

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MAURICE BLAIR,
Complainant

v.

PAN BUILDING CORPORATION,
Respondent

:
:
:
:
:
:
:

DOCKET NO. E-52851-D

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, Maurice Blair (hereinafter "Blair"), is an individual whose race is black. (NT Vol 1, 9.)
2. The Respondent, Pan Building Corporation (hereinafter "Pan Building"), is a New Jersey corporation licensed to do construction business in Pennsylvania. (NT Vol 1, 94.)
3. Pan Building's specialty is rehabilitation of public housing. (NT Vol 1, 95.)
4. For the past six years, Andrew Maletta (hereinafter "Maletta") has been the vice president of Pan Building. (NT Vol 1, 94.)
5. In 1986, Blair was a resident of Bedford Dwellings, a public housing facility at which Pan Building was doing renovations. (NT Vol 1, 44, 102.)
6. At that time, Maletta was Pan Building's project manager at Bedford Dwellings. (NT Vol 1, 100.)
7. On or about 1986 or 1987, Blair approached Maletta at Bedford Dwellings and asked Maletta for a job. (NT Vol 1, 45, 100.)
8. Maletta hired Blair as a laborer, a position which paid \$6.99 per hour. (NT Vol 1, 45.)

* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

NT Vol 1	Notes of Testimony, Volume 1
NT Vol 2	Notes of Testimony, Volume 2
CE	Complainant's Exhibit
RE	Respondent's Exhibit

9. In 1987, Maletta promoted Blair to the position of assistant foreman which paid \$11 per hour. (NT Vol 1, 46, 62, 75, 76.)

10. Blair worked as assistant foreman at Bedford Dwellings until the project was completed on or about 1989 - early 1990, at which time Blair worked for Pan Building at Ohio View Acres. (NT Vol 1, 102.)

11. At Ohio View Acres, Brian Miele was the only foreman, and Blair was Brian Miele's only assistant foreman. (NT Vol 1, 72.)

12. Blair worked for Pan Building for approximately four years. (NT Vol 1, 9.)

13. On the morning of July 10, 1990, Blair and a black co-worker, Kim Leverett (hereinafter "Leverett"), arrived late at Pan Building's Ohio View Acres job site. (CE 4; NT Vol 1, 26, 44.)

14. Pan Building's work rules strictly require employees to be on the job site by 6:45 a.m. and productively working by 7:00 a.m. (CE 1; NT Vol 1, 20, 62, 129, 158, 159, 162, 169, 174, 177.)

15. Upon Blair and Leverett's arrival on July 10, 1990, Maletta indicated they were late. (NT Vol 1, 26, 173; NT Vol 2, 22.)

16. Blair formed the impression that Maletta was permitting Leverett to go to work while Blair was being sent home. (NT Vol 1, 26, 32, 44, 50, 56, 156; NT Vol 2, 8.)

17. Blair began to argue with Maletta, and when Maletta walked away, Blair followed him and continued to argue with Maletta. (NT Vol 1, 52, 106, 156, 166.)

18. After a lengthy argument, Blair in effect told Maletta that they should settle the matter in the field like men. (NT Vol 1, 106-107, 156-157, 167, 173; NT Vol 2, 9.)

19. Maletta terminated Blair. (NT Vol 1, 108.)

20. Following his termination, Blair did not seek reemployment. (NT Vol 1, 119.)
21. Pan Building has rehired employees, including assistant foremen, who have been terminated. (NT Vol 1, 119, 147, 148, 152.)
22. Prior to Blair's termination, Maletta disciplined Blair for an incident on February 6, 1990. (CE 3; NT Vol 1, 24.)
23. On February 2, 1990, prior to Blair's termination, Pan Building's Ohio View Acres' foreman, Brian Miele, prepared to lay off Blair for one week, without pay, for an incident on January 30, 1990, which caused minor damage to the vehicle of an Ohio View Acres tenant. (CE 2; NT Vol 1, 23, 115, 132, 142.)
24. Maletta stopped Brian Miele's proposed one-week layoff of Blair. (NT Vol 1, 143.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and the PHRC have fully complied with the procedural prerequisites to a public hearing in this case.
3. Maurice Blair ("Blair") is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. Pan Building Corporation is an employer within the meaning of the PHRA.
5. Blair has the initial burden to establish a prima facie case by a preponderance of the evidence.
6. To establish a prima facie case, Blair must show that:
 - (a) he is a member of a protected class;
 - (b) he was qualified for the position he held;
 - (c) he was disciplined and terminated; and
 - (d) for the same or similar conduct, Blair was treated less favorably than similarly-situated white employees.
7. Blair failed to prove the fourth element of the required prima facie showing.
8. Unobjected to hearsay may only be used if corroborated by competent evidence.
9. Blair's termination was not racially motivated, but rather was because of insubordination.

OPINION

This case arises on a complaint filed on or about July 24, 1990, by Maurice Blair (hereinafter "Blair") against Pan Building Corporation (hereinafter "Pan Building") with the Pennsylvania Human Relations Commission (hereinafter "PHRC").

Blair's complaint alleges age-based and race-based harassment and a subsequent discharge. During the pre-hearing conference held on September 23, 1994, Blair confirmed that he had withdrawn the age-based aspects of his complaint. The remaining race-based allegations allege a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951, et seq. (hereinafter "PHRA").

PHRC staff investigated the allegation, and at the investigation's conclusion informed Pan Building that probable cause existed to credit Blair's race-based allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing.

The public hearing was held on December 21, 1994, and on January 27, 1995, in Pittsburgh, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The PHRC's interest in the complaint was overseen by PHRC staff attorney Lisa J. Mungin. Gregory Gleason, Esquire, appeared on behalf of Pan Building. The parties were afforded an opportunity to submit briefs. Both Attorney Mungin's post-hearing brief and Pan Building's brief were received on March 20, 1995.

In this disparate treatment case, Blair alleges that Pan Building treated him less favorably than others because of his race, black. To prevail, Blair is required to prove that

Pan Building had a discriminatory intent or motive. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Blair must carry the initial burden of establishing a prima facie case of discrimination. Allegheny Housing, supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "prima facie case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the prima facie case creates the presumption that the employer unlawfully discriminated against the employee. Id. at 254. The prima facie case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. Id. It raises an inference of discrimination "only because we presumed these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 467, 577 (1978).

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

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and

- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

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

Here, we adapt the McDonnell Douglas test because this case involves alleged race-based harassment and termination. Usually, as a part of a prima facie showing, a complainant attempts to show that after being terminated he was replaced by a person outside the complainant's protected class. Here, Blair attempts to show that comparable non-protected persons were treated better. Accordingly, to establish a prima facie case, Blair must show:

1. that he is a member of a protected class;
2. that he was qualified for his job;
3. that he was disciplined and terminated; and
4. that for the same or similar conduct he was treated differently than similarly-situated, non-minority employees.

See, e.g., Mitchell v. Toledo Hospital, 59 FEP 76 (6th Cir. 1992), citing Davis v. Monsanto Chemical Co., 858 F.2d 345, 47 FEP 1825 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989).

If Blair can establish a prima facie case, the burden would shift to Pan Building to "articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. Pan Building would be required to rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be "clear and reasonably specific," Id. at 285, and "legally sufficient to justify a judgment" for Pan Building. Id. at 255. However, Pan Building would not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

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

On the initial question of whether Blair can establish a prima facie case, the parties' dispute revolves around the fourth element of the required elements listed above. There is no dispute in this case that Blair is a member of a protected category, that he was qualified for his job, and that he was disciplined and terminated. There is a question of whether other employees were afforded more lenient treatment because they were white.

Before turning to the alleged dissimilar treatment where Blair asserts there are comparably situated white employees who received more lenient treatment, there is another situation about which Blair offered testimony.

Blair testified about an incident which occurred on January 30, 1990, and which resulted in minor damage to an Ohio View Acres tenant's vehicle. On the morning of January 30, 1990, Blair was supervising two white laborers, Kevin Pendzick and Dominic Miele. An insulation machine was loaded onto a truck for transfer to another location. Blair remained at the location where the machine had been loaded while Kevin Pendzick and Dominic Miele transported the machine. Dominic Miele drove the truck, while Kevin Pendzick rode in the back holding the machine. Exactly how or where is unclear, but, the machine fell off the back of the truck and caused \$15 damage to a resident's vehicle.

Blair's testimony suggested he was being made to pay a portion of the damage, even though it is his subjective belief he was in no way responsible for the damage. Furthermore, Blair suggested that had he failed to pay a share of the damages, Pan Building's vice president, Andrew Maletta (hereinafter "Maletta"), would have given Blair a one-week layoff without pay.

However, Blair's testimony failed to reveal several important factors. First, Pan Building had not initially known of the damaged vehicle. Instead, Blair, Kevin Pendzick, and Dominic Miele made an independent agreement with the resident to each pay \$5 towards the \$15 damage. Kevin Pendzick and Dominic Miele each paid the resident \$5. Blair, upon reflection, decided he was not responsible and failed to render \$5 to the resident, as agreed.

Second, the resident then contacted Brian Miele, Pan Building's foreman at Ohio View Acres, and informed him about the situation. Brian Miele then wrote Blair a letter telling Blair that because he had not paid the resident \$5, Blair was to be laid off for one week. Upon Maletta learning of Brian Miele's intended action, Maletta stopped the layoff. Maletta

discussed the situation with Blair, who simply agreed to pay the resident \$5, as he had previously agreed.

This situation does not present a comparable employee situation, as the reason Blair ultimately paid \$5 towards the repair of the damaged vehicle is because he had independently agreed with the resident to do so. Furthermore, Blair was not disciplined for the accident.

We now turn to the heart of this case: alleged dissimilar treatment. Blair attempts to make out a prima facie case by pointing to two separate incidents.

According to Blair, he was disciplined for a failure to properly store insulation at the end of the day on February 6, 1990. Blair suggests that he was not the person responsible for the storage of the materials which were damaged by rain. Blair submits that on February 6, 1990, he was blowing insulation into a unit being renovated, while Kevin Pendzick was the employee responsible for keeping Blair adequately stocked with insulation. In Blair's opinion, Pendzick should have cleaned up the insulation storage area, not Blair.

Without contradiction, Maletta testified that a short time before rain ruined the unstored insulation, Maletta called in both Brian Miele and Blair to tell them to set the example regarding failure to properly store materials. Maletta indicated he made it clear to Blair and Brian Miele that it was part of their duties as foremen to insure materials were properly stored. Although Blair offered rebuttal testimony, Blair did not contest Maletta's testimony.

On the day the insulation was not stored, Blair was Pendzick's supervisor, as Pendzick held the position of laborer. Furthermore, Maletta first looked to Brian Miele to assess who had been responsible for the damaged insulation. The focus was placed on Blair only after Maletta had determined that Brian Miele had been at the far end of the property while Blair had been working with insulation.

Blair seeks a ruling that he was treated more harshly than Pendzick. However, the facts of this case reveal that Blair's attempt to compare himself with Pendzick must fail. Blair's initial burden is to show a similarity between his conduct and that of a white employee who was treated differently. See Burdine at 258, supra.

Here, Blair's actions and those of Pendzick are sufficiently distinguishable to render them not "similarly situated." Blair was Pendzick's supervisor and had, only a short time earlier, been told by Maletta that it was part of Blair's duty as an assistant foreman to insure the proper storage of materials. This significant variable hinders Blair's attempt to make a comparison between his treatment and Pendzick's.

Throughout this public hearing Blair seemed oblivious to the simple fact that he was an assistant foreman earning \$11 per hour, while laborers under his supervision were paid \$6.99 per hour. This difference in pay supports a conclusion that Blair was not comparably situated to Pendzick.

We now turn to the incident for which Blair was ultimately terminated. Initially, Blair submits that he was not late to work on July 10, 1990. At Pan Building, Brian Miele and Maletta are adamant that employees be on site by 6:45 a.m. Failure to be there on or before 6:45 generally results in an employee being sent home for the day.

Several white employees testified that they themselves, as well as any employee who arrives late, have been sent home when arriving late. Both Mark Anthony Mullen and Stephen Edward Trosky indicated that they had been sent home because they had been only one minute late.

Clearly, Blair was aware of the severe consequence of being late because several times he noted that to be on time he had to run up the hill to the site. Few would run to be on time unless they knew their tardiness carried severe consequences.

On the morning of July 10, 1990, Blair says he was on time, but Maletta's watch had been wrong when Maletta told Blair it was 6:50 a.m. The evidence shows that Maletta both polled other employees and called for the time. Each effort failed to change Maletta's mind that Blair and a co-worker were late. Also, on direct examination Blair suggests that when Brian Miele asked him to just go home and come back tomorrow, he did. On cross examination, Blair denied threatening Maletta.

As a short aside, Pan Building points to a ruling by the Pennsylvania Unemployment Compensation Board that found that Blair's actions on the morning of July 10, 1990 amounted to willful misconduct. In effect, Pan Building urges a finding that Blair is collaterally estopped from attempting to suggest that on the morning of July 10, 1990, he did not invite Maletta into the field to settle the issue "like men."

In the case of Gallo v. John Powell Chevrolet, Inc., 57 EPD ¶41,017 (M.D. Pa. 1991), the court ruled that in a Pennsylvania Human Relations Act action, the issue was whether the plaintiff was discriminatorily discharged, while the issue before the Unemployment Compensation Board was whether the plaintiff's discharge was for willful misconduct. Because "the issues are clearly not identical," collateral estoppel does not apply. Id. at 68,469.

Here, it is not necessary to decide whether individual facts found by the Unemployment Compensation Board prevent a different fact finding because the public hearing record in this matter supports the same fact finding made by the Unemployment Compensation Board.

Everyone testifying, except Blair, agrees he was late on the morning of July 10, 1990, and that Blair threatened Maletta by inviting Maletta into the field to settle the matter like men.

This takes us to the individual with whom Blair seeks to compare himself: Kevin Miele. On direct examination, Blair testified that in July or August 1989, there had been an incident between Kevin Miele and Maletta. Blair alleged that on a hot day in July or August cement was being poured. Blair then testified that Calvin Rose told him "that there was an incident going on down there that Kevin Miele hit Andrew Maletta." (NT Vol 1, 35.) Blair further testified that he "went down" and asked Kevin Miele what happened. Blair suggests Kevin Miele told Blair that Maletta blamed Kevin Miele for something he had not done. Blair indicated that Kevin Miele told Blair that Maletta "got up in his face and was hollering and everything and so he punched him." (NT Vol 1, 35.) Kevin Miele was not terminated.

Blair's problems with this testimony begin with the simple fact that the alleged statements are hearsay. In Fairfield Township Volunteer Fire Co. No. 1 v. PHRC, 575 A.2d 152 (Pa. Commonwealth Ct. 1990), the rules for the use of hearsay evidence were outlined. See, Walker v. Unemployment Compensation Board of Review, 27 Pa. Commonwealth Ct. 522, 367 A.2d 366 (1976), and Burks v. Department of Public Welfare, 48 Pa. Commonwealth Ct. 6, 408 A.2d 912 (1979). The rules are as follows: unobjected to hearsay evidence can be relied upon to support a finding if it is corroborated by other competent evidence; objected to hearsay can never be relied upon to support a finding.

Both statements are unobjected to hearsay which require corroboration by competent evidence before they can support a finding. Here, there is no corroborating evidence of these allegations. Why Calvin Rose and others were not called as witnesses is unclear. The fact remains, they were not.

Also, taken as a whole, Maletta's testimony not only specifically denies he was struck by Kevin Miele; Maletta could not recall anything like the alleged incident about which Blair offered only hearsay evidence.

Most damaging to Blair's version was the testimony of Kevin Miele himself. Importantly, Kevin Miele testified that he and Maletta had argued one winter morning about a cement form having broken. Kevin Miele testified that Maletta yelled at him, but Kevin Miele had not been the one causing the problem. The argument between Kevin Miele and Maletta was quite short and not unlike other arguments at the job site which were a regular event (a couple per week).

Kevin Miele also testified that his argument with Maletta occurred at approximately the same time of day as Blair's argument with Maletta. In other words, nearly all Pan Building employees were around and would have witnessed both arguments. Kevin Miele recalled that after his argument with Maletta, Maletta fell down but not from any force applied by Kevin Miele. Instead, Maletta had simply slipped on the ice or snow when Kevin Miele shoved by Maletta to end their conversation.

Kevin Miele also distinguished his argument with Maletta from Blair's argument with Maletta by indicating that his argument had lasted only a couple of minutes, while Blair's incident with Maletta was described as an argument which lasted between a half-hour and forty-five minutes.

Blair said the incident between Kevin Miele and Maletta occurred on a hot summer day; Kevin Miele described his argument with Maletta as occurring on a winter's day. Blair suggests Kevin Miele punched Maletta; Kevin Miele directly confirmed that no such thing happened. Blair suggested the incident occurred at a time of day that few saw the incident,

while Kevin Miele suggests his argument with Maletta happened around 6:45 a.m. in front of the entire crew.

On this note, both Stephen Trosky and Mark Mullen testified that they had never heard of any altercation between Kevin Miele and Maletta. Kevin Miele specifically indicated that both Trosky and Mullen were there on the morning he and Maletta had their short argument. On the other hand, Trosky and Mullen both understood Blair's irate invitation of Maletta into the field as a threat to Maletta.

From these conflicts, a conclusion can be made that the minimal evidence Blair offered regarding an argument between Kevin Miele and Maletta is simply not credible. Instead, the two incidents are vastly different. Kevin Miele and Maletta simply had a routine argument about work-related problems. The argument between Blair and Maletta continued for an inordinate time and culminated in Blair inviting Maletta into the field at Ohio View Acres to settle the matter like men. Such an invitation during the heat of an argument was reasonably understood by Maletta and others, and probably intended, as an invitation to physical confrontation. Maletta testified convincingly that prior to Blair's invitation to a physical confrontation, Maletta harbored no expectation of terminating Blair.

The record considered as a whole reveals that Blair's less than persuasive evidence lacks the necessary mortar with which to build the fourth element of a prima facie case. The vague attempts to compare Blair with either Pendzick or Kevin Miele lack preponderance of the evidence proof that other employees were similarly situated. See, Lanear v. Safeway Grocery, 46 FEP 821 (8th Cir. 1988). Absent such proof, Blair is unable to raise an inference of discrimination. Here, the magnitude of each comparison falls heavily against Blair.

Fundamentally, employers are permitted to distinguish between marginal incidents and behavior like Blair's, which falls substantially below expected standards. See, Davis v. Greensboro News Co., 39 FEP 535 at 538 (M.D. N.C. 1985). Here, the employees and the seriousness of their acts that Blair attempted to compare himself and his acts to simply lack similarity and comparability. Accordingly, Blair has failed to establish a prima facie case of discrimination.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MAURICE BLAIR,
Complainant

v.

PAN BUILDING CORPORATION,
Respondent

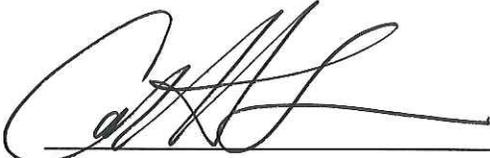
:
:
:
:
:
:
:
:

DOCKET NO. E-52851-D

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

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

By: _____


Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MAURICE BLAIR,
Complainant

:
:
:
:
:
:
:
:
:
:

v.

DOCKET NO. E-52851-D

PAN BUILDING CORPORATION,
Respondent

FINAL ORDER

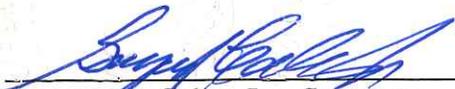
AND NOW, this 27th day of April, 1995, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own 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 to the complaint and hereby

ORDERS

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

By: 
Robert Johnson Smith, Chairperson

Attest:


Gregory J. Celia, Jr., Secretary