

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ELVIS ROJAS,
Complainant

v.

SCOTLAND YARD SECURITY,
Respondent

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PHRC CASE No. 200403930
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FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant herein is Elvis Rojas (hereinafter "Rojas"), an adult who resides at 1146 East Cheltenham Avenue, Philadelphia, PA. (N.T. 12).
2. The Respondent herein is Scotland Yard Security (hereinafter "Scotland Yard").
3. Initially, in December 2003, Scotland Yard hired Rojas as a Security Guard. (N.T. 12).
4. Scotland Yard's Director of Human Resources, Major Derrick P. Lynch, (hereinafter "Lynch"), hired Rojas. (N.T. 31, 50-51).
5. In hiring Rojas, Lynch was doing a favor for Rojas' cousin who was an employee of Scotland Yard. (N.T. 33, 46).
6. Lynch overlooked certain background information about Rojas and assigned Rojas to supervisor Littlepage without informing Littlepage of Rojas' adverse background. (N.T. 36, 51).
7. All Scotland Yard supervisors report to Lynch. (N. T. 51, 52).
8. Among Rojas' assignments, Rojas had been assigned to work as a Security Guard at City Hall. (N.T. 32, 50).
9. Security Officers at City Hall reported to a Hispanic supervisor. (N.T. 60).

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

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

10. All but one Security Officer at the City Hall location are also Hispanic. (N.T. 61).
11. Rojas knew the Latino Security Officers at the City Hall as they were raised together. (N.T. 61).
12. While working for Scotland Yard, Rojas had wanted to transfer to the City Hall location. (N.T. 60).
13. Rojas' initial salary at Scotland Yard was \$7.50 per hour. (N.T. 13).
14. After approximately three months, Rojas received a raise and approximately one month before his last day of employment, he received a second raise bringing his wages to \$8.83 per hour. (N.T. 14).
15. Rojas' workweek was 40 hours per week. (C.E. 1).
16. Rojas' last day of employment with Scotland Yard was November 5, 2004. (N.T. 13).
17. Within two weeks after November 5, 2004, Rojas saw a posting for a security officer position on the bulletin board of the Municipal Services Building in Philadelphia. (N.T. 34).
18. Rojas signed up to take a test for the City's open municipal guard position. (N.T. 17).
19. Rojas took the test and by letter dated December 23, 2004, was notified that he had passed the test with a score of 80.71, thereby ranking him 196.000 on the eligibility list. (N.T. 17, 18; C.E. 2).

20. Rojas testified that he also walked around his neighborhood speaking with managers of local supermarkets, stores and mini-markets about a job. (N.T. 23).
21. Sometime after June 28, 2005, Rojas began to search for jobs on the Internet by using a service called "Career Link". (N.T. 20, 40).
22. Approximately three times a week every other week, Rojas would search "Career Link" for approximately 3 hours. (N.T. 22, 23).
23. Rojas' job search efforts have been unsuccessful. (N.T. 19).
24. The only interim work Rojas did was to assist neighbors approximately 3 to 4 times per month for which he would be paid approximately \$8.00 each time. (N.T. 24).
25. On June 28, 2005, at a conciliation conference, Lynch offered Rojas a Security Guard job at City Hall where Rojas would earn approximately \$3.45 per hour more than he was earning when he was a Scotland Yard employee. (N.T. 30, 39, 48-49).
26. The job offered to Rojas would be under the supervision of a Hispanic supervisor. (N.T. 31, 47).
27. Rojas rejected Lynch's offer. (N.T. 31, 56-57).
28. Before he was hired by Scotland Yard in December 2003, Rojas had experienced personal problems that necessitated psychotherapy. (N.T. 40).
29. In connection with his PHRC claim, Rojas made at least seven trips to the PHRC Philadelphia regional office. (N.T. 25).

30. Rojas took public transportation when traveling to the PHRC Philadelphia regional office, which cost \$5.20 round trip. (N.T. 25).
31. At the Public Hearing, Lynch indicated that the job offer made on June 28, 2005, was still open to Rojas. (N.T. 52).

CONCLUSIONS OF LAW

1. A combination of Section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31(c) requires a Respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.
2. 16 Pa. Code §42.31(d) declares that the failure of a Respondent to timely answer a complaint places a Respondent in default.
3. Under 16 Pa. Code §42.33, when a Respondent has not answered a complaint, a Rule to Show Cause may be issued.
4. Under Pa. Code §42.33(d)(4), when a Respondent does not respond to a Rule to Show Cause, the Pennsylvania Human Relations Commission ("PHRC") may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of damages.
5. In this matter, the Respondent's failure to file a properly verified answer or to respond to a Rule to Show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arose on a complaint filed by Elvis Rojas against Scotland Yard Security. Rojas' complaint at PHRC Case No. 200403930 alleged that on November 5, 2004, Rojas was terminated because of his sex, male, and his ancestry, Hispanic. Rojas' complaint states a claim under Sections 5(a) of the Pennsylvania Human Relations Act ("PHRA").

Rojas' verified complaint was filed on or about December 8, 2004. By correspondence dated April 20, 2005, the Pennsylvania Human Relations Commission (PHRC"), Philadelphia Regional Office, petitioned Motions Commissioner Gilhooley for a Rule to Show Cause, indicating that Scotland Yard had not properly answered Rojas' complaint. The petition indicated that, by correspondence dated March 21, 2005 and April 7, 2005, Scotland Yard was notified that its failure to properly answer Rojas' complaint could result in a judgment being entered for Rojas.

On April 22, 2005, a Rule to Show Cause was issued, directing Scotland Yard to respond on or before May 23, 2005. After no response was filed on May 30, 2005, Motions Commissioner Gilhooley recommended a finding of liability to the full PHRC. On June 28, 2005, the full PHRC determined that on November 5, 2004, Rojas was terminated because of his sex and ancestry.

After the finding of liability in this case, conciliation efforts were unsuccessfully attempted. Subsequently, this matter was approved for a public hearing on the issue of appropriate damages.

The public hearing on the issue of appropriate damages was held January 17, 2006 in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Ryan A. Hancock, PHRC Assistant Chief Counsel, oversaw the state's interest in the complaint. Major Derrick P. Lynch represented Scotland Yard. Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. Only the PHRC Philadelphia Regional Office chose to file a post-hearing brief. That brief was received on February 22, 2006.

Since liability had been found after Scotland Yard failed to file a properly verified answer, the only question at the public hearing was what damages Rojas could establish. Under Section 9(f)(1) of the PHRA, the PHRC is empowered to order the 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, compensation for loss of work in matters involving the complaint...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..."

Generally, at the beginning of the Public Hearing, the PHRC Regional Office attorney on behalf of the State's interest in Rojas' complaint made a brief opening statement in which he indicated he would seek lost back pay, two years front pay, certifiable travel expenses, and a cease and desist order. Subsequently, in his post-

hearing brief, pursuit of front pay appears to have been abandoned and instead, an argument was made to order training of Scotland Yard managers. The post-hearing brief continues to seek back pay, certifiable travel expenses and a cease and desist order. In this regard, the period of back pay being sought is for the limited period beginning on November 5, 2004 until January 17, 2006, the date of the Public Hearing.

The U.S. Supreme Court has ruled that back pay is an integral part of civil rights protections. Abermarle Paper Co. v. Moody, 422 U.S. 405 (1975). In this fundamental pronouncement, the court noted the two-fold purpose of civil rights laws: eliminating unlawful employment discrimination and compensating the economic injuries visited upon the victim of discrimination. Albermarle Paper Co. at 417-19. Here in Pennsylvania, the Commonwealth Court has recognized that a back pay award serves not only the purpose of restoring the injured party to his pre-injury status and making him whole, but also serves to discourage discrimination. Consolidated Rail Corporation v. PHRC, 582 A.2d 702 (Cmwth. Ct. 1990), citing Williamsburg Community School District v. PHRC, 99 Pa. Commonwealth Ct. 206, 512 A-2d 1339 (1986).

In the Consolidated Rail Corporation case, the Court also acknowledged that the general question of mitigation of damages is a matter which lies within the sound discretion of the Commission, at 708, citing Albert Einstein Medical Center v. PHRC, 87 Pa. Commonwealth Ct. 145, 486 A.2d 575 (1985). Included within this authority given to the Commission is the more specific discretion to resolve questions regarding the

duty of a Complainant to mitigate their damages. Albert Einstein Medical Center v. PHRC, 87 Pa. Commonwealth Ct. 145, 486 A.2d 575 (1985).

In the present case, the facts presented reveal the existence of less than credible testimony provided by Rojas on several relevant factors that influence the application of discretion in this area of mitigation responsibility. While it is clear that within several weeks of Rojas' last day with Scotland Yard, he took a City of Philadelphia test for the position of Municipal Guard, what he did after that is less than clear.

At first, Rojas testified that he used "Career Link", an Internet service to apply for jobs. (N.T. 20). Rojas suggested he used "Career Link" three times a week. (N.T. 22). Almost immediately, Rojas changed his testimony to say he only used "Career Link" every other week. (N.T. 23). Later, when clarification was attempted, Rojas admitted that he did not begin using "Career Link" until after June 28, 2005, almost seven months after his last day with Scotland Yard. (N.T. 40).

Generally, Rojas offered that throughout the period after November 5, 2004, he continually looked for a job. (N.T. 34). Perhaps, Rojas' efforts were as he stated, that he had walked around his neighborhood speaking with managers of local supermarkets, stores, mini markets. (N.T. 23). Clearly, all his purported efforts were unsuccessful.

Added to the glaring conflict about when Rojas began to use "Career Link", we find Rojas admitting that at a June 28, 2005 PHRC conciliation conference, he told Lynch that he was not able to work at all because of trauma he suffered as a result of leaving the employ of Scotland Yard. (N.T. 28-29). As Rojas' testimony unfolded, Rojas

explained that, actually, he has experienced problems requiring psychotherapy even before he began working for Scotland Yard. (N.T. 40). Indeed, Rojas indicated that the therapy he receives now is similar to his therapy prior to becoming a Scotland Yard employee. (N.T. 42-44).

On the one hand, Rojas submits that he was diligent in his attempts at finding work, while on the other hand, in June 2005, Rojas informed Scotland Yard he was unable to work at all. The record is clear about one thing, on June 28, 2005, Lynch offered Rojas a position that would have paid Rojas over \$3.00 per hour more than Rojas was making in November, 2004. (N. T. 30, 39).

The PHRC Philadelphia Regional Office post-hearing brief suggests that the June 28, 2005 offer should not toll the back pay period because the offer was not unconditional. The suggestion is that the offer was conditioned on the settlement of Rojas' PHRC claim. However, the precise details of the offer and any purported conditions was not explored at the Public Hearing. Basically, all the record shows is that Rojas first says that he rejected Lynch's offer for the purported reason that he was not able to work at all because of trauma associated with Rojas leaving the employ of Scotland Yard. (N. T. 28-29). Later, Rojas offered that he rejected Lynch's offer because he distrusted Scotland Yard personnel and feared if he accepted the offer he would just be terminated later. (N. T. 31).

One reason Rojas offered that he lacked trust was because Scotland Yard had allowed a security officer to be arrested while on duty. (N. T. 56). Rojas affirmed that he

knew nothing about the details of what led to the arrest, but maintained this caused him to distrust Scotland Yard. (N. T. 56). Under the circumstances presented, Rojas' purported distrust would not be reasonable. Next, Rojas offered that, while things were great at first, things changed. (N. T. 57).

What Rojas meant by this is he had to adjust to personnel changes and doing so took a "toll on him" (N. T. 57). Additionally, Rojas related that his supervisor, Lt. Littlepage, paid extra attention to him, at times telling Rojas he was not performing his duties correctly. (N. T. 58). Neither adjustment to newly hired staff nor being reasonably supervised amount to work place conditions that would lead to distrust, or fear of termination.

Importantly, Lynch offered a general description of the job being offered to Rojas on June 28, 2005. Not only would the job have paid over \$3.00 per hour more, the job was at a location Rojas had on occasion worked and liked. (N. T. 32, 39, 50, 60). Rojas' supervisor would have been Hispanic and all but one of his colleagues would also have been Hispanic. (N. T. 60, 61). Incredibly, Rojas not only knew these Latino officers with whom he would have been assigned, but was raised together with several of them. (N. T. 61). Further, Rojas would have answered directly to Lynch. (N. T. 47).

When asked, Rojas substantially corroborated Lynch's testimony that Rojas would have had nothing to worry about. (N. T. 49). From the start of Rojas' employment, Lynch was looking out for Rojas. Significantly, Lynch overlooked adverse information in Rojas background when he hired Rojas. (N. T. 46). Lynch went so far as

to not even tell Rojas' then supervisor, Lt. Littlepage about Rojas' record. (N. T. 36, 51). The evidence shows that Lynch had hired Rojas as a favor to Rojas' cousin, who remains an employee of Scotland Yard. (N. T. 46). Further, when asked, Rojas confirmed that he currently respects Lynch. (N. T. 63).

One additional point must be made regarding the issue of Rojas' rejection of the job offer on June 28, 2005. At the Public Hearing, Lynch confirmed that the job offer to Rojas remains open. (N. T. 52).

Weighing these circumstances, it was not reasonable for Rojas to refuse Lynch's June 28, 2005 offer. Accordingly, Scotland Yard's back pay liability is tolled as of June 28, 2005, due to Rojas' rejection of Lynch's job offer.

This brings us to the period between November 5, 2004 and June 28, 2005. Some courts have held that it is a Respondent's initial burden to establish that a Complainant did not exercise reasonable diligence to find comparable employment. See i.e. Robinson v. Southeastern Pennsylvania Transportation Authority, 982 F.2d 892 (3rd Cir. 1993). The central question in this regard is what amount a Complainant could have earned through reasonable efforts and that amount would operate to reduce an otherwise allowable back pay award. See EEOC v. Exxon Corp. d/b/a Exxon Co., USA, 36 FEP 330 (5th Cir. 1984).

In Robinson, the Court found that while the evidence of a Complainant's efforts to find work was scant, the Respondent failed to produce evidence that the efforts were inadequate. Here, we find a similar situation. Rojas' efforts to find work between

November 2004 and June 2005 seem scant, but Scotland Yard did not probe the adequacy of Rojas' efforts. Similarly, some courts require a Respondent to establish substantially equivalent positions were available during the period in question. See i.e. Hutchinson v. Amateur Electrical Supply, 42 F.3d 1037 (7th Cir. 1994). Once again, Scotland Yard made no such showing.

Accordingly, under the circumstances present in this case, Rojas should be awarded the back pay he lost between November 5, 2004 and June 28, 2005, less interim wages. Here, the evidence shows that Rojas had minimal interim wages. Approximately 3 to 4 times a month, Rojas would earn approximately \$8.00 doing chores for neighbors. (N. T. 24). Given this information, Rojas' back pay award should be as follows:

\$8.83 per hour x 40 hours per week =	\$353.20
\$353.20 x 33 2/5 th weeks =	\$11,796.88
Minus interim wages:	
8 months @ \$28.00 per month =	<u>\$224.00</u>
Total lost wages =	\$11,572.88

The PHRC is also authorized to award interest on the back pay award. Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A. 2d 579 (1975).

Also added to Rojas' total lost wages is Rojas' certifiable travel expenses. Rojas testified that at least seven times he expended \$5.20 in travel costs to visit the PHRC regarding his complaint. Accordingly, Rojas should also be awarded \$36.40 as certifiable travel expenses.

The final area of remedial consideration in this case is whether a cease and desist order is appropriate. Here, the evidence tends to suggest that Scotland Yard was extremely unwise by failing to answer Rojas' complaint. While liability was found because of a failure to answer, the merits of Rojas' substantive claims of sex-based and ancestry-based discrimination were never fully litigated. Instead, as background to Rojas' claim that he reasonably rejected Lynch's June 28, 2005, job offer, we generally learned that shortly before Rojas left Scotland Yard's employ, a Scotland Yard client had requested background checks on all security guards servicing that client. (N. T. 51). Of course, we also know that Rojas' supervisor was unaware Rojas had a record. Once this was discovered, Rojas ceased to be a Scotland Yard employee. Beyond this, precise details of the merits of Rojas' claim are unknown.

Section 9(a) of the PHRA already prohibits employers from terminating an employee because of that employee's sex or ancestry. Accordingly, a cease and desist order that only addresses the substance of Rojas' claims would not reach Scotland Yard's clear shortcoming. That is, a failure to timely answer a PHRC complaint. Accordingly, a cease and desist order that orders Scotland Yard to timely answer any future PHRC complaint that may be filed against it seems more appropriate.

An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ELVIS ROJAS,
Complainant

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SCOTLAND YARD SECURITY,
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PHRC CASE No. 200403930

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RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Elvis Rojas suffered damages. 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.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Carl H. Summerson, Permanent Hearing Examiner

March 8, 2006
Date

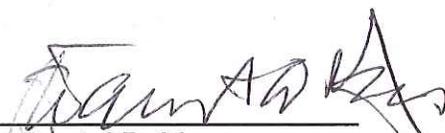
3. That Scotland Yard shall pay additional interest of six percent per annum on the back pay award.
4. That Scotland Yard shall pay Rojas, within 30 days of the date of this Order, the lump sum of \$36.40, which amount represents Rojas' certifiable travel expenses in connection with Rojas' pursuit of his PHRC claim.
5. That within 30 days of the effective date of this Order, Scotland Yard shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Ryan A. Hancock, Esquire, in the Commission's Philadelphia Regional Office, 711 Philadelphia State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 

Stephen A. Glassman, Chairperson

Attest:



Dr. Daniel D. Yun
Secretary