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HOMER C. FLOYD



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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Commissioners
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RAQUEL OTERO de YIENGST

September 9, 1986

Reply to:
P.O. Box 3145
Harrisburg, PA 17105-3145

Joseph Rengert, Esquire
Pennsylvania State Police
1800 Elmerton Avenue
Harrisburg, Pennsylvania 17110

Ellen K. Barry, Assistant
Chief Counsel
Pennsylvania Human Relations Commission
3405 North Sixth Street
Harrisburg, Pennsylvania 17110

Re: Docket No. E-24312D, Almando Carrasquillo
v. Pennsylvania State Police

Dear Counsel:

At its Commission meeting of August 25, 1986, the Pennsylvania Human Relations Commission voted four to two (4-2) to again adopt its original Order finding that respondent Pennsylvania State Police discriminated against complainant Almando Carrasquillo and directed that appropriate release be provided. A copy of the Order is enclosed, along with the dissent of Commissioner Leader, in which Commissioner Clark joined.

Very truly yours

A handwritten signature in cursive script, appearing to read "Homer C. Floyd".

Homer C. Floyd
Executive Director

HCF:jpg

Enclosure

cc: Almando Carrasquillo

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICES

PENNSYLVANIA HUMAN RELATIONS COMMISSION

----- :
ALMANDO CARRASQUILLO, :
Complainant :
v. : DOCKET NO. E-24312
PENNSYLVANIA STATE POLICE, :
Respondent :
----- :

FINDINGS OF FACT*

1. Complainant Almando Carrasquillo ("Complainant") is an adult male who lives at 1938 North Fourth Street, Philadelphia, PA 19122. He is of Pureto Rican ancestry and speaks Spanish. (N. T. 14 - 15)

2. Respondent Pennsylvania State Police ("Respondent"), headquartered at 1800 Elmerton Avenue, Harrisburg, PA 17109, employs more than four persons within the Commonwealth of Pennsylvania. (N. T. 693)

* The following abbreviations are utilized throughout:

N. T. Notes of Testimony
C. E. Complainant's Exhibit
R. E. Respondent's Exhibit
C. Complainant

3. On or about December 13, 1982, Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission at Docket No. E-24312-D. All parties to this action were duly served with a copy of the complaint. (C.)

4. Following an investigation of the allegations of discrimination, Commission staff found probable cause to credit the allegations of discrimination. (N. T. 192)

5. Complainant entered the Pennsylvania State Police Academy in May of 1981 and became a probationary trooper after completing a five month training program at the Academy. (N. T. 16 - 17)

6. Complainant received a three day suspension at the time of his graduation from the Academy for failing to respond truthfully to an official inquiry about an incident involving his Academy roommate. (N. T. 17 - 19, C. E. 1)

7. After serving his suspension, Complainant reported to Troop S, Harrisburg, assigned to interstate highway patrol. (N. T. 20)

8. When he first reported to Troop S, Complainant successfully completed a thirty day "coach-pupil" training program under Trooper Benner. (C. E. 2, N. T. 22 - 24)

9. Up to the end of their eighteen month probationary period, troopers may be discharged following a fairly informal hearing; after that time a court martial is necessary. (N. T. 201 - 204, 685)

10. At Troop S Complainant was supervised by a number of corporals, chiefly Corporal Willie Lanier. (N. T. 25)

11. Complainant was verbally counselled by Sargeant Barkofsky in January and June of 1982; he was evaluated by Sargeant Barkofsky in March and August of 1982. (C. E. 3, 4; R. E. 3, 4)

12. Complainant received a disciplinary action in September of 1982 on the basis of a complaint of rudeness filed against him by a motorist in June of 1982; in the interim (on July 25, 1982) Corporal Lanier had recommended non retention. (C. E. 11, 13, 15, 30)

13. Complainant was discharged from his employment as a State Trooper effective November 3, 1982. (C. E. 6)

14. Corporal Lanier's July, 1982 recommendation of nonretention indicated that Complainant was not competent to perform routine duties unsupervised. (C. E. 11)

15. Complainant on numerous occasions had gone out on patrol alone or accompanied by cadets from the Academy whom he was training. (N. T. 578)

16. In response to Corporal Lanier's recommendation of nonretention, State Police headquarters directed that more detail in support of the recommendation be provided. (C. E. 11, 12)

17. Corporal Lanier's second report recommending nonretention of Complainant, submitted in September of 1982, contained little new detail or material and much vague, conclusory comment regarding Complainant's unsatisfactory attitude. (C. E. 13) Comparable general investigation reports contained much more thorough documentation, (C. E. 17, 18, 19, 20, 21, 22)

18. Corporal Lanier's second report recommending nonretention referred to an incident wherein Complainant was stopped for speeding by another Trooper. The incident, which has occurred in July of 1982, was brought forward later by the trooper for the purpose of compounding the case against Complainant. (C. E. 13, N. T. 527, 859, 860, 866, 867)

19. Corporal Lanier's suggestion that Complainant had "ulterior motives" for wishing to be a state policeman could not be explained by Lanier. (C. E. 13, N. T. 556, 557)

20. A report on Complainant's difficulties at the Academy was placed before the Probationary Trooper Review Committee; this was not routine practice. (N. T. 222, 223)

21. Complainant appeared before the Probationary Trooper Review Committee on October 26, 1982. (C. E. 16)

22. In January of 1982, Complainant was counselled for playing pinball in uniform; Trooper Rivera was playing pinball with him but was not counselled. Trooper Rivera is not Puerto Rican. (R. E. 3, N. T. 27, 909, 420)

23. In January of 1982, Complainant was also counselled about radio demeanor as a result of a report from Corporal Buck which suggested that he had lied about the location of his patrol car. The senior trooper with whom he was on patrol, who is not Puerto Rican, was not counselled. (C. E. 25, R. E. 3, N. T. 876)

24. No other probationary trooper was brought before the Probationary Trooper Review Committee on the basis of an initially inadequate recommendation which was supplemented after the fact in the manner in which the case against Complainant was. (C. E. 11, 13, 17 - 22)

25. Troopers with worse records than Complainant's, who were not Puerto Rican, were retained. (C. E. 11, 13, 20, 21)

26. Respondent's proffered reason for terminating Complainant's employment was based on subjective appraisals of his attitude. (C. E. 11, 13, N. T. 679 - 941)

27. Respondent terminated Complainant on the basis of his ancestry, Puerto Rican.

28. In 1982, Complainant earned \$15,209 as a state trooper between January 1 and his discharge on November 3.

29. In 1983, Complainant earned approximately \$8982.

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Act.
2. Respondent is an employer within the meaning of the Act.
3. The Commission has jurisdiction over the parties and subject matter of this case.
4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
5. Complainant was discharged by Respondent on the basis of his ancestry, Puerto Rican, in violation of Section 5(a) of the Act.
6. Complainant is entitled to reinstatement and an award of all monies lost as a result of Respondent's discriminatory discharge of him, with interest.

O P I N I O N

This case arises on a complaint filed by Almando Carrasquillo ("Complainant") against the Commonwealth of Pennsylvania, Pennsylvania State Police ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on December 13, 1982, at Docket No. E-24312D. Complainant alleged that Respondent discriminated against him on the basis of "...[his] race, Hispanic, and/or [his] ancestry, Puerto Rican," by discharging him from his position as state policeman, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. Commission staff investigated the situation and found probable cause to credit the allegations of discrimination. When the parties were unable to resolve the matter through conciliation, a public hearing was approved and held in Harrisburg, Pennsylvania on March 19-23, 1984, before Commissioner Elizabeth M. Scott, Chairperson of the panel, and hearing Commissioners Doris M. Leader and Raquel Otero de Yiengst.

Section 5(a) provides in relevant part:

It shall be unlawful discriminatory practice ... (f) or any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual... to discharge from employment such individual...

The parties' respective burdens of proof under this section are well established. Complainant in order to make out a prima facie case must prove:

1. That he is a member of a protected class;
2. That he was qualified to perform his job duties;
3. That he was terminated from his position; and
4. That persons not of the protected class but otherwise comparable, were not discharged.

Sutton v. Atlantic Richfield Company, 646 F.2d 407 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir., 1979); McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973).

Should Complainant meet this burden, Respondent may still prevail by establishing a legitimate, non-discriminatory reason for its conduct. Philadelphia Electric Co. v. Pennsylvania Human Relations Commission, Pa. Cmwlth. 448 A.2d 701 (1982). If this burden is met, the burden of producing evidence that the proffered reason is pretextual lies with the Complainant, who also bears the ultimate burden of persuasion as to the discriminatory nature of the challenged action. Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Harrisburg School District v. Pennsylvania Human Relations Commission, 77 Pa. Commonwealth Ct. 594, 466 A.2d 760 (1983). For the reasons which follow, we find that Complainant has made out his prima facie case, and that Respondent has failed to establish a legitimate, non-discriminatory reason for discharging him.

Almando Carrasquillo is a bilingual male of Puerto Rican national ancestry who was born in New York City. He entered the Pennsylvania State Police Academy in May of 1981 and successfully completed a rigorous five month course of

training there. Near the end of this time period, he received a three day suspension for failure to respond truthfully when questioned about his knowledge of an incident of sexual conduct involving his roommate and a female cadet, both of whom were ultimately expelled from the Academy. The suspension was served immediately after his graduation from the Academy.

After graduating MR. Carrasquillo was assigned to Troop S, located in Harrisburg and responsible for patrolling interstate highways. He reported to this assignment three days later than his two classmates who were also assigned there, because of the suspension. Notice of the suspension was tacked on the barracks bulletin board when he arrived.

Pursuant to regular State Police procedures, Complainant first went through a thirty day "coach-pupil" period during which he was assigned to a Trooper Benner. He accompanied Trooper Benner in a patrol car during this period, watching Trooper Benner perform various duties and then performing them himself. He completed this program successfully and was assigned to regular patrol duty.

As do all newly graduated troopers, he remained on probation. Troopers serve an eighteen month probation period, which includes the five months at the Academy. While on probation, they may be discharged after a relatively informal hearing before the Probationary Troop Review Committee. After completing probation a trooper may be removed only by court martial.

Complainant's immediate superiors at Troop S were a number of corporals, primarily Corporal Willie Lanier. Above Corporal Lanier were, in order, Sargeant Barkofsky and the area commander, Lieutenant Sharpe.

Complainant's problems had begun by January of 1982, when he was verbally counselled by Sargeant Barkofsky about a number of incidents; the counselling was reduced to writing and admitted to the record as R.E. 3. Complainant's March, 1982 performance evaluation, signed by Sargeant Barkofsky and admitted as C.E. 3, gave him an overall rating of "good", however.

It was through this period that Complainant testified to receiving an increasing number of discrepancy notices, many for minor mistakes on reports. (Discrepancy notices, issued by all of the corporals, were used to point out errors in reports turned in to them. The notices were signed and returned to the issuing corporal to indicate that the necessary corrections had been made.)

In June of 1982, Sargeant Barkofsky again verbally counselled Complainant for two incidents, and reduced the counselling to writing; this document admitted as R.E. 4 advised that further infractions of Field Regulations would result in a Disciplinary Action Report.

Later in June, a motorist who encountered Mr. Carrasquillo after running out of gas lodged a complaint of rude treatment by him. This was investigated and resulted in disciplinary action over two months later, on September 7, 1982.

The September date is significant because of intervening events. In July of 1982, Corporal Lanier had completed general performance inquiries on probationary troopers, including Complainant. His July 25, 1982 report on Complainant, C.E. 11, recommended non-retention, based solely on the following five listed events. The first three, in part the subjects of the January, 1982 counselling, were: one unauthorized use of a patrol car for "personal relay" (getting a ride home in a patrol car from a friend still on duty); coming to work late once; and using a vulgar term over a patrol car's public address system to inquire about the activities of a motorist who was standing beside his car at the side of the interstate. (This last incident came to the attention of Complainant's superiors through a report from the senior trooper with whom he was on patrol; no citizen complaint was lodged.) The final two grounds relied upon were one incident of rudeness to a superior officer and one error in filling out a traffic citation.

While only the proper completion of a citation seems relevant to Complainant's ability to perform his job duties, the report also opined that Complainant "...has not progressed to a point whereby he could be left alone, without supervision, and perform duties routinely expected of him." No mention was made of the fact that, as Complainant testified without contradiction, he was sent out several times on patrol with cadets for the purpose of illustrating various procedures to them.

Before Corporal Lanier's recommendation produced any action from above, Sargeant Barkofsky on August 3, 1982 signed an evaluation of Complainant, C.E. 4, giving him an overall high "fair" rating with only one "unsatisfactory", in "relationship with people." The comments included mention of Complainant's "negative attitude" toward a superior officer and the complaint of "arrogant attitude toward public" lodged on June 16, 1982; although the report on that incident was filed on July 25, 1982, no disciplinary action was taken on it by Sargeant Barkofsky until September 7, 1982. Notwithstanding Corporal Lanier's July 25, 1982 opinion that Complainant was not competent to perform routine duties without supervision, Sargeant Barkofsky in this evaluation signed less than ten days later described the quantity and quality of his work as "good".

Not surprisingly, Corporal Lanier's July 25, 1982 recommendation of non-retention produced a directive (C.E. 12) dated August 25, 1982 from Respondent's Director of Personnel requesting more detail. In response, a number of events occurred which we conclude were designed to bolster the case against Mr. Carrasquillo.

First, as noted, a disciplinary action was issued over the complaint of rudeness to a motorist which had been filed late in June. Although the investigation of this incident had been concluded in July of 1982, Sargeant Barkofsky did not take the disciplinary action until September 7, 1982, after the request from the Bureau of Personnel for additional information

about Mr. Carrasquillo in connection with the recommendation of non-retention. At that time disciplinary action was taken in spite of the investigating officer's recommendation, also submitted in July, that only verbal counselling occur.

Second, as directed, Corporal Lanier prepared a second general investigation report which again recommended non-retention of Complainant. This report was dated September 17, 1982. Admitted to the record as C.E. 13, it in fact added little to the earlier report.

The report noted that five magistrates had been contacted about Complainant's performance in court, and stated with seeming disappointment that ... "none would say anything negative towards Trooper Carrasquillo's performance in court." This is in marked contrast to other general investigation reports, which regularly quoted both positive and negative responses of interviewees such as magistrates in detail. See C.E. 17, 18, 19, 20, 21, 22.

The report next listed as "examples of Trooper Carrasquillo's performance that have resulted in additional supervisory actions" three events: an accident investigation performed by Complainant in April of 1982 which was said to have been inadequate; the lately-imposed disciplinary action flowing from the June, 1982 charge of discourteous treatment of a motorist; and an "incident recently discovered" which had occurred on July 11, 1982 of Complainant being stopped for speeding by another trooper. That trooper, questioned during

this hearing about why he had waited so long to come forward with the incident, testified quite directly that he came forward when he did, with knowledge of Complainant's upcoming termination hearing, for the purpose of compounding the evidence against him.

Finally, the report in attachments authored by Corporals Lanier and Shovlin described in almost totally subjective terms Complainant's unsatisfactory attitude. Corporal Lanier's statement included an allegation that "Trooper Carrasquillo has ulterior motives in wanting to be a state policeman," a conclusion which Corporal Lanier was unable to clarify on the stand.

Of the many kinds of supplementing information requested by the Bureau of Personnel, this second report contained only a few, and those largely conclusory. Completely missing were the requested statements from persons who were issued citations by Complainant, or were involved in investigations performed by him. This packet nevertheless was placed before the Probationary Trooper Review Committee, along with yet another report of yet another earlier incident which was nevertheless not reported upon until September 17, 1982: This report, C.E. 14, centered in essence around whether Complainant while in uniform had asked a young woman for a date in May or June of 1982. While the report itself is dated September 17, 1982 (the same date as Corporal Lanier's supplemental report), the body of the report refers to interviews conducted as late as September 23, 1982.

Also placed before that Committee was a report of the incident at the Academy which had resulted in Complainant's suspension. Christina Carter, Respondent's Affirmative Action Officer and a standing member of the Committee, testified without contradiction that never before in her experience on that Committee had a probationary trooper's record at the Academy been reviewed by the Committee.

Thus accused, Mr. Carrasquillo appeared before the Committee on October 26, 1982. Pursuant to the Committee's recommendation, his employment as a state trooper was terminated effective November 3, 1982. As noted, we find that this termination was the culmination of a course of treatment which was different from that accorded to others not in Complainant's protected class.

Different treatment began as early as January of 1982 when Complainant was counselled by Sargeant Barkofsky for claimed infractions which included playing pinball while in uniform and on duty, see R.E. 3. Although he had in fact been playing pinball in the company of Trooper Rivera, who is not Puerto Rican, only Complainant was counselled about this conduct.

Similarly, Complainant in January of 1982 was counselled about his radio demeanor on the basis of a memorandum (C.E. 25) from Corporal Buck which also suggested quite strongly that Complainant had intentionally called in with an incorrect report of his patrol car's location. At the time he was on

patrol with Trooper Darthinia Hairston, who was driving; there was however never even a hint that the mistake in location might have been hers, rather than Complainant's. Unlike him, she was not reported or counselled.

Most striking however is the process which placed Complainant before the Probationary Trooper Review Committee and ultimately resulted in his dismissal. As the rather lengthy narrative above indicates, the initial recommendation of non-retention was woefully inadequate and extremely subjective. In no other instance was non-retention recommended on the basis of such a paucity of material; nor was a case against any other trooper pieced together after the initial fact of a negative recommendation, using incidents which had occurred before the negative recommendation was made but which were not used until so much later. See C.E. 17-22.

We find this discrepancy in the process itself to be sufficient to support Complainant's prima facie case. We also find however that the record strongly suggests that at least two troopers with records worse than Mr. Carrasquillo's were retained; neither is Puerto Rican. The trooper referred to during this hearing as W-5, a White male, had evaluations which were lower than Complainant's. Some of his superiors recommended psychological evaluation; he was reported to have serious problems with submitting reports on time, and to have an inability, or unwillingness, to correct incompetency in filing reports and obeying lawful orders. He was retained. See C.E. 20.

Similarly retained was the trooper referred to as B-8, a Black female. Her problems included poor driving ability and poor map reading skills, late filing of reports, and overall competence problems. Her March 1982 evaluation found her "unsatisfactory" in three categories; Complainant in all of his evaluations was given only one "unsatisfactory." See C.E. 3, 4, 21.

Ultimately, the question before us is whether Complainant was in fact terminated because of what Respondent termed his poor attitude, as Respondent so vigorously argues. As already noted, we are not persuaded that this was the actual reason.

The matter of attitude is necessarily subjective; unlike the number of accidents one has had, or errors one has made on reports, attitude cannot be quantified. Use of subjective criteria does not, without more, violate the Act; however, courts have repeatedly recognized the dangers inherent in subjective appraisals and have been correspondingly suspicious of them. General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649, 657 n. 14. As the United States Supreme Court stated in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), use of subjective criteria makes it impossible to ascertain whether job-related factors were actually used. Conscious and unconscious bias may easily impinge upon the decision making process.

His supervisors characterized Complainant's attitude in a confusing variety of ways. Corporal Lanier described him

in July of 1982 as "argumentative" and "refus[ing] to accept constructive criticism." (C.E. 11) In the attachment to his September, 1982 evaluation the same writer described Complainant as "lackadaisical" in attitude, and added the mystifying comment about his "ulterior" motives in wishing to become a state trooper. These sets of comments blur the distinction between Complainant's ability to perform his duties and his willingness to do so.

Corporal Shovlin's comments, appended to the September, 1982 report (C.E. 13) likewise refer to both lack of competence and lack of desire to be competent. Conclusory and all but meaningless phrases such as "poor attitude" make up the bulk of this set of comments. Neither Corporal Lanier nor Corporal Shovlin gave examples of the specific behavior to which they objected.

These descriptions do little to explain Respondent's objections to Complainant; they fail utterly to explain or even address the question of why he was treated differently from other probationary troopers: why the initial recommendation of non-retention was made on the basis of such an inadequate report, and why it was then necessary to piece together a case using stale information which still lacked the sort of detail present in the case of every other trooper facing dismissal. As Complainant argues, why if he was so incompetent was he being sent out on patrol both alone and with cadets?

We, therefore, conclude that Respondent has failed to advance a legitimate and non-discriminatory reason for its

treatment of Complainant which is sufficient to overcome his prima facie case, and find that his termination violated Section 5(a) of the Act. We are empowered by Section 9 of the Act to award relief including backpay and reinstatement following such a finding. We therefore direct entry of the final order which follows.

DISSENTING OPINION

I respectfully dissent.

As the other members of this panel have stated, the ultimate issue for our resolution is the reason for Mr. Carrasquillo's discharge by the Pennsylvania State Police. While I cannot condone the methods by which this discharge was accomplished, I have reached a different conclusion about the reason for it. I am convinced that the reason was not Mr. Carrasquillo's Puerto Rican ancestry, but rather, as Respondent argues, his attitude.

Based upon his own testimony and that of the many other witnesses, I find that Mr. Carrasquillo was indeed unwilling or unable to accept the constraints imposed upon him by the State Police organization. That organization is of course paramilitary, and requires of all of its members a high degree of loyalty and unquestioning obedience. In my view, Mr. Carrasquillo took personally the many actions of his commanding officers which were designed only to elicit such obedience. His response was to insist that he be accepted on his own terms. While other probationary troopers committed serious infractions and were retained, in each other comparable situation there was some indication of desire to change and of effort expended toward that end, effort that the Complainant did not make.

It is perhaps sad that the result was his discharge and this lawsuit, which evoked such strong feelings in all concerned; there was not, however, any violation of the Human Relations Act. I therefore dissent.

BY: Doris M. Leader
DORIS M. LEADER
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ALMANDO CARRASQUILLO,

Complainant

v.

PENNSYLVANIA STATE POLICE,

Respondent

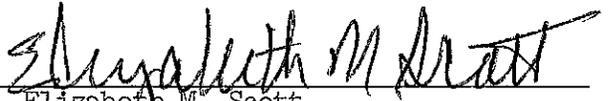
DOCKET NO. E-24312

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this case, the undersigned members of the Hearing Panel conclude that Respondent violated Section 5 of the Pennsylvania Human Relations Act, and therefore recommend that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.

November 19, 1984

Date:


Elizabeth M. Scott
Chairperson, Hearing Panel

November 19, 1984

Date:


Raquel Otero De Yiengst
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICES

PENNSYLVANIA HUMAN RELATIONS COMMISSION

----- :
ALMANDO CARRASQUILLO, :
Complainant :
v. : DOCKET NO. E-24312
PENNSYLVANIA STATE POLICE, :
Respondent :
----- :

FINAL ORDER

AND NOW, this 4th day of December, 1984, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, and therefore

O R D E R S:

1. Respondent shall cease and desist from discriminating on the basis of ancestry;
2. Respondent shall immediately reinstate Complainant to the position of State Trooper in non-probationary status, with an official entry date of May 11, 1981;
3. Respondent shall adjust Complainant's seniority date so as to include the period of time after his termination on November 3, 1982, such that it reflects a continuous period of employment with the Pennsylvania State Police; and restore to him all benefits of employment;
4. Respondent shall pay to Complainant a lump sum of \$16,858.00,

representing his lost salary from the time of his discharge until the public hearing until the public hearing in this case less interim earnings; Respondent shall further pay to Complainant the difference between his actual earnings and the amount he would have earned had he remained in Respondent's employ beginning on March 23, 1983 and ending at such time as a bona fide offer of reinstatement is made to Complainant.

Interest of six per cent per annum shall also be paid by Respondent to Complainant on all amounts described above.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____

Joseph X. Yaffe
JOSEPH X. YAFFE
Chairperson

ATTEST:

Elizabeth M. Scott
ELIZABETH M. SCOTT
Secretary

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ALMANDO CARRASQUILLO, :
COMPLAINANT :
v. : DOCKET NO. E-24312D
PENNSYLVANIA STATE POLICE, :
RESPONDENT :

FINAL ORDER

AND NOW, this 25th day of August, 1986, following review of the entire record in this case, including the transcript of public hearing testimony, exhibits, and the briefs of the parties, pursuant to Commonwealth Court's Order of July 30, 1986, the full Pennsylvania Human Relations Commission hereby again concludes that Respondent discriminated against Complainant, in violation of Section 5 (a) of the Pennsylvania Human Relations Act, and therefore reissues its December 4, 1984, Order in this case, specifically ordering that:

1. Respondent shall cease and desist from discriminating on the basis of national ancestry;

2. Respondent shall immediately reinstate Complainant to the position of State Trooper in non-probationary status, with an official entry date of May 11, 1981.

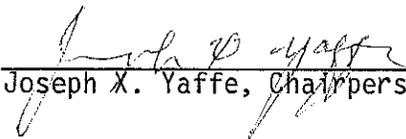
3. Respondent shall adjust Complainant's seniority date so as to include the period of time after his termination on November 3, 1982, such that it reflects a continuance period of employment with the Pennsylvania State Police, and restore to him all benefits of employment;

4. Respondent shall pay to Complainant a lump sum of \$16,858., representing his lost salary from the time of his discharge until the public hearing in this case less interim earnings;

5. Respondent shall further pay to Complainant the difference between his actual earnings and the amount he would have earned had he remained in Respondent's employ beginning on March 23, 1983, and ending at such time as a bona fide offer of reinstatement is made to Complainant.

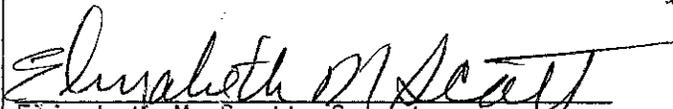
Interest of 6% per annum shall also be paid by Respondent to Complainant on all amounts described above.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Joseph X. Yaffe, Chairperson

ATTEST:



Elizabeth M. Scott, Secretary

DISSENTING OPINION

Following our review of the entire record in this case, including the transcript of public hearing testimony, exhibits, and briefs of the parties, pursuant to Commonwealth Court's Order of July 30, 1986, we again conclude that Respondent did not discriminate against Complainant for the reasons stated in Commissioner Leader's Dissenting Opinion of December 4, 1984; we therefore dissent and would dismiss this case.

Doris M. Leader

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ALMANDO CARRASQUILLO,
COMPLAINANT

v.

PENNSYLVANIA STATE POLICE,
RESPONDENT

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DOCKET NO. E-24312

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL MEMBER

FINAL ORDER

FINDINGS OF FACT*

1. Almando Carrasquillo, (hereinafter "Complainant"), is an adult male of Puerto Rican ancestry and who speaks Spanish. (N.T. 14-15)

2. The Pennsylvania State Police (hereinafter "Respondent"), headquartered at 1800 Elmerton Avenue, Harrisburg, PA 17109, employs more than four persons within the Commonwealth of Pennsylvania. (N.T. 693)

3. On or about December 13, 1982, Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "PHRC"), at Docket No. E-24312D. All parties to this action were duly served with a copy of the complaint. (C.)

4. Following an investigation of the allegations of discrimination, PHRC staff found probable cause to credit the Complainant's allegations of discrimination. (N.T. 192)

5. The Complainant entered the Pennsylvania State Police Academy in May of 1981 and became a probationary trooper after completing a five month training program at the Academy. (N.T. 16-17)

6. The Complainant received a three day suspension at the time of his graduation from the Academy for failing to respond truthfully to an official inquiry about an incident involving his Academy roommate. (N.T. 17-19, C.E. 1)

* To the extent that the opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations are utilized throughout:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
C. Complaint

7. After serving his suspension, the Complainant reported to Troop S, Harrisburg, and was assigned to interstate highway patrol. (N.T. 20)

8. Upon his arrival at Troop S, the Complainant successfully completed a thirty day "coach-pupil" training program under the guidance of Trooper Benner. (C.E. 2, N.T. 22-24)

9. PA State Troopers serve an initial eighteen month probationary period, during which period troopers may be discharged following a fairly informal hearing; after that time a court martial is necessary. (N.T. 201-204, 685)

10. While at Troop S, the Complainant was supervised by several corporals, chiefly Corporal Willie Lanier. (N.T. 25)

11. The Complainant was verbally counseled by Sergeant Barkofsky in January and June of 1982; he was evaluated by Sergeant Barkofsky in March and August of 1982. (C.E. 3, 4, R.E. 3, 4)

12. The Complainant received a disciplinary action in September of 1982 following a motorist's complaint of rudeness filed against the Complainant in June of 1982; in the interim (on July 25, 1982) Corporal Lanier had recommended non retention. (C.E. 11, 13, 15, 30)

13. The Complainant was discharged from his employment as a State Trooper effective November 3, 1982. (C.E. 6)

14. Corporal Lanier's July, 1982 recommendation of non-retention indicated that the Complainant was not competent to perform routine duties unsupervised. (C.E. 11)

15. On numerous occasions the Complainant had gone out on patrol alone or was accompanied by Academy cadets whom the Complainant was training. (C.E. 11, 12)

16. In response to Corporal Lanier's recommendation of non-retention, State Police headquarters directed Corporal Lanier to provide more detail in support of the recommendation. (C.E. 11, 12)

17. Corporal Lanier's second report recommending non-retention of the Complainant, submitted in September of 1982, contained little new detail or material and much vague, conclusory comment regarding the Complainant's unsatisfactory attitude. (C.E. 13) Comparable general investigation reports contained much more thorough documentation, (C.E. 17, 18, 19, 20, 21, 22)

18. Corporal Lanier's second report recommending non-retention referred to an incident wherein the Complainant was stopped for speeding by another Trooper. The incident, which had occurred in July of 1982, was brought forward later by the Trooper for the purpose of compounding the case against Complainant. (C.E. 13, N.T. 527, 859, 860, 866, 867)

19. Corporal Lanier's suggestion that Complainant had "ulterior motives" for wishing to be a state policeman could not be explained by Lanier. (C.E. 13, N.T. 556, 557)

20. A report on the Complainant's difficulties at the Academy was placed before the Probationary Trooper Review Committee (hereinafter "PTRC), this was not routine practice. (N.T. 222, 223)

21. The Complainant appeared before the PTRC on October 26, 1982. (C.E. 16)

22. In January of 1982, the Complainant was counseled for playing pinball in uniform. Trooper Rivera was playing pinball with him but was not counseled. Trooper Rivera is not Puerto Rican. (R.E. 3, N.T. 27, 909, 420)

23. In January of 1982, the Complainant was counseled about radio demeanor as a result of a report from Corporal Buck which suggested the Complainant had lied about the location of his patrol car. The senior trooper with whom the Complainant was on patrol, who is not Puerto Rican, was not counseled. (C.E. 25, R.E. 3, N.T. 876)

24. No other probationary trooper was brought before the PTRC on the basis of an initially inadequate recommendation which was supplemented after the fact in the manner in which the case against Complainant was. (C.E. 11, 13, 17-22)

25. The Respondent's proffered reason for terminating the Complainant's employment was based on subjective appraisals of the Complainant's attitude. (C.E. 11, 13, N.T. 679-941)

26. Respondent terminated Complainant on the basis of his ancestry, Puerto Rican.

27. In 1982, the Complainant earned \$15,209 as a state trooper between January 1 and his discharge on November 3.

28. In 1983, the Complainant earned approximately \$8,982.

CONCLUSIONS OF LAW

1. The Complainant is an individual within the meaning of the PHRA.

2. The Respondent is an employer within the meaning of the PHRA.

3. The PHRC has jurisdiction over the parties and subject matter of this case.

4. The parties and the PHRC have fully complied with the procedural prerequisites to a public hearing in this case.

5. The Complainant established a prima facie case of discrimination by showing:

- a. he is a member of a protected class;
- b. he was performing his job satisfactorily;
- c. he was terminated; and
- d. he produced evidence of disparate treatment.

6. The Respondent articulated a legitimate, non-discriminatory reason for the Complainant's discharge.

7. The Complainant has shown by a preponderance of the evidence that the Respondent's stated reason is a pretext.

8. The Complainant was discharged by the Respondent on the basis of his ancestry, Puerto Rican, in violation of Section 5(a) of the Act.

9. The Complainant is entitled to reinstatement and an award of all monies lost as a result of the Respondent's discriminatory discharge of him, with interest.

O P I N I O N

This case arises on a complaint filed by Almando Carrasquillo ("Complainant"), against the Commonwealth of Pennsylvania, Pennsylvania State Police ("Respondent"), with the Pennsylvania Human Relations Commission ("PHRC"), on December 13, 1982, at Docket No. E-24312D. The Complainant alleged that the Respondent discriminated against him on the basis of "...[his] race, Hispanic, and/or [his] ancestry, Puerto Rican," by discharging him from his position as a state policeman, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq., (PHRA). PHRC staff investigated the Complainant's allegations and found probable cause to credit the Complainant's claim of discrimination. When the parties were unable to resolve the matter through conciliation, a public hearing was approved and held in Harrisburg, Pennsylvania on March 19-23, 1984, before Commissioner Elizabeth M. Scott, Panel Chairperson, and Hearing Panel Commissioners Doris M. Leader and Raquel Otero de Yiengst.

Originally, two members of the three member hearing panel issued Findings of Fact, Conclusions of Law, and an Opinion concluding that the Respondent had discriminated against the Complainant. One hearing panel member dissented. Subsequently, the PHRC adopted the majority opinion of the hearing panel.

Following the issuance of the PHRC's Final Order, the Respondent appealed this case to the Commonwealth Court. This matter was remanded with the instruction that the entire PHRC must review the public hearing record. Following that review, the PHRC reaffirmed the prior Final Order, adopting the majority opinion of the hearing panel.

Once again, the Respondent appealed this matter to the Commonwealth Court and once again, in an order dated May 10, 1988, the Commonwealth Court remanded this matter to the PHRC. Of the original hearing panel, only Commissioner Raquel Otero de Yiengst is still a PHRC Commissioner. Accordingly, Commissioner de Yiengst hereby modifies her prior opinion in a manner consistent with the Commonwealth Court's concerns and instructions.

In its opinion remanding this case, the Commonwealth Court cites error in the PHRC's original opinion in two particular areas. First, the prior PHRC opinion stated that the "Respondent has failed to establish a legitimate, non-discriminatory reason for discharging [the Complainant]." Commonwealth Court noted the PHRC erroneously applied the law with respect to the appropriate shifting of burdens in a disparate treatment case. Second, the Commonwealth Court opinion indicates that the PHRC improperly used hearsay evidence in support of a factual finding. Accordingly, in view of the findings of the Commonwealth Court, the original PHRC opinion has been redrafted in a manner consistent with an appropriate application of the law on the burdens of the parties without an improper reliance on hearsay documents.

The order and allocation of proof in a disparate treatment case was first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). and recently clarified by the PA Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, Pa. , 532 A.2d 315 (1987). The PA Supreme Court's guidance indicates that the Complainant must first establish a prima facie case of discrimination. If the Complainant

establishes a prima facie case, the burden of production then shifts to the Respondent to "simply...produce evidence of a 'legitimate, non-discriminatory reason' for.. [its action]." Id at 318. If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. Id at 318.

A Complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In order to do so, the Complainant need not necessarily offer evidence beyond that offered to establish a prima facie case. Id at 255 n.10. The trier of fact may consider the same evidence that a Complainant has introduced to establish a prima facie case in determining whether a Respondent's explanation for the employment decision is pretextual. Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1358-59 (9th Cir. 1985).

On appeal, the Commonwealth Court rejected an argument by the Respondent which contended that the Complainant failed to establish a prima facie case. Specifically, the Court found that the Complainant:

- a. established his membership in a protected class;
- b. produced evidence that his job performance was satisfactory;
- c. was terminated; and
- d. produced evidence to show that he was treated differently on several levels from others not in his class.

The Complainant having produced sufficient evidence to establish his prima facie case, the burden of production shifts to the Respondent to articulate a legitimate non-discriminatory reason for terminating the Complainant. Clearly, the Respondent has met this burden.

The Respondent presented evidence to show that the Complainant had what it termed an "attitude problem." On the one hand, the Complainant was characterized by his superiors as an individual who disregarded the organization and necessary standardization of the Respondent's system of reporting accidents, incidents and other sorts of investigations. Large numbers of discrepancy notices were introduced as evidence on this point. On the other hand, the Complainant was regarded as arrogant and unwilling to accept constructive criticism. In addition to the Complainant's supervisors' testimony, the Respondent's evidence included documentation of two incidents for which the Complainant was counseled (use of "smart alecky" tone over the radio and lack of military courtesy in becoming involved in an altercation with a corporal who had returned a report to him for correction), and a complaint from a disabled motorist. The Respondent also offered copies of its field regulation and field reporting manuals, as much of its evidence related to the Complainant's violations thereof. Further, there was testimony that State Police regulations allow dismissal of probationary troopers for rule or other violations. Such evidence is sufficient to advance a legitimate, non-discriminatory reason for the Complainant's discharge.

Since the Respondent successfully met its burden of production, the entire body of evidence produced at the public hearing must be

evaluated according to the preponderance standard. Allegheny Housing Supra at 319. In deciding which party's explanation of the Respondent's motivation to believe, a review of the factual setting is appropriate.

The Complainant is a bilingual male of Puerto Rican ancestry. He entered the Pennsylvania State Police Academy in May of 1981 and successfully completed a rigorous five month course of training there. Near the end of his stay at the Academy, he received a three day suspension for failure to respond truthfully when questioned about his knowledge of an incident involving his roommate and another cadet, both of whom were ultimately expelled from the Academy. The Complainant's three day suspension was served immediately after his graduation from the Academy.

After graduating, the Complainant was assigned to Troop S, located in Harrisburg and responsible for patrolling interstate highways. Because of the suspension the Complainant reported to this assignment three days later than two Academy classmates who were also assigned there. Notice of the suspension was tacked on the barracks bulletin board when he arrived.

Pursuant to regular State Police procedures, the Complainant first went through a thirty day "coach-pupil" period during which he was assigned to Trooper Benner. The Complainant accompanied Trooper Benner in a patrol car during this period, watching Trooper Benner perform various duties and then performing them himself. He completed this program successfully and was assigned to regular patrol duty.

As do all newly graduated troopers, the Complainant remained on probation. Troopers serve an eighteen month probation period, which includes the five months at the Academy. While on probation, a trooper may

be discharged after a relatively informal hearing before the Probationary Troop Review Committee ("PTRC"). After completing probation a trooper may be removed only by court martial.

The Complainant's immediate superiors at Troop S were a battery of corporals; primarily Corporal Willie Lanier. The chain of command above Corporal Lanier were Sergeant Barkofsky and the area commander, Lieutenant Sharpe.

The Complainant's problems at Troop S began in January of 1982, when he was verbally counseled by Sergeant Barkofsky about a number of incidents; the counseling was reduced to writing and admitted to the record as R.E. 3. The Complainant's March, 1982 performance evaluation, signed by Sergeant Barkofsky and admitted as C.E. 3, gave him an overall rating of "good", however.

The Complainant testified that it was through this period he received an increasing number of discrepancy notices, many for minor mistakes on reports. (Discrepancy notices, issued by all of the corporals, were used to point out errors in reports turned in to them. The notices were signed and returned to the issuing corporal to indicate that the necessary corrections had been made.)

In June of 1982, Sergeant Barkofsky again verbally counseled the Complainant for two incidents, and again reduced the counseling to writing; this document admitted as R.E. 4 advised that further infractions of Field Regulations would result in a Disciplinary Action Report.

Later in June 1982, a motorist who encountered the Complainant after running out of gas lodged a complaint citing alleged rude treatment by the Complainant. The Complaint was investigated and resulted in disciplinary action over two months later, on September 7, 1982.

The September date is significant because of intervening events. In July of 1982, Corporal Lanier had completed general performance inquiries on probationary troopers, including the Complainant. Corporal Lanier's July 25, 1982 report on the Complainant, C.E. 11, recommended non-retention, based solely on the following five listed events. The first three, in part the subjects of the January, 1982 counseling, were: one unauthorized use of a patrol car for "personal relay" (getting a ride home in a patrol car from a friend still on duty); coming to work late once; and using a vulgar term over a patrol car's public address system to inquire about the activities of a motorist who was standing beside his car at the side of the interstate. (This last incident came to the attention of the Complainant's superiors through a report from the senior trooper with whom he was on patrol; no citizen complaint was lodged.) The final two grounds relied upon were one incident of rudeness to a superior officer and one error in filling out a traffic citation.

While only the proper completion of a citation seems relevant to Complainant's ability to perform his job duties, the report also opined that the Complainant "...has not progressed to a point whereby he could be left alone, without supervision, and perform duties routinely expected of him." No mention was made of the fact that, as the Complainant testified without contradiction, he was sent out several times on patrol with cadets for the purpose of illustrating various procedures to them.

Before Corporal Lanier's recommendation produced any action from above, Sergeant Barkofsky on August 3, 1982 signed an evaluation of the Complainant, C.E. 4, giving him an overall high "fair" rating with only one "unsatisfactory", in a category designated "relationship with people." The comments included mention of the Complainant's "negative attitude" toward

a superior officer and the complaint of "arrogant attitude toward public" lodged on June 16, 1982; although the report on that incident was filed on July 25, 1982, no disciplinary action was taken on it by Sergeant Barkofsky until September 7, 1982. Notwithstanding Corporal Lanier's July 25, 1982 opinion that the Complainant was not competent to perform routine duties without supervision, Sergeant Barkofsky, in this evaluation signed less than ten days later, described the quantity and quality of his work as "good".

Corporal Lanier's July 25, 1982 recommendation of non-retention produced a directive (C.E. 12) dated August 25, 1982 from Respondent's Director of Personnel requesting more detail. In response, a number of events occurred.

First, as noted, a disciplinary action was issued over the complaint of rudeness to a motorist which had been filed late in June. Although the investigation of this incident had been concluded in July of 1982, Sergeant Barkofsky did not take the disciplinary action until September 7, 1982, after the request from the Bureau of Personnel for additional information about the Complainant in connection with Corporal Lanier's recommendation of non-retention. At that time disciplinary action was taken in spite of the investigating officer's recommendation, also submitted in July, that only verbal counseling occur.

Second, as directed, Corporal Lanier prepared a second general investigation report which again recommended non-retention of the Complainant. This report was dated September 17, 1982. Admitted to the record as C.E. 13, it added little to the earlier report.

The report noted that five magistrates had been contracted about Complainant's performance in court, and stated with seeming disappointment

that ..."none would say anything negative towards Trooper Carrasquillo's performance in court." This is in marked contrast to other general investigation reports, which regularly quoted both positive and negative responses of interviewees such as magistrates in detail. See C.E. 17, 18, 19, 20, 21, 22.

The report next listed as "examples of the Complainant's performance that have resulted in additional supervisory actions" three events: an accident investigation performed by the Complainant in April of 1982 which was said to have been inadequate; the lately-imposed disciplinary action flowing from the June, 1982 charge of discourteous treatment of a motorist; and an "incident recently discovered" which had occurred on July 11, 1982 of the Complainant being stopped for speeding by another trooper. That trooper, questioned during this hearing about why he had waited so long to come forward with the incident, testified quite directly that he came forward when he did, with knowledge of the Complainant's upcoming termination hearing, for the purpose of compounding the evidence against him.

Finally, the report in attachments authored by Corporals Lanier and Shovlin described in almost totally subjective terms the Complainant's unsatisfactory attitude. Corporal Lanier's statement included an allegation that "Trooper Carrasquillo has ulterior motives in wanting to be a state policeman," a conclusion which Corporal Lanier was unable to clarify at the public hearing.

Of the many kinds of supplementing information requested by the Bureau of Personnel, Corporal Lanier's second report contained only a few, and those largely conclusory. Completely missing were the requested statements from persons who were issued citations by the Complainant, or

were involved in investigations performed by him. This packet nevertheless was placed before the PTRC, along with yet another report of yet another earlier incident which was nevertheless not reported upon until September 17, 1982. In essence, this report, C.E. 14, centered around whether the Complainant while in uniform had asked a young woman for a date in May or June of 1982. While the report itself is dated September 17, 1982 (the same date as Corporal Lanier's supplemental report), the body of the report refers to interviews conducted as late as September 23, 1982.

Also placed before the PTRC was a report of the incident at the Academy which had resulted in the Complainant's suspension. Christina Carter, the Respondent's Affirmative Action Officer and a standing member of the PTRC, testified without contradiction that never before in her experience on the PTRC had a probationary trooper's record at the Academy been reviewed by the PTRC.

Thus accused, the Complainant appeared before the PTRC on October 26, 1982. Pursuant to the PTRC's recommendation, his employment as a state trooper was terminated effective November 3, 1982. We find that this termination was the culmination of a course of treatment which was different from that accorded to others not in the Complainant's protected class.

Different treatment began as early as January of 1982 when the Complainant was counseled by Sergeant Barkofsky for claimed infractions which included playing pinball while in uniform and on duty, see R.E. 3. Although he had in fact been playing pinball in the company of Trooper Rivera, who is not Puerto Rican, only the Complainant was counseled about this conduct.

Similarly, the Complainant in January of 1982 was counseled about his radio demeanor on the basis of a memorandum (C.E. 25) from Corporal Buck which also suggested quite strongly that the Complainant had intentionally called in with an incorrect report of his patrol car's location. At the time he was on patrol with Trooper Darthinia Hairston, who was driving; there was, however, never even a hint that the mistake in location might have been hers, rather than the Complainant's. Unlike the Complainant, Trooper Hairston was not reported or counseled.

Most striking, however, is the process which placed the Complainant before the PTRC and ultimately resulted in his dismissal. As the rather lengthy narrative above indicates, the initial recommendation of non-retention was woefully inadequate and extremely subjective. In no other instance was non-retention recommended on the basis of such a paucity of material; nor was a case against any other trooper pieced together after the initial fact of a negative recommendation, using incidents which had occurred before the negative recommendation was made but which were not used until so much later. See C.E. 17-22.

Ultimately, the question before us is whether the Complainant was in fact terminated because of what the Respondent termed his poor attitude, as the Respondent so vigorously argues. As already noted, we are not persuaded that this was the actual reason.

The matter of attitude is necessarily subjective; unlike the number of accidents one has had, or errors one has made on reports, attitude cannot be quantified. Use of subjective criteria does not, without more, violate the Act; however, courts have repeatedly recognized the dangers inherent in subjective appraisals and have been correspondingly

suspicious of them. General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649, 657 n. 14. As the United State Supreme Court stated in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), use of subjective criteria makes it impossible to ascertain whether job-related factors were actually used. Conscious and unconscious bias may easily impinge upon the decision making process.

The Complainant's supervisors characterized the Complainant's attitude in a variety of ways. Corporal Lanier described the Complainant in July of 1982 as "argumentative" and "refus[ing] to accept constructive criticism." (C.E. 11) In the attachment to his September, 1982 evaluation Corporal Lanier described the Complainant as "lackadaisical" in attitude, and added a mystifying comment about the Complainant's "ulterior" motives in wishing to become a state trooper. Such comments blur the distinction between the Complainant's ability to perform his duties and his willingness to do so.

Corporal Shovlin's comments, appended to the September, 1982 report (C.E. 13) likewise refer to both lack of competence and lack of desire to be competent. Conclusory and all but meaningless phrases such as "poor attitude" make up the bulk of this set of comments. Neither Corporal Lanier nor Corporal Shovlin gave examples of the specific behavior to which they objected.

These descriptions do little to explain the Respondent's objections to the Complainant; they fail utterly to explain or even address the question of why he was treated differently from other probationary troopers: why the initial recommendation of non-retention was made on the basis of such an inadequate report, and why it was then necessary to piece together a case using stale information which still lacked the sort of

detail present in the case of every other trooper facing dismissal. As Complainant argues, why if he was so incompetent was he being sent out on patrol both alone and with cadets?

Although the Respondent articulated a legitimate, non-discriminatory reason for the Complainant's termination, we find that the Complainant has established by a preponderance of the evidence that the reasons given by the Respondent are pretextual. We choose to believe the Complainant's evidence which explains the Respondent's action in terminating the Complainant as disparate and unlawfully discriminatory in violation of Section 5(a) of the PHRA.

We are empowered by Section 9 of the Act to award relief including backpay and reinstatement following such a finding. We, therefore, direct entry of the Final Order which follows.

3. That the Respondent shall adjust the Complainant's seniority date so as to include the period of time after his termination on November 3, 1982, such that it reflects a continuous period of employment with the Pennsylvania State Police; and restore to him all benefits of employment;

4. That the Respondent shall pay to the Complainant a lump sum of \$16,858.00, representing his lost salary from the time of his discharge until the public hearing in this case less interim earnings; That the Respondent shall further pay to the Complainant the difference between his actual earnings and the amount he would have earned had he remained in the Respondent's employ beginning on March 23, 1984 and ending at such time as a bona fide offer of reinstatement is made to the Complainant.

Interest of six percent per annum shall also be paid by the Respondent to the Complainant on all amounts described above.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

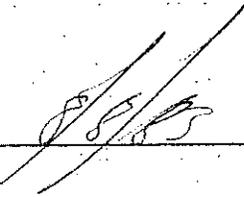
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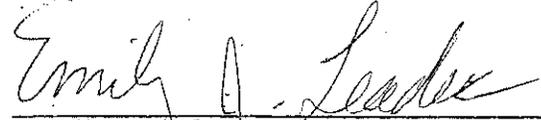
Raquel Otero de Yiengst
Raquel Otero De Yiengst, Secretary

The Stipulations of Fact, together with all Appendices and the Witness List and List of Exhibits submitted by each party will be incorporated into a Pre-Hearing Order to become a part of the official record of this case and will be incorporated into the transcript prepared during the course of any subsequent public hearing held in this matter.



KENNETH L. BARITZ
Counsel for Respondent

Date: 



EMILY J. LEADER
Assistant General Counsel
Counsel for the Commission on
behalf of the Complainant

Date: 