

**COMMONWEALTH OF PENNSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**Renee Johnson  
and  
Jill Toomer,**  
Complainants

v.

**City of Philadelphia, Philadelphia  
Prison System,**  
Respondent

PHRC Case No.: **200207251**

PHRC Case No. **200208664**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

**FINAL ORDER**

## FINDINGS OF FACT

1. The Complainants herein are Renee Johnson who is an African American female (hereinafter "Complainant Johnson") (C.E.1), and
2. Jill Toomer who is also an African American female (hereinafter "Complainant Toomer") (C.E.2).
3. The Respondent in these cases is the City of Philadelphia, Philadelphia Prison System (hereinafter "Respondent") (C.E. 1).
4. The Respondent at all times relevant to the instant consolidated cases has employed four or more persons within the Commonwealth of Pennsylvania. (C.E. 1).
5. On or about September 1, 1987, Respondent hired Complainant Johnson as a Correctional Officer (C.E. 1, N.T. 22).
6. On or about September 2, 1996, Complainant Johnson was promoted to the position of Correctional Sergeant (C.E. 1, N.T. 23).
7. As a Correctional Sergeant, Complainant Johnson directly supervised the training of Respondent's Correctional Officers (N.T. 24).
8. Complainant Johnson, at all times relevant to the instant case, and based on the overall rating from her performance reviews from the years 1997 through 2002, performed her job duties in a satisfactory manner (N.T. 25-28).

C.E. - Complainant Exhibit N.T. - Notes of Testimony R.E. - Respondent Exhibit
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9. During the time period of 1997 through 2002, Complainant Johnson never received a disciplinary action from the Respondent (N.T. 25-28).
10. During the same time period, (1991-2002), Complainant Johnson was never placed on the sick abuse list (N.T. 55).
11. During the years 1997-2002, Complainant Johnson was never suspended for violating Respondent's sick leave policy (C.E. 11).
12. Before Complainant Johnson's 2002 application for promotion to an open Correctional Lieutenant's position, Complainant Johnson requested an approval from Commissioner Thomas J. Costello (hereinafter "Costello") to work part-time at Respondent's commissary (N.T. 29-30).
13. Complainant Johnson was approved by Costello to work part-time at the commissary (N.T. 29-30).
14. On or about January 4, 1988, Respondent hired Complainant Toomer as a Correctional Officer (N.T. 58).
15. On or about March 9, 1988, Complainant Toomer was promoted to the position of Correctional Sergeant (N.T. 59).
16. In her capacity as Correctional Sergeant, Complainant Toomer directly supervised the training of Respondent's Correctional Officers (N.T. 59).
17. Complainant Toomer at all times relevant to the instant complaint and based on performance reviews from 1997 through 2002 performed her job duties in a satisfactory manner (N.T. 59-63).

18. Complainant Toomer received a "satisfactory" notation in the area of attendance on her 1997 performance review (C.E. 2).
19. Complainant Toomer has never received a disciplinary action from the Respondent (C.E. 2; N.T. 59).
20. During the years 1997 through 2002, Complainant Toomer was never placed on the sick abuse list (N.T. 89).
21. Complainant Toomer, from 1997-2002, was never disciplined or suspended for violating Respondent's sick leave policy (N.T. 89-90).
22. Prior to her application for an open Correctional Lieutenant position, Complainant Toomer requested and was granted Family Medical Leave ("FMLA") in order to take care of her sick daughter (N.T. 64-66).
23. Complainant Toomer's September 17, 2002 Personal Profile does not reflect she requested and was granted FMLA (C.E. 28).
24. Both Complainants applied for a promotion and took a promotional examination for placement on Respondent's eligibility list (N.T. 34-35).
25. Complainant Johnson ranked 10<sup>th</sup> out of 72 candidates on Respondent's eligibility list for Correctional Lieutenant (C.E. 1; C.E.11).
26. Complainant Toomer ranked 18<sup>th</sup> out of 72 candidates on the list for Correctional Lieutenant (C.E. 10; N.T. 71).

27. The requirements for the position of Correctional Lieutenant are as follows:
- A. Current city employee with a permanent status in any class in the Philadelphia Prison's Corrections Department and a performance rating of satisfactory or higher;
  - B. Education equivalent to completion of the twelfth school grade; and
  - C. Three years of experience guarding inmates in a correctional institution, one year of which has been supervising correctional officers (C.E. 37).
28. The Respondent utilized a promotion selection process called "Certification - Rule of Two" (N.T. 36-37).
29. In this process, an eligible candidate is paired with another eligible candidate that ranks either just ahead or below on the eligibility list starting with number one and continuing chronologically (N.T. 36-37; 121).
30. The Rule of Two process is repeated twice, resulting in two promotional selections and one removal from the current eligibility list (N.T. 121).
31. During the time period relevant to the instant case, the Respondent did not uniformly apply the "Certification - Rule of Two" (N.T. 123-128).

32. During the time period relevant to these cases, the Respondent did not have a written promotional selection policy which identified the criteria used to promote an employee. (N.T. 68).
33. During the time period relevant to these cases, the Respondent utilized a Promotional Board, which consisted of the Commissioner, Deputy Commissioners and a representative from Human Resources (R.E. 1).
34. The Promotional Board would review work histories of employees who were available, were on the eligibility list, and were certified to the department (R.E. 1).
35. Generally, the Respondent's Promotional Board would review an employee's records up to five years prior to an application for promotion (R.E. 1).
36. Commissioner Costello, a Caucasian male, had the ultimate authority to promote an employee (N.T. 106).
37. The Respondent asserts, that when reviewing promotional candidates, it considers work history, attendance, discipline, performance, and whether a candidate has arrests not leading to conviction (N.T. 20, N.T. 107-108).
38. Costello stated that a pattern of arrests is considered unprofessional and violates Respondent's Policy #112 - General Order ¶6 (N.T. 114-115).
39. Costello confirmed that, prior to promotion decisions, he would look at an employee's entire employment record (N.T. 175).

40. The Respondent does not have a written policy regarding lateness (R.E. 1)
41. The Respondent interchangeably identified attendance, disciplinary history and lateness as three of the most important factors in promotional selection. (N.T. 102-103; 111)
42. The Citywide Sick Leave Policy is the only numerically specific standard articulated by the Respondent (N.T. 41, 42, 55, 57).
43. During the time period relevant to this case, Frank Mariani (hereinafter "Mariani") was Respondent's Human Resources Manager (R.E. 1).
44. Mariani did not recall whether he played a role in the Promotional Board process or what documents that the Promotional Board reviewed prior to determining who should be promoted (R.E. 1).
45. Respondent's Personnel Assistant, Deliecscha Brown (hereinafter "Brown") did not respond to requests for the Respondent's official attendance and lateness policies (N.T. 43).
46. Brown did not play any role in the selection of which employees to promote in 2002-2003 or sit on the Promotional Board during that time period (N.T. 182).
47. Among the eligible candidates on the 2003 eligibility list for Correctional Lieutenant:
  - A. 52.6% of eligible Caucasian males were promoted,
  - B. 40% of eligible Caucasian females were promoted,
  - C. 34.6% of eligible African American males were promoted; and

D. 22.2% of the eligible African American females were promoted (C.E. 10).

48. Four candidates were rejected based on the Rule of Two selection process: an African American male, a Caucasian male and two African American females, one of which was Complainant Johnson (C.E. 1).
49. On or about October 3, 2002, Brown advised Complainant Johnson by letter, that she was rejected for promotion to the position of Correctional Lieutenant (C.E. 12; N.T. 37-38).
50. On about October 22, 2002, Complainant Johnson was notified by Costello that she was not selected because she had been late 42 times between 1999 and 2002 (N.T. 40-41).
51. Costello further stated that one of the requirements for the position of Correctional Lieutenant was to serve as a role model for those individuals under a Lieutenant's supervision. (N.T. 40, 41; C.E. 14).
52. Complainant Johnson filed a grievance with her union requesting that the Respondent provide written documentation of the Respondent's sick leave and lateness policy in regard to promotions (N.T. 44).
53. Complainant Johnson did not receive a response to her grievance or her request for information (N.T. 44).
54. Complainant Toomer, utilizing the Rule of Two, should have been compared to Gianetta, a white female and Watson, an African American male (N.T. 131-132).



55. Costello advised Complainant Toomer that she was rejected for promotion because of her attendance and lateness (N.T. 135).
56. Complainant Toomer was further advised by Mariani, Human Resources Manager, that she was rejected because she used too many sick days (C.E. 2).
57. In response, Complainant Toomer advised Mariani that on November 2, 2002, she had received approval for intermittent leave usage under FMLA, beginning at least prior to 2001 and for the period of October 19, 2002 through January 19, 2003 to care for her daughter and foster child (N.T. 65-66).
58. On or about October 4, 2002, Costello informed Complainant Toomer that her memo detailing the reasons for her sick leave usage would be placed in her personnel file (N.T. 66-67).
59. The Respondent counted Complainant Toomer's FMLA leave against her (C.E. 28).
60. On or about January 7, 2003, Complainant Toomer was notified that she was not selected for promotion to the position of Correctional Lieutenant (C.E. 29).
61. Though the Respondent counted FMLA leave against Complainant Toomer, it did not count FMLA leave against either Caucasian men and women or African American men (C.E. 2).
62. Costello testified that the Promotional Board could use FMLA leave against an employee who is vying for a promotion (N.T. 116).

63. Mariani requested that Complainant Toomer find someone who could testify to her "work ethic" on the job (N.T. 77).
64. On or about January 16, 2003, Walter Dunleavy (hereinafter "Dunleavy"), Warden for Respondent, recommended that Mariani reconsider Complainant Toomer's application for promotion (C.E. 30).
65. The Respondent refused to reconsider its denial of Complainant Toomer's application for promotion (N.T. 77-78).
66. Complainant Toomer also complained to Leon King (hereinafter "King") Commissioner for Respondent, regarding the denial of Complainant Toomer's application for promotion (C.E. 32).
67. In a letter dated March 13, 2003, Respondent's Equal Employment Opportunity (EEO) Officer, William Peberdy (hereinafter "Peberdy") told Complainant Toomer; "It's in the numbers; the one with the lower numbers (related to attendance), gets promoted" (C.E. 31).
68. In the March 13<sup>th</sup> letter, Peberdy further advised Complainant Toomer that in regards to the disciplinary record of the two employees she was compared to (Daryl Watson and Nancy Gianetta), "both disciplinary records were identical, no recommendations in six years" (C.E. 2; 31).
69. While Complainant Toomer did not have any disciplinary actions taken against her within the last five years, both Watson and Gianetta had disciplinary actions within the last five years on their records (C.E. 2, 31; N.T. 79 - 80; N.T. 60-63).

70. The Respondent promoted Caucasian males and female candidates and African American males with more grievous policy violations than the Complainants herein (C.E. 10).
71. On or about January 14, 2003 Gianetta, a Caucasian female, was given a written warning for conduct, disrespect and attitude after she was found guilty of conduct detrimental to the Respondent or other employees (N.T. 73, 82).
72. During the years between 1997 and 2002, Gianetta used 91 sick days and 5 FMLA days (C.E. 2).
73. On February 17, 2003, Gianetta was promoted to the position of Correctional Lieutenant (C.E. 2; N.T. 161).
74. At the time of the public hearing in this matter, Gianetta was an assistant to the Deputy Commissioners (N.T. 173).
75. In 1988, Daryl Watson (hereinafter "Watson"), an African American male, was dismissed by the Respondent after he was arrested for DUI; an alleged violation of the Controlled Substance, Drug, Device, Cosmetic Act; Resisting Arrest; and Simple Assault (C.E. 2, 65, 68).
76. Watson was reinstated to his position on February 27, 1989 (C.E. 65, 68).
77. On September 12, 1993, the Respondent placed Watson on the Excessive Use of Sick Leave List (N.T. 163).
78. On or about November 12, 1993 Watson received a written warning – Penalty under Citywide Sick Leave Policy (N.T. 163).

79. On or about December 9, 1993, Watson received a one-day suspension for violating Respondent's Citywide Sick Leave Policy (C.E. 63; N.T. 164).
80. On April 28, 1997, the Respondent issued Watson an employee warning for a security violation (C.E. 63).
81. On or about March 9, 1998, Costello promoted Watson to an open Correctional Sergeant position with the Respondent (C.E. 48).
82. In May of 1998, Watson was arrested for an alleged attempt to obtain discounted auto insurance coverage by supplying fictitious and forged information to an insurance provider (C.E. 69; N.T. 167).
83. On or about July 13, 2000, the Respondent filed an Employee Violation Report against Watson subsequent to his arrest for Possession of an Instrument of Crime, Simple Assault, Recklessly Endangering Another Person, Criminal Mischief, Burglary and Criminal Trespass (N.T. 167-168).
84. Also, On July 13, 2001, the Respondent found Watson guilty of violating General Order No. 8 – Proper Conduct On and Off Duty (C.E. 70; N.T. 168).
85. On or about September 30, 2001, Watson was charged by the Philadelphia Police Department with two counts each of Aggravated Assault, Simple Assault, Recklessly Endangering Another Person, and Possession of an Instrument of Crime (C.E. 2).

86. On or about October 12, 2001, Watson was issued an Employee Violation Report based on the criminal charges filed on September 30, 2001 (C.E. 2).
87. On February 21, 2002, Watson requested a personal leave of absence as a result of the pending criminal charges (C.E. 71; N.T. 168-169).
88. During the years 1997 through 2002, Watson used 118 sick days, had 55 sick occasions and was late eight times (N.T. 162).
89. Watson's ranking was 20<sup>th</sup> out of 72 candidates on the eligibility list for Correctional Lieutenant (C.E. 10).
90. On March 17, 2003, Watson was promoted to the position of Correctional Lieutenant (C.E. 2).
91. On or about September 13, 1993, Steven Angelucci (hereinafter "Angelucci") Caucasian male, was placed on the Excessive Use of Sick Leave List by the Respondent (N.T. 150).
92. On or about October 22, 1993 Angelucci received a Written Warning – Penalty under Citywide Sick Leave Policy (N.T. 13-22; N.T. 150).
93. In 1995, Angelucci used sixty-four hours of sick leave without medical certification within a twelve-month period (N.T. 151).
94. On or about June 17, 1995, Angelucci received a one-day suspension from Respondent for violating Respondent's Citywide Sick Leave Policy (C.E. 57).
95. On September 20, 1995, Angelucci received a three-day suspension for violation the Respondent's Citywide Sick Leave Policy (C.E. 57).

96. Between the years 1993 through 1997, Angelucci used 177 sick days and was late 13 times (C.E. 57).
97. Angelucci ranked third out of 72 candidates on the eligibility list for correctional Sergeant (C.E. 10).
98. On March 9, 1998, Costello promoted Angelucci to an open Correctional Sergeant position (N.T. 148; C.E. 48).
99. In 1997 and 2001, Angelucci was rated unsatisfactory in attendance on his annual performance reviews (N.T. 154).
100. On or about October 28, 2000, Angelucci was placed on the Excessive Use of Sick Leave List (C.E. 54).
101. On May 1, 2001, Angelucci was notified by Respondent that because he continued to violate the Excessive Use of Sick Policy, he would remain on the Excessive Sick Leave List until at least January of 2002 (C.E. 54).
102. Between 1997 and 2002, Angelucci used 121 sick days and was late 10 times (C.E. 57).
103. On May 13, 2002, Costello promoted Angelucci to the position of Correctional Lieutenant while Angelucci was still on the Excessive Use of Sick Leave List (C.E. 54).
104. Roy Barksdale (hereinafter "Barksdale"), an African American male, was rated unsatisfactory in attendance in his annual performance reviews in 1997, 1999, and 2001 (N.T. 146-147).

105. On May 25, 1995, Barksdale received an official reprimand for lateness (C.E. 41).
106. On or about April 7, 1995, Barksdale received a Written Warning for Disobeying a Lawful Order (C.E. 41).
107. On March 3, 1996, Barksdale received an Employee Warning for Failing to Report an Officer Injury (C.E. 41).
108. In 1997, Barksdale was rated unsatisfactory for tardiness on his annual performance reviews (C.E. 41).
109. On March 9, 1998, Costello promoted Barksdale to an open Correctional Sergeant position (C.E. 48).
110. On or about June 8, 1998, Barksdale received a five-day suspension for lateness (N.T. 142).
111. On July 13, 1998, Barksdale was suspended for three days for his demeanor with a supervisor when he referred to Captain Tomaszewski as an "asshole" (C.E. 44; N.T. 142).
112. On July 13, 1998, the Respondent admitted that Barksdale has "extensive attendance, performance, and disciplinary problems" (C.E. 44).
113. Between 1995 and 2000, Barksdale used 174 sick days and was late 15 times (N.T. 138-139).
114. On May 25, 2001, Barksdale was given a written verbal admission for lateness and attendance (C.E. 45).

115. On June 14, 2001, the Respondent placed Barksdale on the Excessive Use of Sick Leave List (N.T. 137-138).
116. Barksdale was to remain on the Excessive Sick Leave List for one year, ending on June 14, 2002 (N.T. 137).
117. In an email dated April 3, 2002 from Costello to Deputy Commissioner Press Grooms (hereinafter "Grooms"), Grooms stated that he spoke with the Promotional Board regarding Barksdale's possible promotion to Correctional Lieutenant (C.E. 42; N.T. 141).
118. Grooms asserted that one member of the board voted "no" to Barksdale's promotion and three (including Grooms) voted "yes" with reservations (C.E. 42).
119. Grooms advised Costello that he felt Barksdale should be given an opportunity to prove himself (C.E. 42).
120. Barksdale, according to the Rule of Two, should have been compared to Dolfredo Pieretti (hereinafter "Pieretti"), a Hispanic male (N.T. 123; N.T. 125).
121. Pieretti was not compared to anyone in violation of the Rule of Two (N.T. 125).
122. On or about April 15, 2002, Costello promoted Barksdale to the position of Correctional Lieutenant while Barksdale was still on Respondent's Excessive Use of Sick Leave List (N.T. 136).



123. Stanley Washington (hereinafter "Washington"), African American male, was rated unsatisfactory in attendance on his 1997 performance review (N.T. 156-157).
124. Grooms stated that on October 16, 2002, he had a phone conversation with Washington wherein he cautioned him about his less than desirable attendance record (C.E. 59).
125. From 1997 through 2002, Washington used 98 sick days and was late 4 times (C.E. 58; N.T. 157).
126. Washington ranked 12<sup>th</sup> out of 72 candidates on the eligibility list for the position of Correction Lieutenant (C.E. 10).
127. James Tilsner was the only Caucasian male who was rejected for promotion to the position of Correctional Lieutenant (C.E. 10).
128. Costello stated that individuals with both poor attendance and lateness were promoted from the 2003 eligibility list (C.E. 1, 2; N.T. 139, 159).
129. Costello further stated that individuals with disciplinary records were promoted from the 2003 eligibility list (C.E. 1, 2; N.T. 161).
130. The Respondent has failed to identify any other individuals who were denied promotions based on poor attendance or lateness (N.T. 102-104).
131. Johnson and Toomer were making \$37,109 in the position of Correctional Sergeants (N.T. 51, 83).
132. Each hour of overtime is compensated as time and a half of the employee's regular hourly salary (N.T. 99).

133. Both Complainants worked approximately sixteen to twenty-four hours of overtime per week (N.T. 52, 84).
134. The salary range for a Correctional Lieutenant was \$37,972 to \$41,854 (C.E. 37; N.T. 119).
135. In October of 2006, Toomer was promoted to Correctional Lieutenant position (N.T. 83-84).

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "Commission") has jurisdiction over the parties under the Pennsylvania Human Relations Act (hereinafter "Act").
2. The Commission has jurisdiction over the subject matter of the complaint herein under the Act.
3. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter.
4. Both Complainants are individuals within the meaning of Section 5(a) of the Act.
5. The Respondent is an employer within the meaning of Section 4(a) and 5(a) of the Act.
6. The complaints filed in the matter satisfy the filing requirements set forth in Section 9 of the Act.
7. Section 5(a) of the Act, *Inter alia*, prohibits employers from discriminating against individuals because of their race and sex.
8. The Complainants have established a *prima facie* case of race and sex based discrimination by showing:
  - A. The Complainants are both African American females;
  - B. The Complainants applied and were qualified for the promotion to Correctional Lieutenant;
  - C. Each Complainant was denied promotion; and
  - D. Other employees of similar qualifications who were not members of protected classes did receive promotions.

9. The Respondent articulated the existence of a legitimate non-discriminatory reason for its action.
10. The Complainants herein have established a preponderance of the evidence that the Respondent unlawfully discriminated against them because of their race, African American and their sex, female by denying them promotions to the position of Correctional Lieutenant.
11. The Respondent promoted Caucasian Male and female candidates and African American male candidates who had worse performance, attendance and disciplinary records than the Complainant, African American females.
12. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order and it may order such affirmative action as in its judgment will effectuate the purposes of the Act.

## OPINION

On or about March 10, 2003, Renee Johnson (hereinafter "Complainant Johnson") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at PHRC Case No. 200207251. Complainant Johnson alleged that the City of Philadelphia, Philadelphia Prison System (hereinafter "Respondent") unlawfully discriminated against her by failing to promote her to an open Correctional Lieutenant position because of her race, African American and her sex, female. On or about October 6, 2003, Respondent filed an answer in response to the complaint. On or about June 12, 2006, Complainant Johnson filed an amended complaint and on July 7, 2006, Respondent filed an answer to the amended complaint.

In correspondence dated March 4, 2007 Commission staff notified the parties that probable cause existed to credit the allegations in the complaint. Subsequent to the determination of probable cause, the parties attempted to resolve the matter in dispute between the parties by conference, conciliation, and persuasion but were unable to do so. In subsequent correspondence, on September 14, 2007, Commission staff notified the parties that a public hearing was approved.

On or about April 29, 2003, Jill Toomer (hereinafter "Complainant Toomer") filed a verified complaint with the Commission at PHRC Case No. 200208664. Complainant Toomer alleged that the Respondent unlawfully discriminated against her by failing to promote her to an open Correctional

Lieutenant position because of her race, African American, and sex, female. On or about July 2, 2003, Respondent filed an answer to the complaint. On or about June 13, 2006, Complainant Toomer filed an amended complaint and, on July 6, 2006, the Respondent filed an answer to the amended complaint.

By correspondence dated April 10, 2007, Commission staff notified the parties that probable cause existed to credit the allegations raised in the complaint. Subsequent to the determination of probable cause, the parties attempted to resolve the matter in dispute by conference, conciliation, and persuasion but were unable to do so. On or about September 14, 2007, Commission staff notified the parties that a public hearing had been approved.

The two above cases were consolidated and a public hearing, convened by Permanent Hearing Examiner Phillip A. Ayers, was held on July 10, 2009 at the Commission's Philadelphia Regional office. Ryan Allen Hancock, Assistant Chief Counsel represented the state's interest in the complaints. Jeffery B. First, Esquire represented the Respondent at the public hearing. Both parties filed post hearing briefs on September 29, 2009.

Section 5(a) of the PHRA *inter alia*, declares it to be an unlawful discrimination practice:

(a) For any employer because of the race, sex... to otherwise discriminate against such individual.... with respect to.....terms, conditions or privileges of employment..... if the individual or independent contractor is the best able and most competent to perform the service required. 43.P.S. §955(a)

In a case involving disparate treatment allegations we often apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 460 U.S. 248, 254 (1981). Under this proof model, a Complainant must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Once a Complainant meets her initial burden, a Respondent must articulate a legitimate, non-discriminatory reason for its action. Once a Respondent articulates a legitimate non-discriminatory reason, a Complainant must prove that the stated reason was merely a pretext for race or sex-based discrimination. Clearly, the ultimate burden is on a Complainant to persuade by a preponderance of evidence that the Respondent's action was discriminatorily motivated.

The initial question is whether a Complainant has established the requisite *prima facie* case. In McDonnell Douglas, the United States 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 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.

Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of a *prima facie* case will vary substantially according to the differing factual situation of each case. McDonnell Douglas, 411 U.S. at 802. 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 FEB 1018 (6<sup>th</sup> Cir. 1987).

Therefore, in cases where there is an allegation of a failure to promote because of the race and sex. The Complainants herein must show that:

- (1) The Complainants are members of a protected class;
- (2) Complainants applied for and were qualified for promotion;
- (3) Complainants were denied the promotions; and
- (4) that other employees of similar qualifications who were not members of the Complainants' protected classes received promotions.

In the instant consolidated cases, the Complainants have established *prima facie* cases of unlawful discrimination based on race and sex. First, both of the Complainants meet the first element in that they are both African American females. Secondly, both of the Complainants were qualified for the position of Correctional Lieutenant. The job posting indicated that a prospective candidate had to take a written examination and have seniority. Both Complainants submitted an application and took the examination in



order to be placed on the eligibility list. The record reflects that Complainant Johnson and Complainant Toomer ranked 13<sup>th</sup> and 25<sup>th</sup> percent respectively (C.E. 10). In addition, both Complainants were exemplary employees without any performance or disciplinary issues between 1997 and 2002. Thirdly, both of the Complainants were considered for the promotion and both were denied the promotion to Correctional Lieutenant (N.T. 37-39).

Lastly, while Complainants were being denied promotions, others not in Complainants' protected classes with similar qualifications were promoted. Specifically, Gianetta, a Caucasian female, Watson, an African American male, Angelucci, a Caucasian male and Barksdale, an African American male were promoted. The Complainants have established a *prima facie* case of unlawful discrimination.

As aforementioned, once the Complainants have established their *prima facie* cases of unlawful discrimination, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its actions. The Respondent asserts that there is only one reason for its actions. The Respondent asserts that the Complainants were not promoted pursuant to the "Certification - Rule of Two" process and because of their lateness and attendance records. The Rule of Two provides that an eligible candidate be paired with another eligible candidate that ranks either just above or just below them on the eligibility list. After this comparison, one candidate is selected and the other candidate returns to the eligibility list (N.T. 121; R.E. 1). If a candidate is passed over twice, he/she is "x-ed" from the list and

removed from further consideration for promotion. The Respondent further states that an employee's personnel file is reviewed when considering candidates for promotion (N.T. 128). The Respondent reviews employees' records for five years prior to their application for promotion. As a result of the above assertions, the Respondent has articulated legitimate non-discriminatory reasons for its actions.

Once the Respondent has articulated a legitimate non-discriminatory reason for its action, the Complainants must prove that the stated reason was a pretext for unlawful discrimination. As always, the ultimate burden is on the Complainants to persuade by a preponderance of the evidence that the Respondent was motivated by unlawful discrimination. In determining whether the Respondent's defense herein is pretextual, an examination of Respondent's hiring policy at the time of the promotion denials is necessary. Respondent maintains that the hiring process was objective not subjective. This is important in these cases because courts have recognized that the chance of disparate treatment increases where subjective rather than objective decision-making rules the process. Cook v. Billington, 59 FEP 1010, 1013 (D.O.C. 1992)

The Respondent asserts that the Rule of Two is based on objective ranking of candidates based on written examinations and seniority (C.E. 1). When two candidates are selected for comparison, other factors such as work history, performance reviews, attendance, disciplinary factors and

arrest not leading to conviction are considered at the time of promotion (C.E. 1; N.T. 107-108). A review of the evidence presented in these cases reveals that the Respondent did not consistently apply the Rule of Two to promotional candidates. Specifically the Respondent allowed subjective criteria into its hiring process. When reviewing the 2003 eligibility list, the first three candidates, Barksdale, Pieretti and Angelucci were compared to each other and promoted (CE 10). All three candidates were promoted on April 15, 2002, June 24, 2002 and May 12, 2002 respectively. Barksdale is an African American male, Pieretti is a Hispanic male and Angelucci is a Caucasian male. Under the Rule of Two, only two of these individuals should have been promoted. The Rule of Two was not applied and the Respondent has not offered any justification for the fundamental inconsistency. Interestingly, Civil Service Regulations provide that "an eligible candidate who has been rejected twice by an appointing authority in favor of another on the same eligible list shall not again be certified to that appointing authority, except upon written request from the appointing authority" (C.E. 38). There is no record of the Respondent submitting a written request justifying the failure to apply the Rule of Two.

Furthermore, in addition to the inconsistent application of the Rule of Two, the standards the Respondent used in the selection process were applied extremely subjectively. Both Complainants testified that they had little or no knowledge of the "Rule of Two" as well as the attendance and lateness requirements for promotion (N.T. 36, 37, 70-71). Specifically, the

Respondent did not have a written late policy or a written promotional selection policy. (R.E. 1; N.T. 35) The only policy known to Complainant Johnson was the Citywide Sick Leave Policy, and neither she nor Complainant Toomer was in violation of that policy prior to being denied for promotions (C.E. 11; N.T. 55).

The Respondent, through Commissioner Costello, was never able to firmly state the top criteria in the Rule of Two process. Costello, in his testimony, refers to a "case-by-case" analysis used in the selection process (N.T. 113-114). Clearly, this analysis is a subjective assessment and any review is heightened when the individuals evaluating candidates are not members of the protected class. In the instant case, none of the members of the Promotional Board were African American females. Even while reviewing disciplinary history regarding arrests and convictions, Costello analyzed these matters on a "case-by-case" basis. Specifically in regard to the promotion of Barksdale, the application of the Rule of Two was revealed. Barksdale's comparators, Pieretti and Angelucci, were never discussed. The record reflects that the members of the Promotional Board had serious reservations regarding Barksdale's promotion. Even with the reservations, Barksdale was given an "opportunity to prove himself." This type of reasoning clearly gave Barksdale an advantage over the Complainants in these cases. As Commission Counsel notes, the process was essentially a Rule of One since the process was an individual selection not a comparison as required by the Rule of Two. If the Rule of Two was followed, Barksdale

would have been compared to the other two candidates in regard to work history, discipline, and attendance. Instead, the Respondent allowed an individual not in the Complainants' protected classes to have an unfair advantage. The Complainants were not given an opportunity to "prove themselves," although each of the Complainants had requested such an opportunity (N.T. 43; N.T. 44).

The Respondent also stated, in its defense, that the Complainants did not receive promotions based on their lateness and attendance records. However, the record reveals that the Respondent, on numerous occasions, promoted candidates not in Complainants' protected classes with poor attendance, lateness issues, and disciplinary problems while denying promotions to the Complainants. Moreover, Costello testified that only when the Respondent is left with two candidates with poor attendance, will it promote an individual with problematic records (N.T. 159). Accordingly, we must review the records of other employees who were promoted off the 2003 eligibility list and compare them to the Complainants. Stanley Washington, an individual who was promoted, was described as someone who had a "less than desirable" attendance record (C.E. 59). Washington was warned by Grooms, a member of the Promotional Board, that if his "attendance does not improve he may jeopardize his promotion" (C.E. 59). Washington had more documented sick days at 115 than Complainant Toomer and had received an unsatisfactory attendance rating in 1997. Furthermore, Complainant Toomer had less absences and a better

disciplinary record than the two individuals (Gianetta and Watson) she was allegedly compared to under the Rule of Two (C.E. 2).

In reviewing Watson's records, between 1997 and 2002, he used 118 sick days and was late 8 times. In August 1991, Watson received a written warning regarding sick leave. In September of the same year, he got a notice of suspension without pay (C.E. 65). In March 1994, Watson received a notice of suspension without pay as a second occurrence under the Citywide Sick Leave Policy. (C.E. 67)

The record also reveals that Angelucci was promoted despite having a poor attendance record. From 1997 until 2000, Angelucci had 121 absences and 10 latenesses (C.E. 57). In 1997 and 2001, Angelucci was rated unsatisfactory in attendance in his performance review (C.E. 2). In May 2001, Angelucci was specifically warned that his continued abuse of the excessive leave policy could result in his remaining on the excessive sick list until at least May 12, 2001 (C.E. 2). Even with his absence record, Angelucci was still promoted while still on the Excessive Use of Sick Leave List (C.E. 10). By comparison, Complainant Johnson consistently received satisfactory ratings regarding attendance in her performance reviews.

It is clear that the Complainants herein were not given any of the accommodations given to similarly situated individuals not in the Complainants' protected classes. There is no clearer example of this disparate treatment than Mr. Barksdale, an African American male.

Barksdale was extended an opportunity to meet with Commissioner Costello prior to his promotion (C.E. 42). His promotion was approved with reservations by several members of the promotions board, including Costello. Barksdale had numerous attendance violations when he was promoted. From 1997 to 2000, Barksdale had 118 absences and 7 latenesses. In 1998, he was suspended on two occasions without pay for excessive attendance, performance and disciplinary problems (C.E. 43, 44). In 1999, Barksdale was directed to improve on his sick leave usage (C.E. 46). In Barksdale's performance reports in 1997, 1999, and 2001, he failed to meet Respondent's attendance standards and was again warned about sick leave usage. On June 13, 2001, he received a verbal admonition for excessive use of sick leave (C.E. 45). However, irrespective of these attendance violations, Barksdale was still promoted.

It is revealing to note the different treatment where the two Complainants were involved. In January of 2003, Complainant Toomer wrote a letter to the promotion board requesting to meet with Commissioner King regarding the circumstances of her promotion application (C.E. 32). The Respondent never responded to Complainant Toomer's letter (N.T. 80-81). Complainant Toomer wrote another letter indicating that her use of sick time was related to the adoption of her two daughters. This letter was to be placed in Complainant Toomer's personnel file. The letter was never placed in her personnel file. After her rejection for promotion, Complainant Toomer, during a meeting with a member of the board, was asked to

provide a letter vouching for her work ethic (N.T. 77). After providing the letter, Complainant Toomer received no response (N.T. 77-78).

We now move to Complainant Johnson. Before the promotion decision was made, Complainant Johnson wrote a letter to Costello, expressed her desire for promotion and offered to clarify any perceived problems in her personnel files. Complainant Johnson was denied an opportunity to meet with the board, while others outside her protected classes were offered the opportunity to meet with the Promotion Board. Not only was Complainant Johnson denied the opportunity to meet with the board, but also she received a letter from Costello, dated October 22, 2002, telling her she did not meet the standard of a "role model" (C.E. 14). There was no mention of any issue regarding attendance and/or lateness in the letter (C.E. 14).

The Respondent has asserted that the Complainants were rejected due to their attendance and lateness. In addition, the Respondent further asserts that good attendance is a necessary element that supervisors must possess in order to be good role models. The record reflects that the Respondent did not consistently apply this "role model" standard. The Respondent continued to promote African American men and Caucasian men as well as Caucasian females who failed to meet the alleged standard of being a good role model. In other words, the Respondent continued to promote individuals with significantly worse attendance and/or lateness records than the records of the Complainants. In fact, the personnel files of Barksdale and Angelucci, as Commission Counsel notes, were particularly



egregious and they were promoted despite their records. The record is clear that, but for race and sex, both Complainants would have been promoted into the position of Correctional Lieutenant.

In summarizing these cases, the Respondent articulated that the Complainants were not promoted because of the "Rule of Two" and their lateness and attendance records. The evidence at public hearing reveals that the Rule of Two was not consistently applied to candidates for promotion. Moreover, the record demonstrates that the Complainants have established that the Respondent has unlawfully discriminated against them because of their race, African American, and sex, female by denying them promotion to the position of Correctional Lieutenant.

Having found that the Respondent unlawfully discriminated against Complainant Toomer and Complainant Johnson, we move to the issue of appropriate remedy.

Section 9(f)(1) of the PHRA provides in pertinent part:

If, upon hearing 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 main function of a remedy in employment discrimination is not to punish the Respondent, but rather to make the Complainant whole and to return the Complainant to the position in which she would have been, absent the discriminatory practice. Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975). The purpose of the remedy under the Act is clearly two fold. The first purpose is to insure that the state's interest in eliminating the unlawful discriminatory practice is vindicated. The second purpose is focused on not only restoring the Complainants to their pre-injury states and make them whole but also to clearly discourage future unlawful discrimination. Williamsburg Community School District v. PA Human Relations Commission, 512 A.2d 1339 (1986)

First, the Respondent should be ordered to cease and desist from unlawfully discriminating against the Complainants and other individuals because of their race and sex.

Lastly, Complainants should receive a back pay award and interest on the back pay award. Goetz v. Norristown Area School District, 328 A.2d 579 (1974) 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 Commonwealth Ct. 1975) aff'd 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the

wrongdoer caused the damage. Green v. USX Corp, 46 FEP Cases 720 (3<sup>rd</sup> Cir. 1988)

In order to properly calculate Complainant Toomer's back pay award, we must review her earnings from January 7, 2003, the date she was denied a promotion to a Correctional Lieutenant position, until October 2006, the date she was finally promoted to a Correctional Lieutenant position. Complainant testified that her base salary was approximately \$37,109 (N.T. 83). The base salary converts into a monthly salary of \$3,092.42 and an hourly salary of \$19.33. In addition, Complainant Toomer testified that she worked 16 to 24 hours of overtime each week and was compensated at time and a half of her base hourly salary (N.T. 84, 99). Specifically the time period in regard to Complainant Toomer's actual earnings is 46 months, from January 2003 until October 2006. Complainant Toomer's base salary as a Correctional Sergeant, without overtime, 46 months x \$3,092.42 = \$142,251.32. The testimony at the public hearing indicated that Complainant Toomer worked approximately 80 hours of overtime at a rate calculated at time and a half. The 80 hours per month x \$28.99 = \$2,319.60 in overtime earnings per month. This figure (\$2,319.60) x 46 months = \$106,701.60 which represents Complainant Toomer's overtime earnings as a Correctional Sergeant. The final calculations for Complainant Toomer's actual earnings are: \$142,251.32 + \$106,701.60 = \$248,952.92.

Next we move to Complainant Toomer's proposed earnings as a Correctional Lieutenant. The base salary for a Correctional Lieutenant was

\$41,778 that breaks down to a monthly salary of \$3,481.50 and an hourly rate of \$21.75. Once again, calculating a 46 month period, the earnings for a Correctional Lieutenant, without overtime, would be \$160,149.00. With Complainant Toomer working 80 hours of overtime at a rate of \$32.62 per hour, her monthly overtime would be \$2,610. Her total overtime earnings (46 months x \$2,610) = \$120,060. Complainant Toomer's total proposed earnings as a Correctional Lieutenant would be as follows: \$160,149.00 + \$120,060.00 = \$280,209.00. Complainant Toomer is entitled to the difference between what she would have earned if she were promoted to a Correctional Lieutenant and her actual earnings as a Correctional Sergeant.

The calculations are as follows:

	<b>Actual Salary</b>	<b>Proposed Earnings</b>	<b>Difference</b>
January 7, 2003 Until October 2006	\$248,952.92	\$280,209.00	\$31,256.00

The specific recitation of Complainant Toomer's back pay award is accurately reflected in Appendix B of Commission Counsel's post-hearing brief.

Concerning Complainant Johnson's back pay award, it is necessary to review her earnings from October 2, 2002, the date she was denied a promotion to a Correctional Lieutenant position, until the December 12, 2006, the date of her termination. Complainant Johnson testified that she was making approximately \$37,000 to \$38,000 as a base salary (N.T. 51). The record reflects that the average base salary for a Correctional Sergeant was \$37,109. As with Complainant Toomer, this figure (\$37,109) converts

into a monthly salary of \$3,092.42 and an hourly salary of \$19.33. Also, Complainant Johnson testified that she worked 16 to 24 hours of overtime each week and was compensated at time and a half of her base hourly salary (N.T. 52). In regard to Complainant Johnson, the time period is 83 months, from October 2, 2002 and December 12, 2006, the date of her termination. Complainant Johnson's base salary, without overtime, as a Correctional Sergeant was \$37,109.00. Complainant Johnson's total base salary would be 83 months x \$3,092.42 = \$256,670.86. The testimony at public hearing indicated that Complainant Johnson also worked approximately 80 hours a month at a rate of time and a half. The period of 83 hours x \$28.99 (time and a half) = \$2,319.60 in overtime earnings per month; next \$2,319.60 x 83 months = \$192,526.80. The final calculation for Complainant Johnson's actual earnings is: \$256,670.86 + \$192,526.80 = \$449,197.66.

Next we move to Complainant Johnson's proposed earnings as a Correctional Lieutenant. Once again, the base salary for a Correctional Lieutenant was \$41,778.00 that breaks down to a monthly salary of \$3,481.50 and an hourly rate of \$21.75. Using the 83 month period, the earnings for a Correctional Lieutenant, without overtime, would be \$288,964.50 (83 months x \$3,481.50). With Complainant Johnson working 83 hours overtime per month at a rate of \$32.62, her total overtime earnings would be \$216,630.00. Complainant Johnson's total proposed earnings would be as follows: \$288,964.50 (base salary) + \$216,630.00

(overtime) = \$505,594.50. Complainant Johnson is entitled to the difference she would have earned if she had been promoted to a Correctional Lieutenant position and her actual earnings as a Correctional Sergeant. The calculations are as follows:

	<b>Actual Salary</b>	<b>Proposed Earnings</b>	<b>Difference</b>
October 2002 to December 12, 2006	\$449,197.66	\$505,594.40	\$56,396.84

As with Complainant Toomer, the specific recitation of Complainant Johnson's back pay award is accurately reflected in Appendix A.

Lastly, the commission has broad discretion in fashioning a remedy after a finding of unlawful discrimination. The Commission has the authority to require training as an affirmative measure to deter future instances. In the instant cases, training should be provided to Respondent's staff regarding the rights of all employees to work in a non-discriminatory environment consistent with the Act.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Renee Johnson  
and  
Jill Toomer,  
Complainants

v.

City of Philadelphia, Philadelphia  
Prison System,  
Respondent

PHRC Case No.: 200207251  
PHRC Case No. 200208664

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainants have proven discrimination in the instant consolidated cases. It is, therefore, the Permanent Hearing Examiner's Recommendation that the attached 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.

2/10/12  
Date

Phillip A. Ayers  
Phillip A. Ayers  
Permanent Hearing Examiner

**COMMONWEALTH OF PENNSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**Renee Johnson**  
**and**  
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v.

**City of Philadelphia, Philadelphia**  
**Prison System,**  
Respondent

PHRC Case No.: **200207251**  
PHRC Case No. **200208664**

**FINAL ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_ 2012, after review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, Opinion, and Recommendation of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties and hereby



## ORDERS

1. That the Respondent shall cease and desist from discriminating against the Complainants and other individuals because of their race and sex.
2. That the Respondent shall immediately promote Complainant Johnson to the next available Correctional Lieutenant position.
3. That the Respondent shall pay Complainant Johnson an amount of \$56,396.74, which represents back pay as a full time Correctional Lieutenant from October 2002 until December 12, 2006. This figure represents the difference in salary between a Correctional Lieutenant and a Correctional Sergeant.
4. The Respondent shall pay Complainant Johnson interest at the rate of 6% annum from October 2002 through the date of payment
5. The Respondent shall pay Complainant Toomer the amount of \$31,256.08, which represents back pay as a full time Correctional Lieutenant from January 2003 through October 2006. This figure represents the difference in salary between a Correctional Lieutenant and Correctional Sergeant.
6. The Respondent shall pay Complainant Toomer interest at the rate of 6% annum from January 2003 through the date of payment.
7. That the Respondent shall provide training to its staff regarding the right of all employees to work in a non-discriminatory environment consistent with the provisions found in the Act.

8. The Respondent shall report the means of compliance with this Final Order, in writing to Ryan Allen Hancock, Assistant Chief Counsel within thirty days of the date of this order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**BY:**

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**Gerald S. Robinson, Chairman**

**ATTEST:**

**By:** \_\_\_\_\_  
**Daniel D. Yun, Secretary**

**COMMONWEALTH OF PENNSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**Renee Johnson  
and  
Jill Toomer,  
Complainants**

**v.**

**City of Philadelphia, Philadelphia  
Prison System,  
Respondent**

**: PHRC CASE NO. 200207251**

**: PHRC CASE NO. 200208664**

**DISSENT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

### **FINDINGS OF FACT\***

1. The Complainants in these consolidated cases are Renee Johnson who is an African American female (hereinafter "Johnson") (C.E.1), and Jill Toomer who is also an African American female (hereinafter "Toomer") (C.E.2).
2. The Respondent in these cases is the City of Philadelphia, Philadelphia Prison System (hereinafter "Respondent") (C.E. 1).
3. The Respondent at all times relevant to the instant consolidated cases has employed four or more persons within the Commonwealth of Pennsylvania. (C.E. 1).
4. On or about September 1, 1987, Respondent hired Johnson as a Correctional Officer (C.E. 1, N.T. 22).
5. On or about September 2, 1996, Johnson was promoted to the position of Correctional Sergeant (C.E. 1, N.T. 23).
6. On or about January 4, 1988, the Respondent hired Toomer as a Correctional Officer (C.E. 2; N.T. 58).
7. On or about March 9, 1988, Toomer was promoted to the position of Correctional Sergeant (C.E. 2; N.T. 59).

C.E. - Complainant Exhibit N.T. - Notes of Testimony R.E. - Respondent Exhibit
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8. Prior to her application for an open Correctional Lieutenant position, Toomer requested and was granted Family Medical Leave ("FMLA") in order to take care of her sick daughter (N.T. 64-66).
9. In or about 2002, both Johnson and Toomer applied for promotion to the position of Correctional Lieutenant and took a promotional examination for placement on Respondent's Promotional Eligibility List (N.T. 34-35, 64, 66).
10. Johnson ranked 10<sup>th</sup> out of 72 candidates on Respondent's 2002 Promotional Eligibility List for Correctional Lieutenant (C.E. 1; C.E.10).
11. Toomer ranked 18<sup>th</sup> out of 72 candidates on the Respondent's 2002 Promotional Eligibility List for Correctional Lieutenant (C.E. 10; N.T. 71).
12. The requirements for the position of Correctional Lieutenant are as follows:
  - A. Current city employee with a permanent status in any class in the Philadelphia Prison's Corrections Department and a performance rating of satisfactory or higher;
  - B. Education equivalent to completion of the twelfth school grade; and
  - C. Three years of experience guarding inmates in a correctional institution, one year of which has been supervising correctional officers (C.E. 37).

13. For consideration of candidates for the position of Correctional Lieutenant, the Respondent was required to utilize a promotion selection process called "Certification - Rule of Two" which is contained in the City of Philadelphia's Civil Service regulations (N.T. 36-37, 120; C.E. 38).
14. In this process, an eligible candidate is paired with one other eligible candidate that ranks either just ahead or below on the eligibility list starting with number one and continuing chronologically (N.T. 36-37, 121).
15. Under the Rule of Two process, of the two candidates considered, the Respondent has the option of promoting one of the candidates and indicating that the other candidate has one strike against them or not promoting either candidate thereby losing that position (N.T. 107, 121; C.E. 38).
16. If a candidate is twice rejected that candidate may not be considered again except upon a written request from the appointing authority (N.T. 121; C.E. 38).
17. During the time period relevant to these cases, the Respondent did not have a written promotional selection policy which identified the specific criteria used to promote an employee. (N.T. 68).
18. During the time period relevant to these cases, the Respondent utilized a Promotional Board, which consisted of the Commissioner, 4 Deputy

Commissioners and a representative from the Respondent's Human Resource Department (N.T. 105; R.E. 1).

19. Under the Rule of Two, the Promotional Board would review the work histories of the two available employees being compared from the eligibility list, and who had been certified to the department (R.E. 1).
20. Generally, the Respondent's Promotional Board would review a summary of an employee's records that listed information about a candidate for a period of five years prior to an application for promotion (N.T. 116; R.E. 1).
21. Until December 31, 2002, Commissioner Costello, a Caucasian male, had the ultimate authority to promote a candidate from the 2002 Promotional Eligibility List (N.T. 106).
22. Beginning in 2003, Commissioner King had the authority to promote a candidate (N.T. 32, 68, 93).
23. Costello confirmed that, prior to promotion decisions, he would look at an employee's entire employment record (N.T. 175).
24. The Respondent does not have a written policy regarding lateness (R.E. 1)
25. With respect to consideration of who to promote to a supervisory position, Costello identified a candidate's attendance record and disciplinary record and the number one and two factors in determining if someone is eligible for a promotion (N.T. 108, 111, 174)

26. During the time period relevant to this case, Frank Mariani (hereinafter "Mariani") was Respondent's Human Resources Manager (R.E. 1).
27. Among the 31 eligible candidates on the 2002 eligibility list that were considered for promotion to the position of Correctional Lieutenant:
  - A. 12 individuals or 38.7% of the Promotional Eligibility List were Caucasian males
  - B. 2 individuals or 6.4% of the Promotional Eligibility List were Caucasian females
  - C. 10 individuals or 32% of the Promotional Eligibility List were African American males
  - D. 6 individuals or 19.35% of the Promotional Eligibility List were African American females, and
  - E. 1 individual or 3.2% of the Promotional Eligibility List was a Hispanic Male (C.E. 10).
28. Four of the 31 of 72 candidates that were considered for promotion from the 2002 Promotional Eligibility List were rejected based on the Rule of Two selection process: an African American male, a Caucasian male and two African American females, Johnson and Toomer (C.E. 1, 10).
29. Those promoted from the 2002 Promotional Eligibility List include:
  - A. 7 of 10 of the African American Males considered for promotion were promoted to Lieutenant



B. Both White Females considered for promotion were promoted to Lieutenant

C. The sole Hispanic Male considered was promoted to Lieutenant

D. 7 of the 12 White Males considered for promotion were promoted to Lieutenant, and

E. 4 of the 6 African American Females considered for promotion were promoted to Lieutenant

30. Using the Rule of Two, Johnson was first compared with Arlene DeSouza, an African American Female (N.T. 129-130, 176; C.E. 1, 10).

31. Johnson's Personal Profile summarizing her service history, performance reports, attendance records and disciplinary/commendation record portrayed Complainant Johnson's performance report as satisfactory between 1994 and 2002, and that between 1993 and 2002, Johnson had 145 sick days, 123 occasions sick and 62 instances of being late (C.E. 11).

32. In the five year period prior to being considered for promotion, 1998 through 2002, Johnson had 138 sick days, 76 sick occasions, and 54 instances of being late (C.E. 11).

33. In the five year period prior to being considered for promotion, DeSouza had 43 sick days and zero instances of lateness. (C.E. 1 at 25-26)

34. Because DeSouza had fewer sick days and no instances of lateness, on October 14, 2002, DeSouza was promoted and Johnson was rejected giving Johnson one strike. (C.E. 10)
35. Johnson was next compared with Gertrude Hutson, another African American Female (N.T. 129-130, 176; C.E. 10).
36. In the five year period prior to being considered for promotion, Hutson had 50 sick days and zero instances of lateness (C.E. 1 at 25-26).
37. Because Hutson had fewer sick days and no instances of lateness, on October 14, 2002, Hutson was promoted over Johnson giving Johnson two strikes, thereby eliminating Johnson from further consideration for promotion from the 2002 Promotional Eligibility List (C.E. 10).
38. On or about October 3, 2002, the Respondent's Human Resource Department advised Johnson by letter, that she was rejected for promotion to the position of Correctional Lieutenant (N.T. 37-38; C.E. 12).
39. On about October 22, 2002, Johnson was notified by Costello that she was not selected because she had been late 42 times between 1999 and 2002 (N.T. 40-41).
40. Costello further stated that one of the requirements for the position of Correctional Lieutenant was to serve as a role model for those individuals under a Lieutenant's supervision. (N.T. 40, 41; C.E. 14).
41. Utilizing the Rule of Two, Toomer was first compared with Nancy Gianetta, a white female (N.T. 73, 131-132; C.E. 10).

42. Toomer's Personal Profile summarizing her service history, performance reports, attendance records and disciplinary/commendation record portrayed Toomer's performance report as satisfactory between 1994 and 2002, and that between 1997 and 2002, Toomer had 90 sick days plus 16 days designated as "T", 54 occasions sick and 90 instances of being late (C.E. 28).
43. In the five year period prior to being considered for promotion, 1998 through 2002, Toomer had 69 sick days plus 9 days designated as "T", 40 sick occasions, and 60 instances of being late (N.T. 87; C.E. 28).
44. In the five year period prior to being considered for promotion, Gianetta had 75 sick days plus 5 days FMLA, 59 occasions sick and zero lateness days.
45. Because Gianetta had zero late days, on February 17, 2003, Gianetta was promoted over Toomer giving Toomer one strike (C.E. 10).
46. Toomer was next compared with Darryl Watson, an African American male (N.T. 73; C.E. 10).
47. On Watson's Personal Profile dated September 20, 2002, during the period 1997 through 2002, Watson was listed as having 115 sick days, 52 occasions sick, and 8 lateness days (C.E. 72).
48. In the five year period between 1998 and 2002, Watson had 83 sick days, 41 occasions sick and 7 lateness days (C.E. 72).
49. Because Watson had only 7 late days, on February 17, 2003, Watson was promoted over Toomer giving Toomer two strikes, thereby

- eliminating Toomer from further consideration for promotion from the 2002 Promotional Eligibility List (C.E. 10).
50. Costello advised Toomer that she was rejected for promotion because of her attendance and lateness (N.T. 135).
  51. Toomer was further advised by Mariani, Respondents' Human Resources Manager, that she was rejected because she used too many sick days (C.E. 2).
  52. On or about January 7, 2003, Toomer was notified that she was not selected for promotion to the position of Correctional Lieutenant (C.E. 29).
  53. Mariani requested that Toomer find someone who could testify to her "work ethic" on the job (N.T. 77).
  54. On or about January 16, 2003, Walter Dunleavy (hereinafter "Dunleavy"), Warden for Respondent, recommended that Mariani reconsider Toomer's application for promotion (C.E. 30).
  55. Toomer also complained to Leon King (hereinafter "King") Commissioner for Respondent, regarding the denial of Toomer's application for promotion (C.E. 32).
  56. In a letter dated March 13, 2003, Respondent's Equal Employment Opportunity (EEO) Officer, William Peberdy (hereinafter "Peberdy") told Toomer; "It's in the numbers; the one with the lower numbers (related to attendance), gets promoted" (C.E. 31).

57. On April 28, 1997, the Respondent issued Watson an employee warning for a security violation (C.E. 63).
58. On or about March 9, 1998, Costello promoted Watson to an open Correctional Sergeant position with the Respondent (C.E. 48).

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "Commission") has jurisdiction over the parties under the Pennsylvania Human Relations Act (hereinafter "Act").
2. The Commission has jurisdiction over the subject matter of the complaint herein under the Act.
3. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter.
4. Both Complainants are individuals within the meaning of Section 5(a) of the Act.
5. The Respondent is an employer within the meaning of Section 4(a) and 5(a) of the Act.
6. The complaints filed in the matter satisfy the filing requirements set forth in Section 9 of the Act.
7. Section 5(a) of the Act, *Inter alia*, prohibits employers from discriminating against individuals because of their race and sex.
8. To establish a *prima facie* case of race and sex based discrimination the Complainants must show:
  - A. The Complainants are both African American females;
  - B. The Complainants applied and were qualified for the promotion to Correctional Lieutenant;
  - C. Each Complainant was denied promotion; and

- D. Other employees of similar qualifications with whom the Complainants were compared and who were not members of protected classes did receive promotions.
9. Both Complainants herein failed to established a *prima facie* case by a preponderance of the evidence.

## **OPINION**

On or about March 10, 2003, Renee Johnson (hereinafter "Johnson") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at PHRC Case No. 200207251. Complainant Johnson alleged that the City of Philadelphia, Philadelphia Prison System (hereinafter "Respondent") unlawfully discriminated against her by failing to promote her to an open Correctional Lieutenant position because of her race, African American and her sex, female. On or about October 6, 2003, Respondent filed an answer in response to the complaint. On or about June 12, 2006, Johnson filed an amended complaint and on July 7, 2006, Respondent filed an answer to the amended complaint.

In correspondence dated March 4, 2007 Commission staff notified the parties that probable cause existed to credit the allegations in Johnson's complaint. Subsequent to the determination of probable cause, the parties attempted to resolve the matter in dispute between the parties by conference, conciliation, and persuasion but were unable to do so. In subsequent correspondence, on September 14, 2007, Commission staff notified the parties that a public hearing was approved.

On or about April 29, 2003, Jill Toomer (hereinafter "Toomer") filed a verified complaint with the Commission at PHRC Case No. 200208664. Toomer alleged that the Respondent unlawfully discriminated against her by failing to promote her to an open Correctional Lieutenant position because of her race, African American, and sex, female. On or about July 2, 2003,



Respondent filed an answer to the complaint. On or about June 13, 2006, Toomer filed an amended complaint and, on July 6, 2006, the Respondent filed an answer to the amended complaint.

By correspondence dated April 10, 2007, Commission staff notified the parties that probable cause existed to credit the allegations raised in Toomer's complaint. Subsequent to the determination of probable cause, the parties attempted to resolve the matter in dispute by conference, conciliation, and persuasion but were unable to do so. On or about September 14, 2007, Commission staff notified the parties that a public hearing had been approved.

The two above cases were consolidated and a public hearing, convened by Permanent Hearing Examiner Phillip A. Ayers, was held on July 10, 2009 at the Commission's Philadelphia Regional office. Ryan Allen Hancock, Assistant Chief Counsel represented the state's interest in the complaints. Jeffery B. First, Esquire represented the Respondent at the public hearing. Both parties filed post hearing briefs on September 29, 2009.

We, Commissioners Gerald S. Robinson, M. Joel Bolstein, and Pamela McGaha, have reviewed the entire record of these consolidated cases and hereby dissent from the Opinion of the Majority of the PHRC.

Section 5(a) of the PHRA *inter alia*, declares it to be an unlawful discrimination practice:

(a) For any employer because of the race, sex... to otherwise discriminate against such individual.... with respect to.....terms, conditions or privileges of employment..... if the individual or independent

contractor is the best able and most competent to perform the service required. 43.P.S. §955(a)

In a case involving disparate treatment allegations we often apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 460 U.S. 248, 254 (1981). Under this proof model, a Complainant must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Once a Complainant meets her initial burden, a Respondent must articulate a legitimate, non-discriminatory reason for its action. Once a Respondent articulates a legitimate non-discriminatory reason, a Complainant must prove that the stated reason was merely a pretext for a combination of race and sex-based discrimination. Clearly, the ultimate burden is on a Complainant to persuade by a preponderance of evidence that the Respondent's action was discriminatorily motivated.

The initial question in these consolidated cases is whether either Complainant has established the requisite *prima facie* case. In McDonnell Douglas, the United States 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 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.

Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of a *prima facie* case will vary substantially according to the differing factual situation of each case. McDonnell Douglas, 411 U.S. at 802. 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 FEB 1018 (6<sup>th</sup> Cir. 1987).

Therefore, in cases where there is an allegation of a failure to promote because of a combination of race and sex, the Complainants herein must show that:

- (1) The Complainants are members of two protected classes;
- (2) Complainants applied for and were qualified for promotion;
- (3) Complainants were denied promotions; and
- (4) that other employees with whom the Complainant's were compared had similar qualifications and who were not members of the Complainants' protected classes received promotions.

In the instant consolidated cases, the Complainants are unable to establish *prima facie* cases of unlawful discrimination based on a combination of race and sex. Obviously, both of the Complainants meet the first element in that they are both African American females. Secondly, both

of the Complainants were qualified for the position of Correctional Lieutenant. The job posting indicated that a prospective candidate had to take a written examination and have seniority. Both Complainants submitted an application and took the examination in order to be placed on the 2002 Promotional Eligibility List. Indeed, the record reflects that Johnson and Toomer ranked 10th and 18th on the Respondent's Promotional Eligibility List, respectively (C.E. 10). In addition, both Complainants were exemplary employees without any performance or disciplinary issues between 1997 and 2002. Thirdly, both of the Complainants were considered for promotion and both were denied the promotion to Correctional Lieutenant (N.T. 37-39).

It is the fourth element of the requisite *prima facie* showing that the Complainant's fail to establish by a preponderance of the evidence. First, Johnson was compared to two individuals who, like Johnson, are also African American females. Clearly, neither individual with whom Johnson was compared is a member of classes different from Johnson. Also, when you compare Johnson's attendance and lateness record with the records of those to whom Johnson was compared, Johnson's attendance and lateness record reveals that Johnson was sick much more than those to whom she was compared and late far more than those to whom she was compared.

With respect to Toomer, the question of lateness is the reason she is unable to establish that those with whom she was compared had similar qualifications. In Toomer's case, in the prior 5 year period, those to whom

Toomer was compared had either no lateness days or only 7 lateness days while Toomer had 60 lateness days.

Attempts to make comparisons to others who were on the 2002 Promotional Eligibility List are misplaced. In this case, the Respondent was bound by the Rule of Two which limits those to whom an individual may be compared. Here, the parties did not present sufficient information upon which a general extended evaluation of the comparison process could be made. For instance, the evidence that suggests that others on the list had records that were worse than the Complainants' records cannot be viewed in a vacuum. There would have to have been evidence showing that others not in the Complainants' combined protected classes were treated better during the selection process. Such comparative evidence was not presented. To simply present evidence suggesting that others with whom the Complainants were not compared had records that were worse than the Complainants falls short of the requisite showing.

In our opinion, because neither Complainant adequately set forth a *prima facie* case, both cases should have been dismissed.



**COMMONWEALTH OF PENNSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**Renee Johnson  
and  
Jill Toomer,  
Complainants**

**v.**

**City of Philadelphia, Philadelphia  
Prison System,  
Respondent**

**: PHRC CASE NO. 200207251**

**: PHRC CASE NO. 200208664**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**FINAL ORDER**

## **FINDINGS OF FACT\***

1. The Complainants in these consolidated cases are Renee Johnson who is an African American female (hereinafter "Johnson") (C.E.1), and Jill Toomer who is also an African American female (hereinafter "Toomer") (C.E.2).
2. The Respondent in these cases is the City of Philadelphia, Philadelphia Prison System (hereinafter "Respondent") (C.E. 1).
3. The Respondent at all times relevant to the instant consolidated cases has employed four or more persons within the Commonwealth of Pennsylvania. (C.E. 1).
4. On or about September 1, 1987, Respondent hired Johnson as a Correctional Officer (N.T. 22; C.E. 1).
5. On or about September 2, 1996, Johnson was promoted to the position of Correctional Sergeant (N.T. 23; C.E. 1).
6. On or about January 4, 1988, the Respondent hired Toomer as a Correctional Officer (N.T. 58; C.E. 2).
7. On or about March 9, 1988, Toomer was promoted to the position of Correctional Sergeant (N.T. 59; C.E.2).

<p>C.E. - Complainant Exhibit N.T. - Notes of Testimony R.E. - Respondent Exhibit</p>
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8. Prior to her application for an open Correctional Lieutenant position, Toomer requested and was granted Family Medical Leave ("FMLA") in order to take care of her sick daughter (N.T. 64-66).
9. In or about 2002, both Johnson and Toomer applied for promotion to the position of Correctional Lieutenant and took a promotional examination for placement on Respondent's Promotional Eligibility List (N.T. 34-35, 64, 66).
10. Johnson ranked 10<sup>th</sup> out of 72 candidates on Respondent's 2002 Promotional Eligibility List for Correctional Lieutenant (C.E. 1. 10).
11. Toomer ranked 18<sup>th</sup> out of 72 candidates on the Respondent's 2002 Promotional Eligibility List for Correctional Lieutenant (C.E. 10; N.T. 71).
12. The requirements for the position of Correctional Lieutenant are as follows:
  - A. Current city employee with a permanent status in any class in the Philadelphia Prison's Corrections Department and a performance rating of satisfactory or higher;
  - B. Education equivalent to completion of the twelfth school grade; and
  - C. Three years of experience guarding inmates in a correctional institution, one year of which has been supervising correctional officers (C.E. 37).

13. For consideration of candidates for the position of Correctional Lieutenant, the Respondent was required to utilize a promotion selection process called "Certification - Rule of Two" which is contained in the City of Philadelphia's Civil Service regulations (N.T. 36-37, 120; C.E. 38; R.E. 1 at Ex 2).
14. In this process, an eligible candidate is paired with one other eligible candidate that ranks either just ahead or below on the eligibility list starting with number one and continuing chronologically (N.T. 36-37, 121).
15. Under the Rule of Two process, of the two candidates considered, the Respondent has the option of promoting one of the candidates and indicating that the other candidate has one strike against them or not promoting either candidate thereby losing that position (N.T. 107, 121; C.E. 38).
16. If a candidate is twice rejected that candidate may not be considered again except upon a written request from the appointing authority (N.T. 121; C.E. 38; R.E. 1 at 14-15).
17. During the time period relevant to these cases, the Respondent did not have a written promotional selection policy which identified the specific criteria used to promote an employee. (N.T. 68).
18. During the time period relevant to these cases, the Respondent utilized a Promotional Board, which consisted of the Respondent's

Commissioner, 4 Deputy Commissioners and a representative from the Respondent's Human Resource Department (N.T. 105; R.E. 1).

19. Under the Rule of Two, the Promotional Board would review the work histories of the two available employees being compared from the eligibility list, and who had been certified to the department (R.E. 1).
20. Generally, while a candidate's entire file was available to them, the Respondent's Promotional Board would review a summary of an employee's records that listed information about a candidate for a period of five years prior to an application for promotion (N.T. 110, 116; R.E. 1 at 41).
21. Until December 31, 2002, Commissioner Costello, a Caucasian male, had the ultimate authority to promote a candidate from the 2002 Promotional Eligibility List (N.T. 32, 68, 106).
22. Beginning in 2003, Commissioner Leon King had the authority to promote a candidate (N.T. 32, 68, 93).
23. Costello confirmed that, prior to promotion decisions, he would look at an employee's entire employment record (N.T. 175).
24. The Respondent does not have a written policy regarding lateness (R.E. 1)
25. With respect to consideration of who to promote to a supervisory position, Costello identified a candidate's attendance record and disciplinary record as the number one and two factors in determining if someone is eligible for a promotion (N.T. 108, 111, 174)

26. During the time period relevant to this case, Frank Mariani (hereinafter "Mariani") was Respondent's Human Resources Manager (R.E. 1).
27. Among the 31 eligible candidates on the 2002 eligibility list that were considered for promotion to the position of Correctional Lieutenant:
  - A. 12 individuals or 38.7% of the Promotional Eligibility List were Caucasian males
  - B. 2 individuals or 6.4% of the Promotional Eligibility List were Caucasian females
  - C. 10 individuals or 32% of the Promotional Eligibility List were African American males
  - D. 6 individuals or 19.35% of the Promotional Eligibility List were African American females, and
  - E. 1 individual or 3.2% of the Promotional Eligibility List was a Hispanic Male (C.E. 10).
28. 31 of 72 candidates were considered for promotion from the 2002 Promotional Eligibility List, four of whom were rejected based on the Rule of Two selection process: an African American male, a Caucasian male and two African American females, Johnson and Toomer (C.E. 1, 10).
29. Those promoted from the 2002 Promotional Eligibility List include:
  - A. 8 of 10 of the African American Males considered for promotion were promoted to Lieutenant

B. Both White Females considered for promotion were promoted to Lieutenant

C. The sole Hispanic Male considered was promoted to Lieutenant

D. 9 of the 12 White Males considered for promotion were promoted to Lieutenant, and

E. 4 of the 6 African American Females considered for promotion were promoted to Lieutenant

30. Using the Rule of Two, Johnson was first compared with Arlene DeSouza, an African American Female (N.T. 129-130, 176; C.E. 1, 10).
31. Johnson's Personal Profile summarizing her service history, performance reports, attendance records and disciplinary/commendation record portrayed Complainant Johnson's performance report as satisfactory between 1994 and 2002, and that between 1993 and 2002, Johnson had 145 sick days, 123 occasions sick and 62 instances of being late (N.T. 25-27; C.E. 11).
32. Although Johnson testified that she does not believe she had an attendance or lateness problem prior to 2002, in the five year period prior to being considered for promotion, 1998 through 2002, Johnson had 138 sick days, 76 sick occasions, and 54 instances of being late (N.T. 52; C.E. 11).

33. Johnson also testified that she does not believe her absences and instances of lateness were excessive for an individual in the position of Correctional Sergeant (N.T. 53).
34. In the five year period prior to being considered for promotion, DeSouza had 43 sick days and zero instances of lateness (C.E. 1 at 25-26)
35. Because DeSouza had fewer sick days and no instances of lateness, on October 14, 2002, DeSouza was promoted and Johnson was rejected giving Johnson one strike (C.E. 10)
36. Johnson was next compared with Gertrude Hutson, another African American Female (N.T. 129-130, 176; C.E. 10).
37. In the five year period prior to being considered for promotion, Hutson had 50 sick days and zero instances of lateness (C.E. 1 at 25-26).
38. Because Hutson had fewer sick days and no instances of lateness, on October 14, 2002, Hutson was promoted over Johnson giving Johnson two strikes, thereby eliminating Johnson from further consideration for promotion from the 2002 Promotional Eligibility List (C.E. 10).
39. On or about October 3, 2002, the Respondent's Human Resource Department advised Johnson by letter, that she was rejected for promotion to the position of Correctional Lieutenant (N.T. 37-38; C.E. 12).

40. On about October 22, 2002, Johnson was notified by Costello that she was not selected because she had been late 42 times in the prior three year period between 1999 and 2002 (N.T. 40-41).
41. Costello further stated that one of the requirements for the position of Correctional Lieutenant was to serve as a role model for those individuals under a Lieutenant's supervision (N.T. 40, 41; C.E. 14).
42. Utilizing the Rule of Two, Toomer was first compared with Nancy Gianetta, a white female (N.T. 73, 131-132; C.E. 10).
43. Toomer's Personal Profile summarizing her service history, performance reports, attendance records and disciplinary/commendation record portrayed Toomer's performance report as satisfactory between 1994 and 2002, with the exception of an unsatisfactory in attendance in 1997 (C.E. 28).
44. Between 1997 and 2002, Toomer had 90 sick days plus 16 days designated as "T", 54 occasions sick and 90 instances of being late (N.T. 60-63; C.E. 28).
45. In the five year period prior to being considered for promotion, 1998 through 2002, Toomer had 69 sick days plus 9 days designated as "T", 40 sick occasions, and 60 instances of being late (N.T. 87; C.E. 28).
46. In the five year period prior to being considered for promotion, Gianetta had 75 sick days plus 5 days FMLA, 59 occasions sick and zero lateness days (C.E. 61).

47. Because Gianetta had zero late days, on February 17, 2003, Gianetta was promoted over Toomer giving Toomer one strike (C.E. 10).
48. Prior to her promotion on January 14, 2003, Giannetta received an "Employee Warning Record" (N.T. 161; C.E. 62).
49. the Employee Warning Record addressed a reported incident on December 24, 2002, where Deputy Warden, Rodney Brokenbrough, warned Giannetta about conduct he termed as "reprehensible and intolerable", and demonstrating "very bad judgment and unacceptable behavior" (C.E. 62).
50. Brokenbrough believed Giannetta had directly challenged his authority in an unprofessional manner when Giannetta called his office questioning his action of calling her supervisor about the need to make an immediate schedule change (C.E. 62).
51. Toomer was next compared with Darryl Watson, an African American male (N.T. 73; C.E. 10).
52. On Watson's Personal Profile dated September 20, 2002, during the period 1997 through 2002, Watson was listed as having 115 sick days, 52 occasions sick, and 8 lateness days (C.E. 72).
53. In the five year period between 1998 and 2002, Watson had 83 sick days, 41 occasions sick and 7 lateness days (C.E. 72).
54. On February 17, 2003, Watson was promoted over Toomer giving Toomer two strikes, thereby eliminating Toomer from further



consideration for promotion from the 2002 Promotional Eligibility List (C.E. 10).

55. By letter dated January 7, 2003, Toomer was notified that she was not selected for promotion to the position of Correctional Lieutenant (C.E. 29).
56. Subsequently, Toomer called Frank A. Mariani, Respondent's Human Resource Manager, and asked if she could come talk with him (N.T. 76).
57. Mariani agreed to allow Toomer to come to his office (N.T. 76).
58. When Toomer met with Mariani, Toomer told him she believed the process had been unfair and asked him what she could have done that was worse than someone who had been arrested numerous times (N.T. 76-77).
59. Mariani advised Toomer that she had been denied promotion because of her poor attendance record including sick days and latenesses (C.E. 2 at #18).
60. Mariani also requested that Toomer find someone who could testify to her "work ethic" on the job (N.T. 77).
61. On or about January 16, 2003, Walter Dunleavy (hereinafter "Dunleavy"), Warden for Respondent, recommended that Mariani reconsider Toomer's application for promotion (C.E. 30).

62. By letter dated January 14, 2003, Toomer also requested that the newly named Commissioner for Respondent, Leon King, look into the circumstances surrounding Toomer's denial of promotion (C.E. 32).
63. Toomer related her opinion that she had been passed over first by an individual to whom she had been compared that had no inmate supervision experience and second by an individual to whom she had been compared who had been arrested several times (C.E. 32).
64. Toomer also related that much of her sick usage dealt with approved FMLA sick leave attending to the needs of two daughters who have asthma (C.E. 32).
65. Toomer also acknowledged that she had a problem with lateness but did not understand how individuals who had been arrested were promoted to lieutenant and she was not (C.E. 32).
66. In a letter dated March 13, 2003, Respondent's Equal Employment Opportunity (EEO) Officer, William Peberdy (hereinafter "Peberdy") told Toomer; "It's in the numbers; the one with the lower numbers (related to attendance), gets promoted" (C.E. 31).
67. Peberdy also noted that while both Toomer and Giannetta had similar sick usage histories, Toomer had an unsatisfactory attendance noted in a 1997 performance report and of her sick days used, Toomer had 26 days of unpaid leave (C.E. 31).
68. Perberdy informed Toomer that with respect to her comparison with Giannetta, Toomer's instances of lateness was illuminating (C.E. 31).

69. Two separate personal profiles were introduced regarding Darryl Watson, the individual who was the second individual to whom Toomer was compared: (1) a personal profile dated February 13, 1998, covering the period 1993-1997 for service history, performance reports, attendance records and disciplinary actions; and (2) a personal profile dated September 20, 2002, covering the period 1997-2002 for service history, performance reports and attendance (C.E. 63, 72).
70. Watson's September 20, 2002 personal profile indicated that, for the years 1997-2002, Watson had incurred 115 sick days, 52 sick occasions, and 8 instances of lateness (C.E. 72).
71. In the service history portion of Watson's September 20, 2002, personal profile, there is a notation indicating that Watson had been dismissed and later reinstated as a correctional officer (C.E. 72).
72. On November 28, 1988, Watson was dismissed from the Prison System effective November 28, 1988, after his arrest for DUI, controlled substance, drug, device cosmetic act, resisting arrest and simple assault charges, and subsequently reinstated on February 27, 1989 (C.E. 2 at #30, 63, 68).
73. Watson's February 13, 1998 personal profile indicated that for the period 1993-1997, Watson had incurred 103 total sick days, 73 sick occasions, and 26 instances of lateness (C.E. 63).

74. Under disciplinary actions, Watson's 1998 personal profile listed 4 actions: (1) September 12, 1993 – On sick abuse list; (2) November 12, 1993 Sick – First Occurrence – Written Warning; (3) December 9, 1993 Sick – Second Occurrence – One day Suspension; and (4) April 28, 1997 Security Violation on Unit – Employee warned (C.E. 63, 67).
75. Additionally, on November 5, 1996, Watson received a notification of 5 days of uncertified sick leave (C.E. 66).
76. By memorandum dated May 21, 1998, Costello was advised that an internal affairs investigation of Watson was being conducted for Watson's alleged attempt to fraudulently obtain auto insurance by supplying fictitious and forged documents to an insurance provider (C.E. 69).
77. On July 6, 2000, an Employee Violation Report was prepared regarding Watson indicating that a violation of a general order was sustained and Watson had been reprimanded (C.E. 70).
78. By memorandum to Costello dated February 15, 2002, Watson addressed the issue of a personal leave of absence (C.E. 71)
79. Watson's February 15, 2002 memorandum to Costello references an offer by Costello that Watson take a personal leave of absence for up to a year, to be taken in 4 month increments, starting February 10, 2002 through April 2002 (C.E. 71).

80. The situation involved two counts each of aggravated assault, simple assault, recklessly endangering another person and possession of an instrument of crime Watson was facing at the time (C.E. 71).

## **CONCLUSIONS OF LAW**

1. The Pennsylvania Human Relations Commission (hereinafter "Commission") has jurisdiction over the parties under the Pennsylvania Human Relations Act (hereinafter "Act").
2. The Commission has jurisdiction over the subject matter of the complaint herein under the Act.
3. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter.
4. Both Complainants are individuals within the meaning of Section 5(a) of the Act.
5. The Respondent is an employer within the meaning of Section 4(a) and 5(a) of the Act.
6. The complaints filed in the matter satisfy the filing requirements set forth in Section 9 of the Act.
7. Section 5(a) of the Act, *Inter alia*, prohibits employers from discriminating against individuals because of their race and sex.
8. To establish a *prima facie* case of race and sex based discrimination the Complainants must show:
  - A. The Complainants are both African American females;
  - B. The Complainants applied and were qualified for the promotion to Correctional Lieutenant;
  - C. Each Complainant was denied promotion; and

D. Other employees of similar qualifications with whom the Complainants were compared and who were not members of protected classes did receive promotions.

9. Johnson failed to established a *prima facie* case by a preponderance of the evidence.
10. Toomer established a *prima facie* case.
11. The Respondent articulated a legitimate non-discriminatory reason for failing to promote Toomer.
12. Toomer has shown that the Respondent's articulated reason is a pretext for sex based discrimination.
13. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the PHRC may issue a cease and desist order and may order such affirmative relief as in its judgment will effectuate the purposes of the PHRA.

## **OPINION**

On or about March 10, 2003, Renee Johnson (hereinafter "Johnson") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at PHRC Case No. 200207251. Complainant Johnson alleged that the City of Philadelphia, Philadelphia Prison System (hereinafter "Respondent") unlawfully discriminated against her by failing to promote her to an open Correctional Lieutenant position because of her race, African American and her sex, female. On or about October 6, 2003, Respondent filed an answer in response to the complaint. On or about June 12, 2006, Johnson filed an amended complaint and on July 7, 2006, Respondent filed an answer to the amended complaint.

In correspondence dated March 4, 2007 Commission staff notified the parties that probable cause existed to credit the allegations in Johnson's complaint. Subsequent to the determination of probable cause, the parties attempted to resolve the matter in dispute between the parties by conference, conciliation, and persuasion but were unable to do so. In subsequent correspondence, on September 14, 2007, Commission staff notified the parties that a public hearing was approved.

On or about April 29, 2003, Jill Toomer (hereinafter "Toomer") filed a verified complaint with the Commission at PHRC Case No. 200208664. Toomer alleged that the Respondent unlawfully discriminated against her by failing to promote her to an open Correctional Lieutenant position because of her race, African American, and sex, female. On or about July 2, 2003,



Respondent filed an answer to the complaint. On or about June 13, 2006, Toomer filed an amended complaint and, on July 6, 2006, the Respondent filed an answer to the amended complaint.

By correspondence dated April 10, 2007, Commission staff notified the parties that probable cause existed to credit the allegations raised in Toomer's complaint. Subsequent to the determination of probable cause, the parties attempted to resolve the matter in dispute by conference, conciliation, and persuasion but were unable to do so. On or about September 14, 2007, Commission staff notified the parties that a public hearing had been approved.

The two above cases were consolidated and a public hearing, convened by Permanent Hearing Examiner Phillip A. Ayers, was held on July 10, 2009 at the Commission's Philadelphia Regional office. Ryan Allen Hancock, Assistant Chief Counsel represented the state's interest in the complaints. Jeffery B. First, Esquire represented the Respondent at the public hearing. Both parties filed post hearing briefs on September 29, 2009.

After a review of the initial Recommendation of the Permanent Hearing Examiner, a majority of the Commissioners that reviewed the entire record of these consolidated cases find that they have significant differences of opinion with the Opinion Recommended by the Permanent Hearing Examiner. Accordingly, this substitute Opinion and Order were drafted and considered by the full PHRC.

Section 5(a) of the PHRA *inter alia*, declares it to be an unlawful discrimination practice:

(a) For any employer because of the race, sex... to otherwise discriminate against such individual.... with respect to.....terms, conditions or privileges of employment..... if the individual or independent contractor is the best able and most competent to perform the service required. 43.P.S. §955(a)

In a case involving disparate treatment allegations we often apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine. 460 U.S. 248, 254 (1981). Under this proof model, a Complainant must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Once a Complainant meets her initial burden, a Respondent must articulate a legitimate, non-discriminatory reason for its action. Once a Respondent articulates a legitimate non-discriminatory reason, a Complainant must prove that the stated reason was merely a pretext for a combination of race and sex-based discrimination. Clearly, the ultimate burden is on a Complainant to persuade by a preponderance of evidence that the Respondent's action was discriminatorily motivated.

The initial question in these consolidated cases is whether either Complainant has established the requisite *prima facie* case. In McDonnell

Douglas, the United States 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 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.

Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of a *prima facie* case will vary substantially according to the differing factual situation of each case. McDonnell Douglas, 411 U.S. at 802. 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 FEB 1018 (6<sup>th</sup> Cir. 1987).

Therefore, in cases where there is an allegation of a failure to promote because of a combination of race and sex, the Complainants herein must show that:

- (1) The Complainants are members of two protected classes;
- (2) Complainants applied for and were qualified for promotion;
- (3) Complainants were denied promotions; and
- (4) that other employees with whom the Complainant's were compared had similar qualifications and who were not members of the Complainants' protected classes received promotions.

In the instant consolidated cases, while Toomer is able to establish a *prima facie* case, Johnson is unable to establish a *prima facie* case of unlawful discrimination based on a combination of race and sex. Obviously, both of the Complainants meet the first element in that they are both African American females. Secondly, both of the Complainants were qualified for the position of Correctional Lieutenant. The job posting indicated that a prospective candidate had to take a written examination and have seniority. Both Complainants submitted an application and took the examination in order to be placed on the 2002 Promotional Eligibility List. Indeed, the record reflects that Johnson ranked 10<sup>th</sup> and Toomer ranked 18<sup>th</sup> on the Respondent's Promotional Eligibility List (C.E. 10). In addition, both Complainants were exemplary employees without any performance or disciplinary issues between 1997 and 2002. Only Toomer's record reflects that in 1997, she received an "unsatisfactory" rating with respect to attendance. Thirdly, both of the Complainants were considered for promotion and both were denied the promotion to Correctional Lieutenant (N.T. 37-39).

It is the fourth element of the requisite *prima facie* showing that Johnson failed to establish by a preponderance of the evidence. In this matter, Johnson was compared to two individuals who, like Johnson, are also African American females. Clearly, neither individual with whom Johnson was compared is a member of a class different from Johnson. Also, when you compare Johnson's attendance and lateness record with the records of

those to whom Johnson was compared, Johnson's attendance and lateness record reveals that Johnson used sick leave much more than those to whom she was compared as well as being late far more than those to whom she was compared.

With respect to Toomer, under the Rule of Two, she too was compared to two other candidates: Nancy Giannetta and Darryl Watson. In comparison to Giannetta, Toomer's personal profile reflected that for the period from 1997 – 2002, she incurred a total of 97 sick days, 44 occasions of sick and 86 instance of being late. Giannetta's personal profile for the same period reflects a total of 96 days sick, 61 occasions of sick and 0 instance of lateness.

Although, just prior to her appointment to Lieutenant, Giannetta had been issued a written warning, it appears that the Promotion Board was unaware of this discrepancy in her record. While Toomer's and Giannetta's sick records were similar, the fact that Giannetta had no instances of lateness while Toomer had 91 over six years made the difference regarding who was promoted.

In this instance, Toomer's *prima facie* case is established with her comparison to Watson. Not only had Watson been previously terminated and had to be reinstated, Watson's overall record reflects numerous instances of disciplinary action. Indeed, while the only negative notation regarding Toomer was a 1997 performance report indication that she was unsatisfactory in attendance, Watson's overall record shows numerous

instances of suspension for failure to present proper medical certification for absences, a warning for a security violation, a 2000 reprimand for a violation of a general order, and several instances of pending criminal charges including an instance of attempted fraud on an automobile insurance company. Indeed, as recent as February 2002, Costello had to offer Watson a year of personal leave to deal with pending criminal charges he was facing. Clearly, Toomer established that Watson, an individual with a similar attendance record but who had a significantly negative disciplinary record, received a promotion over her.

The Respondent articulated that Toomer was not selected for promotion because of her attendance record. This general assertion meets the Respondent's burden of production. Accordingly, the burden shifts back to Toomer to establish that the Respondent's articulate reason is pretextual and that the real reason Toomer was not promoted was because of either her sex or her race.

First, Toomer was compared with both a white female and an African American male. Again, Toomer cannot show that her comparison to Giannetta was discriminatory. Instead, Toomer's case is established when her comparison to Watson is evaluated. Additionally, there are additional factors that weigh in favor of a finding that the Respondent's articulated reason is a pretext and that Toomer was not promoted because she is a female.

First and foremost is the evidence that shows Watson's disciplinary history. By any standard, Watson was a poor excuse for an employee that one would select to supervise others in a correctional setting. The instances of criminal charges and his reprimand for a violation of a general order clearly illustrate how much better a candidate Toomer was over Watson. Indeed, approximately one year before Watson was compared with Toomer, Watson had to be offered a year's personal leave to deal with pending criminal charges which included two counts of aggravated assault, simple assault, recklessly endangering another person and possession of an instrument of crime (C.E. 2 at 34).

Attempts to make comparisons to others who were on the 2002 Promotional Eligibility List are misplaced. In this case, the Respondent was bound by the Rule of Two which limits those to whom an individual may be compared. Here, the parties did not present sufficient information upon which a general extended evaluation of the comparison process could be made. For instance, the evidence that suggests that others on the list had records that were worse than the Complainants' records cannot be viewed in a vacuum. There would have to have been evidence showing that others not in the Complainants' combined protected classes were treated better during the selection process. Such comparative evidence was not presented. To simply present evidence suggesting that others with whom the Complainants were not compared had records that were worse than the Complainants falls short of the requisite showing.

However, there is a general comparison with another employee who was promoted but was not directly compared with Toomer that does help support a showing of pretext. After learning that she had been passed over for promotion, Toomer consulted with Mariani telling him that she could not understand how individuals who had been arrested numerous times had been promoted and she was not. After all, Costello testified that arrests were viewed badly and that an individual would be considered not a good role model if the individual had a pattern of arrests (N.T. 112). Toomer also told this to the new Commissioner, King. When she told this to Mariani, he asked Toomer to get someone to vouch for her "work ethic". When Toomer did so, Warden Dunleavy's letter in support of Toomer appears to have been simply discounted.

In the present case, the first person on the Promotional Eligible List was Roy Braksdale and African American male. A general comparison of how Braksdale was treated compared with the treatment of Toomer is illuminating. First of all, Braksdale's personal profile dated March 8, 2000, reflects that he had been marked as unsatisfactory in punctuality and attendance from 1996 through 1999. Between 1995 and 2000, Braksdale incurred 174 sick days, 80 occasions sick and 15 instances of lateness (C.E. 41). Braksdale's personal profile also lists 6 instances of disciplinary actions: (1) May 24, 1995 - lateness - official reprimand; (2) April 7, 1996 - Disobeyed lawful order - written warning; (3) March 3, 1996 - Did not report Officer injury - employee warning; (4) March 23, 1996 - did not obey



order – Employee warning; (5) June 8, 1998 – Lateness – 5 day suspension; and July 13, 1998 – Demeanor with supervisor – 3 day suspension (C.E. 41, 43, 44). Additionally, on May 25, 2001, Barksdale received a Verbal Admonition Record regarding sick leave usage. This admonition also noted that a pattern of sick use had been observed (C.E. 45).

By email dated April 3, 2002, one of the Deputy Commissioners on the Promotion Board, Press Grooms, wrote to Costello. Grooms related that, as Costello had suggested, he spoke with the other Deputies regarding Barksdale. Grooms further indicated to Costello that the vote was 1 no for Barksdale and 3 yes, "but with reservations". Grooms then told Costello that the Deputies felt that Barksdale deserved an opportunity to prove himself. Finally, Grooms told Costello that he had also spoken with Warden Adams about Barksdale and that the Warden supported the promotion of Barksdale. Costello responded by email dated April 2, 2002, informing the Promotion Board that the Board should meet on April 8, 2002 to discuss and vote on Barksdale's candidacy for promotion to Lieutenant. In telling the Board this, Costello also informed the Board that he had met with Barksdale and that he would share his "reservations" with the Board.

These two emails reveal several important differences in treatment. With Barksdale, a male, the Commissioner had suggested that a Deputy speak with the other Promotion Board members about Barksdale. As instructed by the Commissioner, that Deputy also spoke with Barksdale. Additionally, that Deputy conveyed that he also spoke with a Warden and

that Deputies felt that Barksdale deserved an opportunity to prove himself. Finally, the Commissioner revealed that he too had spoken with Barksdale and that he would share his thoughts with the Promotion Board before a decision was made whether to promote Barksdale.

With Barksdale, you have a candidate with a dismal record regarding both attendance and discipline, however, the Commissioner and a Deputy meet with Barksdale before his final consideration for promotion. With Toomer, no such advantage is given. Indeed, when Toomer raised legitimate concerns, she was, in effect, ignored.

We find that Toomer has sufficiently established that the Respondent's articulated reason for not promoting her was a pretext and that the real reason she was not promoted was because she is a female. Because of this finding, we turn to the question of an appropriate remedy. Section 9(f)(1) of the PHRA provides in pertinent part:

If, upon hearing 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 main function of a remedy in employment discrimination is not to punish the Respondent, but rather to make the Complainant whole and to

return the Complainant to the position in which she would have been, absent the discriminatory practice. Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975). The purpose of the remedy under the Act is clearly two fold. The first purpose is to insure that the state's interest in eliminating the unlawful discriminatory practice is vindicated. The second purpose is focused on not only restoring the Complainants to their pre-injury states and make them whole but also to clearly discourage future unlawful discrimination. Williamsburg Community School District v. PA Human Relations Commission, 512 A.2d 1339 (1986)

First, the Respondent should be ordered to cease and desist from unlawfully discriminating against individuals because of their sex.

Next, Toomer should receive a back pay award and interest on the back pay award. Goetz v. Norristown Area School District, 328 A.2d 579 (1974) 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 Commonwealth Ct. 1975) aff'd 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damage. Green v. USX Corp, 46 FEP Cases 720 (3<sup>rd</sup> Cir. 1988)

In order to properly calculate Toomer's back pay award, we must review her earnings from January 7, 2003, the date she was denied a

promotion to a Correctional Lieutenant position, until October 2006, the date she was finally promoted to a Correctional Lieutenant position. Complainant testified that her base salary was approximately \$37,109 (N.T. 83). The base salary converts into a monthly salary of \$3,092.42 and an hourly salary of \$19.33. In addition, Complainant Toomer testified that she worked 16 to 24 hours of overtime each week and was compensated at time and a half of her base hourly salary (N.T. 84, 99). Specifically the time period in regard to Complainant Toomer's actual earnings is 46 months, from January 2003 until October 2006. Complainant Toomer's base salary as a Correctional Sergeant, without overtime, 46 months x \$3,092.42= \$142,251.32. The testimony at the public hearing indicated that Complainant Toomer worked approximately 80 hours of overtime at a rate calculated at time and a half. The 80 hours per month x \$28.99= \$2,319.20 in overtime earnings per month. This figure (\$2,319.60) x 46 months= \$106,683.20 which represents Complainant Toomer's overtime earnings as a Correctional Sergeant. The final calculations for Complainant Toomer's actual earnings are: \$142,251.32 + \$106,683.20= \$248,934.52.

Next we move to Complainant Toomer's proposed earnings as a Correctional Lieutenant. The base salary for a Correctional Lieutenant was \$41,778 that breaks down to a monthly salary of \$3,481.50 and an hourly rate of \$21.75. Once again, calculating a 46 month period, the earnings for a Correctional Lieutenant, without overtime, would be \$160,149.00. With Complainant Toomer working 80 hours of overtime at a rate of \$32.62 per

hour, her monthly overtime would be \$2,609.60. Her total overtime earnings (46 months x \$2,609.60) = \$120,041.60. Complainant Toomer's total proposed earnings as a Correctional Lieutenant would be as follows: \$160,149.00 + \$120,041.60 = \$280,190.60. Complainant Toomer is entitled to the difference between what she would have earned if she were promoted to a Correctional Lieutenant and her actual earnings as a Correctional Sergeant. The calculations are as follows:

	<b>Actual Salary</b>	<b>Proposed Earnings</b>	<b>Difference</b>
January 7, 2003 Until October 2006	\$248,934.52	\$280,190.60	\$31,256.08

Lastly, the commission has broad discretion in fashioning a remedy after a finding of unlawful discrimination. The Commission has the authority to require training as an affirmative measure to deter future instances. Because of the finding in Toomer's case, training should be provided to Respondent's staff regarding the rights of all employees to work in a non-discriminatory environment consistent with the Act.

An appropriate Order follows.



## O R D E R S

1. That the Respondent shall cease and desist from discriminating against the Complainants and other individuals because of their sex.
2. The Respondent shall pay Complainant Toomer the amount of \$31,256.08, which represents back pay as a full time Correctional Lieutenant from January 2003 through October 2006. This figure represents the difference in salary between a Correctional Lieutenant and Correctional Sergeant.
3. The Respondent shall pay Complainant Toomer interest at the rate of 6% annum from January 2003 through the date of payment.
4. That the Respondent shall provide training to its staff regarding the right of all employees to work in a non-discriminatory environment consistent with the provisions found in the Act.
5. That Johnson's case be dismissed.
6. That the Respondent shall report the means of compliance with this Final Order, in writing to Ryan Allen Hancock, Assistant Chief Counsel within thirty days of the date of this order.

### PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: \_\_\_\_\_

  
**Gerald S. Robinson, Chairman**

**ATTEST:**

By: \_\_\_\_\_

  
**Daniel D. Yun, Secretary**

