 18, 23-24)
60. Following Love's visit, Larkins reconvened the selection committee in his office to make a final decision. (N.T. 96)
61. Kneiss and Stachelek arrived before Van Why and when Van Why arrived, Larkins asked him which applicant he wanted, and Van Why responded that his choice was Matthews. (N.T. 97)
62. Larkins then informed Van Why that Kneiss and Stachelek had already given their recommendation and they had decided on Burnett. (N.T. 97)

63. Van Why then asked Larkins if he wanted him to change his vote so the decision would be unanimous, but Larkins told him no, that he should recommend the applicant he felt was the best qualified. (N.T. 97)
64. Van Why testified that until Burnett's selection, there had never been a member of a minority group in a management position at SCI-Dallas. (N.T. 98)
65. After the interviews, Kneiss ranked Burnett first and Matthews second, and because he felt that their qualifications were so close, the issue of race entered into his decision. (N.T. 142)
66. Kneiss testified that at about the time of the interviews, "there was a perception that SCI-Dallas was a good old boy network or it was the rednecks from up in the mountain type of situation." (N.T. 140-141)
67. Larkins and Stachelek also ranked Burnett first and Matthews second. (S.F. #28)
68. Van Why felt that Matthews' experience merited his being ranked first. (N.T. 112)
69. Because of his good appearance, good verbal skills, extensive community service, news media experience, and his having chaired numerous committees at his church and other organizations, Burnett was Van Why's second choice. (N.T. 112; J.E. 6)
70. The April 1996 opening for CSA 2 was the first opening for this position in 25 years as Figmik had held the position until he retired. (N.T. 109)
71. The CSA 2 was described as the "right hand man of the Superintendent". (N.T. 34-35)
72. Under Department of Corrections' informal policies, if two applicants possess equal qualifications and one applicant is either a female or a minority, the female or minority

would be promoted as an affirmative action measure. (J.E. 67, 31-32)

73. John S. Shaffer, PhD, Executive Deputy Secretary for the Department of Corrections, (hereinafter "Shaffer") offered testimony that his department looks at the racial composition of Department employees and addresses the recruitment and retention of women and minorities in the Department. (J.E. 67, p.16)

74. Shaffer offered that, consistently, over the past 10 years approximately 55% of the 41,000 inmate population in the Commonwealth is African American, 35% is white, and 10% is Hispanic and other. (J.E. 67, p. 19)

75. Shaffer testified that he has concluded that diversity in the workplace is an important aspect of the correctional environment in that having diversity normalizes the living environment of inmates. (J.E. 67, p.19)

76. Shaffer further testified that, from a correctional management position, it is important to have a diverse work force in all levels of the organization because diversity fosters the sharing of different perspectives and ideas and generally promotes better understanding from a cultural awareness and sensitivity perspective. (J.E. 67, p.20)

77. In Shaffer's opinion, having minorities in management positions sends the important message that diversity is valued. (J.E. 67, p. 30)

78. The Department of Corrections has approximately 16,000 employees, 10-12% of which are minority employees. (J.E. 67, p.28)

79. The Department's equal employment policy prohibits discrimination in promotional opportunities and has as its goal the recruitment and retention of women and minorities. (J.E. 67, p. 22-23)

80. Over the past 5 years, the department has increased the number of minorities in management positions. (J.E. 67, p.29)

81. The department neither uses quotas nor awards a predetermined number of points to a minority applicant when making hiring and promotional decisions. (J.E. 67, p.23)

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. George A. Matthews, Jr., was an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Respondent is an employer within the meaning of the Act.
5. The Estate of George A. Matthews, Jr. has established a *prima facie* case of failure to promote by proving that:
 - a. Matthews was a member of a protected class;
 - b. he applied for and was qualified for a position for which the Respondent was seeking applicants;
 - c. despite the Complainant's qualifications, he was denied a promotion; and
 - d. the promotion was awarded to a promotion candidate with either equal or less qualifications, and who is not in the Complainant's protected class.
6. The Respondent offered evidence of legitimate, nondiscriminatory reasons for not promoting the Complainant.
7. The Estate of George A. Matthews failed to prove that the legitimate, nondiscriminatory reasons offered by the Respondent were pretextual.

OPINION

This case arises on a complaint filed by George A. Matthews, Jr, (hereinafter "Matthews") against the Commonwealth of Pennsylvania, Department of Corrections, State Correctional Institution at Dallas (hereinafter "SCI-Dallas"), on or about May 21, 1996, at PHRC Docket No. E-78141-D. In his complaint Matthews generally alleged he was denied a promotion to the position of Corrections Superintendent Assistant 2, (hereinafter "CSA 2") and denied equal pay. Matthews alleged that both the denial of equal pay and the promotion denial were race-based discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA"). Due to the untimely death of Matthews on January 29, 2004, an Amended Complaint was filed on May 20, 2004, substituting Matthews' two daughters, acting Co-Administratrices on behalf of Matthews' estate, as substitute Complainants, (hereinafter "the estate"). At the pre-hearing conference held on October 20, 2003, it was determined that this matter would proceed on the alleged race-based refusal to promote only. The PHRC staff attorney indicated that probable cause had not been found on the alleged race-based pay disparity.

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated Matthew's allegations, and at the conclusion of the investigation concluded that probable cause existed with respect to Matthew's race-based claim.

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

The public hearing was held on June 18, 2004, in Wilkes-Barre, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint

was presented by PHRC staff attorney Ronald W. Chadwell. Michael J. McGovern, Esquire, appeared on behalf of SCI-Dallas. Following the public hearing, the parties were afforded an opportunity to submit briefs. The post-hearing briefs were both received on September 23, 2004. Additionally, on October 7, 2004, the PHRC staff attorney filed a reply brief to SCI-Dallas's post-hearing brief.

In this disparate treatment case, Matthews specifically alleges that SCI-Dallas treated him less favorably than one specific candidate for promotion to CSA 2 because of his race, white. To prevail, the estate is required to prove that SCI-Dallas had a discriminatory intent or motive in failing to promote him. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). In a disparate treatment case, discriminatory intent must be established by either direct or circumstantial evidence. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The PHRC regional office post-hearing brief suggests that because of the unique facts present in this case, either the direct or circumstantial analytical frameworks can be utilized. First, the PHRC regional office post-hearing brief suggests that the alleged disparate treatment can be established through the oft used *McDonnell Douglas*, burden shifting analysis, and in the alternative, the PHRC post-hearing brief suggests that direct evidence of discrimination exists.

When direct evidence is not available, we consistently apply the *McDonnell Douglas* 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). Under this shifting burden analysis, the estate must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "*prima facie* case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer

unlawfully discriminated against the employee. *Id.* at 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id.* It raises an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

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

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

Id. at 802. Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802, n.13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 268, 43 FEP 1018 (6th Cir. 1987).

Here, we only slightly adapt the McDonnell Douglas test because this case involves an alleged race-based refusal to promote. To establish a *prima facie* case here, the estate must show:

1. that Matthews was a member of a protected class;
2. that he applied for and he was qualified for a position for which SCI-Dallas was seeking applicants;

3. that, despite his qualifications, Matthews was denied the promotion; and,
4. that the promotion was awarded to a promotion candidate with either equal or fewer qualifications than Matthews', and who is a different race than Matthews.

PHRC v. Johnstown Redevelopment Authority, 527 Pa. 71 588 A.2d 497 (1991), see also, Key v. Gillette Co., 50 FEP 1613 (D.C. Mass 1982); Garner v. Boorstin, 29 FEP 1765 (D.C. Cir. 1982); Leibovitch v. Administrator, 33 FEP 777 (D.C. D.C 1982); Bell v. Bolger, 32 FEP 32 (8th Cir. 1983).

If the estate establishes a *prima facie* case, the burden shifts to SCI-Dallas "to articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. SCI-Dallas 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 SCI-Dallas. *Id.* at 255. However, SCI-Dallas 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 SCI-Dallas carries this burden of production, the estate must then satisfy a burden of persuasion and show that the legitimate reasons offered by SCI-Dallas 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 Matthews was the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that SCI-Dallas intentionally discriminated against Matthews remains at all times with the estate. *Id.* at 253.

On the initial question of whether the estate can establish a *prima facie* case, there is no dispute in this case that Matthews was a member of a protected category, that he requested promotion to the position of CSA 2 for which he was qualified, that he was denied the promotion, and that the promotional opportunity to CSA 2 was awarded to a black candidate. Finally, the estate has shown that Matthews was at least as qualified as Kenneth

Burnett, (hereinafter "Burnett"), the successful candidate for the open position.

At the public hearing, a substantial number of joint exhibits reflect Matthews' accomplishments as a 20 year employee of the Department of Corrections. These documents commemorate Matthews' outstanding service. Collectively, they outline a series of awards, stand as evidence of a broad range of training certifications, certify various accomplishments, and attest to a chronicle of recognition and commendation for notable work. Collectively, Matthews' record confirms a general recognition that Matthews was certainly well qualified for promotion to the CSA 2 position. In Matthews' opinion, his overall experience made him more qualified than Burnett.

Accordingly, the estate established a sufficient, *prima facie* case. Having so found, we move to the question of whether SCI-Dallas has articulated a legitimate, nondiscriminatory reason for not promoting Matthews. The PHRC post-hearing brief submits that SCI-Dallas failed to articulate a legitimate non-discriminatory reason for not selecting Matthews. However, on SCI-Dallas' burden of production we find that SCI-Dallas has met its burden.

In SCI-Dallas' post-hearing brief, at proposed finding of fact #90, SCI-Dallas asserts that Matthews was not the best qualified individual that applied for the CSA 2 position. In effect, SCI-Dallas submits that Burnett was considered the best qualified candidate by three of the four members of the selection panel and the fourth member of the panel, while considering Matthews to be the best candidate, considered Burnett the second best candidate. Indeed, a majority of the selection panel chose Burnett as the best candidate for the promotion to CSA 2.

On this point, in effect, SCI-Dallas argues that the choice of Burnett over Matthews was made not because Burnett had better credentials than Matthews, but that Burnett's qualifications were seen as simply different than Matthews. Clearly, selection committee members have discretion over what particular attributes of a candidate best suit them for a

given task. See Anderson v. City of Bessemer City, 32 FEP 1586 at 1590 (4th Cir. 1983). Here, SCI-Dallas articulates that three of the selection committee picked Burnett first and Matthews second and the remaining selection committee member who selected Matthews first picked Burnett second.

The PHRC post-hearing brief argues that SCI-Dallas' articulation of the relative qualifications of Burnett and Matthews is a pretext for discrimination. The PHRC post-hearing brief suggests that there is no question that Matthews was more qualified than Burnett. In part, the PHRC post-hearing brief points to the testimony of two former SCI-Dallas Superintendents, Stepanik and Ryan. Each of these two individuals testified that based on the application materials before the selection committee on Burnett and Matthews, Matthews was clearly the better-qualified candidate.

While it is admirable that the previous two Superintendents, who had worked closely with Matthews, eloquently supported him at the Public Hearing, Larkins, the current Superintendent, for whom the CSA 2 would directly work, selected Burnett over Matthews. Fundamentally, reasonable minds differ on matters of import. Quite clearly, Matthews felt that the promotion system failed to recognize his special talents and experience. In no way should the failure to promote him be seen as deprecating his many years of admirable service. Clearly, Matthews' superiors consistently viewed him as a faithful and dedicated employee. However, a distinguishing feature in the selection of Burnett appears to have been consideration of Burnett's experiences outside of SCI-Dallas and how those experiences could translate to the job of CSA 2. Kneiss spoke about his rationale for the choice of Burnett over Matthews and his rationale boils down to his view that Burnett had a much better formal education and was considered better suited to address the media exposure component of the CSA 2 position. Kneiss found Burnett's community experience particularly relevant under the circumstances. He testified that he perceived the institution was viewed by the community as part of a good old boy network. Kneiss' evaluation

appears to have been based on a genuine and sincerely held view of the overall needs of the institution as he saw them.

The PHRC post-hearing brief also points to the testimony of Van Why and submits that Matthews was the better qualified of the candidates interviewed by the selection team. Once again, Van Why's evaluation and view is considered reasonable, fair and logical, as was the other members of the selection committee. In this instance, it is simply the case that each selection committee member had to make their own choice after reviewing the application materials and the interview responses of the candidates. In this case, Van Why chose Matthews as the top pick, however, he also selected Burnett second. Similarly, the other three members of the committee selected Matthews second. The relative qualifications of Burnett and Matthews were simply different.

One glaring factor in the process was the fact that while Burnett is Black, all four members of the selection committee are white. When selection committee members are not members of the same protected class of a Complainant, the decision rendered is subject to particularly close scrutiny. See Henry v. Lennox Industries, 42 FEP 771, at 774 (6th Cir. 1985); Royal v. Mo. Highway & Transp. Comm'n, 32 FEP 1389 (8th Cir. 1983); and Paxton v. Union Natl. Bank, 29 FEP 1233 (8th Cir. 1982). Here, of course, the selection committee was the same race of Matthews. In such a circumstance, much of the susceptibility to discriminatory abuse is lost. See MacDonald v. Ferguson School Dist., 31 FEP 184, at 186 (8th Cir. 1983). Indeed, such decision should be presumed to be the unbiased common consensus of several impartial decision makers. See Kolb v. State of Ohio, 50 FEP 1418, at 1429 (N.D. Oh. 1989).

Of course, one difference was the race of Burnett. The PHRC post-hearing brief suggests that SCI-Dallas erred in its use of race as a factor in the selection process. This argument contends that direct evidence shows that SCI-Dallas improperly used race as a factor in the selection process. The entire argument in this regard rests on the contention

that Matthews was better qualified than Burnett. As noted, the evidence considered as a whole reveals that Matthews' qualifications were certainly different than Burnett's but not necessarily better.

In SCI-Dallas' post-hearing brief, SCI-Dallas generally argues that a correctional facility such as SCI-Dallas has a number of compelling operational needs which should act to permit consideration of Burnett's race as a factor in the selection of a person to fill the CSA 2 position. SEC Dallas notes that the position in question is a management position and that, prior to the promotion of Burnett, SCI-Dallas did not have a black as a member of the management team. SCI-Dallas argues that, historically, the institution had been viewed by segments of the public as a "good old boy network." In effect, SCI-Dallas suggested that respect of the public was not at its highest and there was a communication gap between the institution and the public. SCI-Dallas argues that the selection of a qualified minority candidate would help the institution overcome such past perceptions.

Additionally, SCI-Dallas offered the testimony of John S. Shaffer, PhD., Executive Deputy Secretary for the Department of Corrections. Shaffer offered evidence that diversity in the work force of a correctional institution is both significant and important. For one, he offered that it is important to have minorities in management positions in a correctional institution because it tends to normalize the living environment of the inmates. Shaffer related that the prison population in Pennsylvania is approximately 55% black, 35% white, and 10% Hispanic and other, and that those figures have remained fairly constant over the past 10 years. On another point, Shaffer suggested that minorities in management positions bring new ideas and different perspectives and that the presence of minorities in management helps everyone from a cultural awareness and sensitivity perspective.

Although SCI-Dallas' main point appears to be that Burnett was selected because of his qualifications that three of the selection panel considered to have been at least equal to Matthews' qualifications, Burnett's minority status had also been considered a "plus" factor in

the final assessment of which employee to select for promotion. In effect, Deputy Kneiss testified that while he found Burnett's qualifications at least as good as Matthews' qualifications, he found appealing the thought of having a minority in a position to answer alleged racial allegations. In this regard, race became a "plus" factor that worked in Burnett's favor.

Here, there was testimony that the Corrections Department had an informal affirmative action policy that when two applicants have relatively equal qualifications, race could be used as a factor. In this case, advancement of the stated operational needs of the Department by achieving diversity was in no way a cloak for invidious discrimination. Instead, credit must be given to the articulation of the motives for promoting Burnett once his and Matthews' qualifications were viewed as nearly equal. Under the circumstances, SCI-Dallas legitimately took Burnett's race into account to achieve what is deemed a legitimate end. Placing a minority in an upper level management position when there had previously been none is a lofty goal that, under the circumstances, justifies the use of Burnett's race as part of a selection process that is approved by the PHRC.

An order dismissing Matthews' allegations follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

NICOLE MATTHEWS, Administratrix, and :
MICHELLE L. MATTHEWS, :
Administratrix, Administrators of the :
Estate of GEORGE A. MATTHEWS, JR., :
Complainants :

v. :

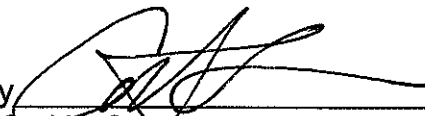
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF CORRECTIONS, :
STATE CORRECTIONAL INSTITUTION :
AT DALLAS, :
Respondent :

PHRC DOCKET NO. E-78141-D
PHRC CASE NO. 199504361
EEOC CHARGE NO. 17F962455

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

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

November 2, 2004
Date

By 
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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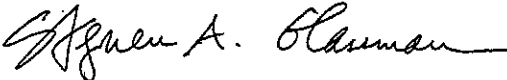
FINAL ORDER

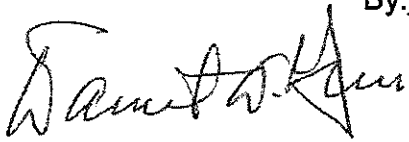
AND NOW, this 23rd day of November, 2004, after

a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations, 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: 
Dr. Daniel D. Yun, Assistant Secretary