COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON	:	
Complainant	:	PHRC CASE NO. 200200400
v.	:	EEOC CASE NO. 17FA261480
	:	
CONCERN PROFESSIONAL	:	
SERVICES	:	
Respondent	:	

STIPULATIONS

FINDINGS OF FACT

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OPINION

RECOMMENDATION OF HEARING PANEL MEMBERS

FINAL ORDER

DISSENTING RECOMMENDATION

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON,	:	
Complainant	:	
v.	:	PHRC Case No. 200200400
CONCERN PROFESSIONAL SERVICES,	:	
Respondent	:	

STIPULATIONS

The parties hereby stipulate to the following:

1. The Pennsylvania Human Relations Commission has jurisdiction over this complaint pursuant to the Pennsylvania Human Relations Act, 43 P.S. §§ 951-963.

2. The Complainant herein is:

Ezekiel Wilson
2757 Genesee Mills Road
Mills, PA 16937

3. The Respondent herein is:

Concern Professional Services
1 West Main Street
Fleetwood, PA 19522

~~4. Respondent hired Complainant as a supplemental counselor effective May 10, 2000.~~ 2W GMB

5. At the time he was hired, Complainant was the only black employee at Respondent's Westfield, Pennsylvania facility.

6. Complainant is black.

SL1 990109v1/002353.00016

PENGAD 800-631-6989
EXHIBIT
Joint Exhibit
1

~~7. As of January 2002, Complainant had been employed by Concern as a Supplemental Counselor since May 10, 2000.~~

8. In January 2002, Respondent hired or promoted Mark Case and Ed Allen, race white, to be full-time Residential Counselors.

9. On or about May 3, 2002, the Assistant Director of the Westfield facility, Jeff Persing, race white, at the instruction of Juliee Franey, race white, Director of Human Resources, informed Complainant that his employment with Concern was terminated.

For Complainant:

William R. Fewell
Attorney for the Complaint of
Ezekiel Wilson

Ezekiel V. Wilson
Complainant

For Respondent:

G. Thompson Bell, III
Attorney for Respondent
Concern Professional Services

FINDINGS OF FACT

1. Concern Professional Services (hereinafter "Concern) is a non-profit child welfare organization that is licensed and regulated by the Pennsylvania Department of Public Welfare ("DPW"). (NT 2 112-114)
2. The Complainant, Ezekiel V. Wilson (hereinafter "Wilson") is an African American male. (S 5,6)
3. Concern primarily deals with foster care and adoption but also provides services for adjudicated youth in a unit called the "Concern Treatment Unit for Boys" ("CTUB") located at a facility in Westfield, Pennsylvania. (NT 1 130).
4. Concern closed the Westfield facility and permanently laid off all employees in August 2005. (NT 2 112)
5. Concern employed several types of counselors in its Westfield facility; full-time counselors, part time counselors and supplemental counselors. (NT 2 115)
6. In April of 2000, Orin Moore (hereinafter "Moore"), an employee of Concern, encouraged Wilson to apply for a job as a counselor for Concern. (NT 128-29)
7. On or about April 5, 2000, Wilson submitted a written application for employment as a counselor at Concern. (NT 1 27-28, JE 3)
8. Concern hired Wilson effective May 10, 2000 as a supplemental counselor in CTUB III. (JE 6,17, NT 1 146)
9. Supplemental counselors worked on an as-needed basis and on unplanned employment shifts in response to the immediate coverage needs of the facility. (NT 2 115)

10. At the time of his hire, Wilson was the only Black/African American counselor employed by Concern. (S 5)
11. At the time of his hire, Wilson told his supervisor that he would eventually like a full-time counselor position. (NT 1 242)
12. Employees in administrative positions such as Home Group Director, Assistant Home Group Director and Case Manager were responsible for scheduling supplemental counselors. (NT 2 139-140)
13. On occasion, senior full-time counselors would schedule supplemental counselors. (NT 2 140).
14. Wilson testified that he furnished Concern with his home phone number and the phone number at his gym to facilitate contact for supplemental duty. (NT 1 56).
15. Wilson maintained a telephone answering machine at his home so that Concern employees could leave messages for him. (NT 1 56; NT 2 295)
16. Wilson or his wife, Connie Wilson, followed up on messages left on his home's answering machine. (NT 2 298)
17. Moore was Wilson's immediate supervisor when Wilson commenced his employment with Concern. (NT 1 46)
18. Moore left his employment at Concern in late 2000. (NT 2 135-135)
19. Moore called Wilson numerous times to schedule him for work. (NT 2 134-135)
20. Byron Lee. (hereinafter "Lee"), Concern's Home Group Director, was Wilson's supervisor after Moore left Concern. (NT 1 132)
21. Lee was primarily responsible for calling Wilson for supplemental duty assignments. (NT 1 132-133)

22. At times, Lee visited the gym Wilson owned and operated when he needed to talk to Wilson in regard to scheduling. (NT 1 132)
23. Concern's records indicate that Wilson worked an average of 19 hours per week as a supplemental counselor in January and February 2001. (JE 17)
24. In May of 2001, Jeff Persing (hereinafter "Persing") became Assistant Home Group Director. (NT 1 69-71)
25. From February 2001, Wilson did not work for twelve consecutive weeks. (JE 17)
26. In January of 2002, Concern hired Marc Case (hereinafter "Case") and Edgar Allen (hereinafter "Allen") as full-time residential counselors. (JE 24, S 8)
27. Both Case and Allen are Caucasian males. (S 8)
28. Dale Niles (hereinafter "Niles") worked at Concern as a full-time counselor from February 1999 until 2005. (NT 1 113)
29. As a shift supervisor, Niles called supplemental counselors into work. (NT 1 114-115)
30. Niles testified that Wilson was available for work 70-75% of the time when he called him. (NT 1 116)
31. Niles thought Wilson was a very effective counselor, especially when dealing with disciplinary matters. (NT 1 117-119)
32. Cathleen Marengo (hereinafter "Marengo") was a senior full-time counselor at Concern from June 21, 2000 until May 6, 2001. (NT 1 14)
33. Marengo testified that when she would call Wilson for work assignments he was available 70-75% of the time. (NT 1 148)

34. Wilson volunteered time at Concern by frequently coming in when he was not scheduled to work. (JE 15)

35. On March 11, 2001, Concern staff sent a letter to Wilson directing him to complete a medical form pursuant to Department of Public Welfare regulations. (NT 1 79-80; JE 11)

36. Wilson testified that he never received the correspondence because it was not mailed to his then current address. (NT 1 80)

37. Wilson testified that he had given Concern the correct address and he had in fact been contacted at his correct address by Concern. (NT 1 73-74)

38. In a memorandum dated May 2, 2002, Wilson was directed by Concern's Human Resource Office to submit the required health report. (NT 1 79; JE 11)

39. On or about May 3, 2002, Persing, at the instruction of Juliee Franey (hereinafter "Franey"), Director of Human Resources, informed Wilson that his employment with Concern was terminated. (S 9)

40. By letter dated May 9, 2002, Wilson informed Concern that he was unaware of the medical form requirement and that he would send in the form in as soon as possible. (JE 14)

41. Wilson also informed Concern that he wished to be reinstated pending completion of the medical form. (JE 14)

42. By letter dated May 20, 2002 Franey informed Wilson that Concern had no choice but to consider him to have voluntary resigned citing his purported unavailability and failure to communicate with supervisors. (JE 15)

43. Wilson testified that he registered with an employment agency, briefly operated a website, wrote a book and worked for Eagle Foods for one month after his termination from Concern. (NT 1 97-100)

44. Wilson further testified that his attempts to seek employment included making personal visits, writing letters of interest and filling out applications for employment. (NT 1 97-100)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties, and subject matter of Wilson's complaint under the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Wilson is an individual within the meaning of PHRA.
4. Concern is an employer within the meaning of PHRA.
5. The complaint filed in this case satisfies the filing requirements found in the PHRA.
6. The PHRA prohibits employers from discrimination against individuals because of their race.
7. Wilson established a *prima facie* case of a failure to promote based on race by establishing:

    (a) he is a member of a protected class;

    (b) that he was qualified for and sought a promotion to a full-time counselor position;

    (c) that he was not promoted

    (d) that other who were similarly situated and not members of his protected class where promoted.

8. Concern met its burden of production by articulating that Wilson was not promoted because he did not formally apply for a full-time position.

9. Wilson has failed to establish that Concern's articulated reason for failing to promote Wilson to a position of full-time counselor was pretextual.

10. Wilson established a *prima facie* case of a race based discharge by establishing:

    (a) he is a member of a protected class;

    (b) that he was qualified for the position;

    (c) that he was subjected to an adverse employment action; and

    (d) that the adverse action occurred under circumstances which gave rise to an inference of discrimination.

11. Concern met its burden of production by articulating legitimate non-discriminatory reasons for terminating Wilson.

12. Wilson established by a preponderance of the evidence that Concern's articulated reasons are pretextual.

13. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the PHRC may issue a cease and desist order and order such affirmative relief as in its judgment will effectuate the purposes of the PHRA.

OPINION

This case arises out of a complaint filed by Ezekiel V. Wilson (hereinafter "Wilson") against Concern Professional Services (hereinafter "Concern") on or about July 23, 2002 at PHRC Case No. 20020400. Wilson alleged that Concern discriminated against him on the basis of race, Black, when it failed to promote him to a full time counselor position and by discharging him. Wilson alleged that Concern's actions are in violation of the Pennsylvania Human Relations Act of October 27, 1995, P.L. 744, as amended, 42 P.S. Section 955 (a) (hereinafter "PHRA").

PHRC staff investigated the allegations and at the conclusion of the investigation, found probable cause to credit the allegations. Thereafter, PHRC staff attempted to resolve the matter through conference, conciliation and persuasion, but such efforts proved unsuccessful. Thereafter, the parties were notified that a public hearing was approved.

A public hearing was originally held on January 24 and 25 and June 27, 2007 before a three Commissioner panel. Rev. James Earl Garmon Sr was the Hearing Panel Chairperson and the other two panel members were Commissioner Toni M. Gilhooley and Commissioner David A. Alexander. Prior to presenting the full Commission with a recommendation from the three member panel, Commissioner Gilhooley resigned from the Commission to pursue a seat in the United States Congress. Also Commissioner Alexander resigned from the Commission after becoming an employee of the Commonwealth. On July 22, 2007 the PHRC issued a Final Order based, only on the recommendation of Commissioner Garmon, in favor of Wilson. Subsequently, Concern appealed the Final Order to Commonwealth Court. On May 28, 2009, Commonwealth

Court issued an Order vacating the Commission's decision and remanded the case to the Commission for a new hearing because the Final Order had been based on the recommendation of only one of the assigned three Hearing Panel Commissioners.

The public hearing in the matter on remand was held on May 17 and May 18, 2010 in Wellsboro, PA. The case was heard by a new three Commissioner Panel. Commissioner Gerald S. Robinson served as the Hearing Panel Chairperson. The other two panel members were: Commissioner Sylvia A. Waters and Commissioner Dr. Raquel O. Yiengst. Phillip A. Ayers, Permanent Hearing Examiner, served as Panel Advisor. The case on behalf of the complaint was presented by PHRC Assistant Chief Counsel, William Fewell, and G. Thompson Bell, Esquire appeared on behalf of Concern. Following the public hearing, all parties were given an opportunity to file post hearing briefs. The Commission, Concern and Wilson filed post hearing briefs on July 16, 2010.

In a case involving disparate treatment allegations, we often apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) The Complainant must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) Once a Complainant meets his/her initial burden, a Respondent must articulate a legitimate, nondiscriminatory reason for its action. Once a Respondent articulates a legitimate, nondiscriminatory reason, a Complainant must prove that the stated reason was merely a pretext for discrimination.

Clearly, the ultimate burden is on the Complainant to persuade that discrimination occurred by a preponderance of the evidence.

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

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

In the instant case, Wilson first alleges the Concern discriminated against him when Concern failed to promote him to a full-time counselor position. In order to set forth a *prima facie* case of failure to promote, Wilson must show;

1.) he is a member of a protected class;

2.) he applied for a full-time position;

3.) his application was rejected; and

4.) Concern hired an individual not in his protected class with equal or less qualifications than Wilson.

There is no question that Wilson meets the first prong of the *prima facie* showing in that he is African American.

In regard to the second and third prongs of the *prima facie showing*, there is evidence in the record that Wilson orally applied for the position of full-time counselor. Byron Lee, CTUB Program Director testified that Wilson repeatedly asked for a full-time position on a regular basis. (NT 2 174) Wilson also asked Orin Moore and Jeff Persing (both supervisors) for promotion to a full-time residential counselor position throughout his employment. (NT 1 46, 57) Clearly Wilson's requests were rejected because he was not hired for a full-time position.

In reviewing the fourth prong of the required *prima facie* showing, the record reflects that at the very least, Wilson is as qualified as Case and Allen. The record also reflects that Wilson was a very good counselor and had excellent rapport with the residents. He was viewed as a problem solver who assisted in emergency situations. Therefore Wilson has met his burden of establishing a *prima facie* case of failure to promote because of race.

Since Wilson has met his burden of establishing a *prima facie* case, the burden of production shifts to Concern to articulate a legitimate non-discriminatory reason for its action in failing to promote Wilson. Concern asserts that the reason for failure to promote

Wilson was that Wilson never formally applied for either of the full-time positions. Accordingly Concern has met its burden of production.

In order to prevail on this issue Wilson must demonstrate that Concern's articulated reason is pretextual and that the real reason he was not promoted was because of his race.

As stated above, Concern's assertion is that Wilson never formally applied for a full-time position. A review of the record supports Concern's stated reason for not promoting Wilson. While Wilson may have believed that it was sufficient to orally request full time employment, the credible evidence shows that the Respondent required any such request be in writing. Despite being adequately informed that the request had to be in writing, the evidence clearly shows that Wilson never did so. Accordingly, Wilson has not offered any credible evidence to show that Concern's proffered reason for failure to promote him is pretextual.

Next we move to Wilson's allegation that his termination by Concern is race-based under the PHRA. In order to establish a *prima facie* case of race based discharge, Wilson must show:

(a) he is a member of a protected class;

(b) he was qualified for the position;

(c) he was subjected to an adverse employment action and

(d) the adverse action occurred under circumstances which gave rise to a inference of discrimination.

The record reflects that Wilson has set forth a *prima facie* case. He is an African American male and was certainly qualified for the position he held. There is no record of

any complaints about Wilson's job performance. Clearly, Wilson was subjected to an adverse employment decision when he was discharged. Lastly Wilson was terminated under circumstances that give rise to an inference of discrimination. Wilson was available for work and did communicate that fact to anyone who would listen. In fact Wilson would volunteer his time and would come in even when he was not scheduled to work.. Accordingly, an inference of discrimination is created.

Since Wilson has met his burden of establishing a *prima facie* case, the burden of production shifts to Concern to articulate a legitimate non-discriminatory reason for the discharge. Concern proffers that Wilson was terminated because he was unavailable for work, he failed to communicate with his supervisors and he failed to provide a required medical form. These articulated reasons meet Concern's burden of production in this case. Since Concern has met its production burden, the burden of persuasion shifts back to Wilson. As always, Wilson retains the ultimate burden of proving by a preponderance of the evidence that he is a victim of discrimination. Wilson may accomplish this by showing that Concern's proffered reasons are pretextual and that the real reason he was terminated was because of his race.

In regard to Wilson's availability for work, Dale Niles and Cathleen Marengo, both full-time former counselors, creditably testified as to Wilson being available 70-75 percent of the time. (NT 1 116) Niles further testified that Wilson would stop in even when Wilson was not on duty. (NT 1 117) Marengo testified that Wilson came in when she called him. Marengo would typically call in supplemental counselors when she worked as a full-time counselor. (NT 1 148) She further testified that the residents

responded well to Wilson and he was able to reach some of the more troubled residents. (NT 1 148, 150)

Connie Wilson, Wilson's wife, testified that her husband was continually seeking work and, in her opinion, communicated with his supervisors on a regular basis. (NT 2 295-299) She testified further that she called Concern every other Thursday and Persing would call his gym when he wanted to speak with Wilson. (NT 2 295-299) Wilson furnished Concern with both the phone number at home and at the gym so that he might more readily be contacted for supplemental duty. Indeed, Lee was known to stop at the gym when he needed to talk to Wilson. The preponderance of the evidence shows that Wilson was indeed available for work when needed and had continuously communicated with his supervisors.

In regard to Wilson's initial failure to provide a medical form, Wilson creditably testified that he was unaware of the need for the medical form. Wilson testified that he never received the form from Concern. Wilson indicated that he had given Concern his correct address but the form had been sent to the wrong address. It is interesting to note that Concern had previously sent other correspondence to the correct address and somehow the required medical form was sent to the wrong address. (NT 1 73-74) Once Wilson had notice that he needed to turn the form in, he asked to be permitted to expeditiously turn in the form and to be reinstated to his position. Even though Wilson complied with the request on June 20, 2002, Concern still refused to reinstate him. (NT 1 89; JE 5) The record reflects that Wilson, a capable and experienced counselor, was available for work and had communicated that fact to his supervisors. The only logical conclusion is that Concern simply did not want retain the only Black counselor employed

at the facility. Upon review of the entire record in this matter, Wilson has met his ultimate burden of persuasion by showing that Concern's proffered reasons are pretextual and that the real reason he was terminated was because of his race.

Having found that Wilson has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy in the instant case. The Commission has broad discretion in fashioning an appropriate remedy. Section 9(f) (1) of the Act provides, in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to... reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of pocket expenses caused by such unlawful discriminatory practice...

The remedy serves two purposes. The first purpose is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. That interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory actions and make him/her whole. Consolidated Rail Corp v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990); Williamsburg Community School District v. Pennsylvania Human Relations Commission, 99 Pa Cmwlth Ct. 206, 512 A. 2d 1339 (1986).

In the instant matter, the specific nature of the first prong of remedy is very clear. Concern should be ordered to cease and desist from discriminating against individuals because of their race in regard to promotion and termination from employment.

Secondly, after due consideration, we find that the record before us does not enable us to sufficiently assess either the amounts Wilson would have earned at Concern had he not been terminated, or the amounts Wilson either did earn or should have earned after his termination. We fully recognize and appreciate the presumption in favor of a back pay award to a person who has suffered discrimination, however, we note that there are gaps in the record information critical to making an informed decision regarding calculating an appropriate back pay award. Given this intractable problem, we decline to recommend a back pay award in this case.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON	:	
Complainant	:	**PHRC CASE NO. 200200400**
vi.	:	**EEOC CASE NO. 17FA261480**
	:	
CONCERN PROFESSIONAL	:	
SERVICES	:	
Respondent	:	

RECOMMENDATION OF HEARING PANEL MEMBERS

Upon consideration of the entire record in the above-captioned matter, we find that the Complainant has proven discrimination in the instant case. It is therefore, our Recommendation that the attached Stipulations, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, we recommend issuance of the attached Final Order.

Sept. 27, 2010
Date

Sylvia A. Waters
Hearing Panel Member

Sept. 27, 2010
Date

Dr. Raquel O. Yiengst
Hearing Panel Member

COMMONWEALTH OF PENNSYLVANIA

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Complainant	:	**PHRC CASE NO. 200200400**
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	:	
CONCERN PROFESSIONAL SERVICES	:	
Respondent	:	

FINAL ORDER

AND NOW, this 26th day of October, 2010, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel Members Waters and Yiengst. Further, the Commission adopts said Stipulations, Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That Concern shall cease and desist from discriminating against individuals because of their race in regard to decisions to terminate an employee from employment.
2. That within 60 days from the date of this Order, Concern shall submit to the PHRC for approval a plan regarding training of Concern's managers and staff with respect to the rights and responsibilities of employees under the PHRA. Upon receipt of such a training plan, the PHRC shall

expeditiously notify Concern whether the submitted plan is satisfactory to the PHRC. Concern shall be obligated to submit training plans until the PHRC expresses satisfaction with such a training plan.

3. That within 30 days of the effective date of this Order, Concern shall report to the Commission on the manner of its compliance with the terms of the Order by letter addressed to William Fewell, Assistant Chief Counsel in the Commission's Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By. _____
Stephen A. Glassman
Chairperson

Attest:

_____
Dr. Daniel D. Yun
Secretary

COMMONWEALTH OF PENNSYLVANIA

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DISSENTING RECOMMENDATION

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STIPULATIONS

The parties hereby stipulate to the following:

1. The Pennsylvania Human Relations Commission has jurisdiction over this complaint pursuant to the Pennsylvania Human Relations Act, 43 P.S. §§ 951-963.

2. The Complainant herein is:

   Ezekiel Wilson
   2757 Genesee Mills Road
   Mills, PA 16937

3. The Respondent herein is:

   Concern Professional Services
   1 West Main Street
   Fleetwood, PA 19522

~~4. Respondent hired Complainant as a supplemental counselor effective May 10, 2000.~~ EW GTB

5. At the time he was hired, Complainant was the only black employee at Respondent's Westfield, Pennsylvania facility.

6. Complainant is black.

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PENGAD 800-631-6989
EXHIBIT
Joint Exhibit
1

~~7. As of January 2002, Complainant had been employed by Concern as a~~ Supp~~lemental Counselor since May 10, 2000.~~

8. In January 2002, Respondent hired or promoted Mark Case and Ed Allen, race white, to be full-time Residential Counselors.

9. On or about May 3, 2002, the Assistant Director of the Westfield facility, Jeff Persing, race white, at the instruction of Juliee Franey, race white, Director of Human Resources, informed Complainant that his employment with Concern was terminated.

For Complainant:

William R. Fewell
Attorney for the Complaint of
Ezekiel Wilson

Ezekiel V. Wilson
Complainant

For Respondent:

G. Thompson Bell, III
Attorney for Respondent
Concern Professional Services

FINDINGS OF FACT

1. Concern is a non-profit child welfare organization that is licensed and regulated by the Pennsylvania Department of Public Welfare ("DPW"). (NT 2 112-114).
2. The Complainant, Ezekiel V. Wilson (hereinafter "Wilson"), is an African-American. (S 5, 6).
3. Concern dealt primarily in foster care and adoption but also provided services for adjudicated youth in a unit called the "Concern Treatment Unit for Boys" that was located at a facility in Westfield, Pennsylvania ("CTUB III"). (NT 1 30; NT 2 110).
4. Concern closed the Westfield facility and permanently laid off all employees in August 2005. (NT 2 112, 252).
5. Concern hired Wilson effective May 10, 2000 as a supplemental counselor in CTUB III. (JE 6 & 17; NT 1 46; NT 2 14).
6. Unlike full-time counselors, who worked regular shift schedules, CTUB III's supplemental counselors, like Wilson, worked on an as needed basis and as available. (NT 2 115).

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

S	Stipulations
NT 1	Notes of Testimony, May 17, 2010
NT 2	Notes of Testimony, May 18, 2010
JE	Joint Exhibit

7. The supervisors at the Westfield facility urged all CTUB III counselors to attend regularly scheduled staff meetings and required them to read the daily reports that were posted in two different places in the Westfield facility, both of which were accessible to supplemental counselors. (JE 20; NT 2 116-120, 147).

8. The daily agency reports and staff memos circulated by Concern among staff members included membership information on job vacancies. (JE 19,20
9. Concern also advertised job vacancies, including counselor positions, in the local newspaper. (JE 19, 20 & 26; NT 2 118-124, 202).
10. Concern announced job vacancies at staff meetings and all employees also had open access to the Human Resources Department to inquire about job vacancies. (JE 19; NT 2 118-122).
11. Concern informed supplemental counselors who did not attend staff meetings that they were required to be aware of staff memos and to review them in the staff office. (NT 2 121-122).
12. Wilson sometimes attended staff meetings and when openings were announced, he was made aware of full-time counselor positions that became available. (NT 1 207-210; NT 2 13).
13. Concern paid supplemental counselors who attended staff meetings for their time at staff meetings. (NT 2 117,201).
14. Wilson's Semi-Annual Employee Evaluation for the period ending on May 10, 2001 ("First Evaluation") pinpoints Wilson's primary goal for the following six-

month period as "increase[d] participation in staff meetings, trainings and supervisions." (JE 7; NT 1 61-62).

15. Wilson's supervisor in 2001, Byron Lee, discussed his First Evaluation with him and Wilson was aware of the primary goal of increased participation in staff meetings, training and supervision. (NT 1 199, 202-205).
16. Wilson's Semi-Annual; Employee Evaluation, for the period from May 10, 2001 until November 10, 2001 ("Second Evaluation"), describes Wilson's fitness center as an "entrepreneurial adventure" that took away "a considerable amount of time for availability to work" at Concern. (JE 8; NT 2 167).
17. Wilson signed his First Evaluation and his Second Evaluation. (JE 7 &8)
18. Concern's policy permitted Wilson to dispute the accuracy of the evaluations at the time, but he chose not to do so. (JE 7&8; NT 2 197-199).
19. Wilson discussed the content of his First and Second Evaluation at the time with his supervisors. (NT 1 202-205; NT 2 162-163, 197-198).
20. Wilson expressed no interest in the full-time counseling positions that became available in June 2001 and again in December 2001. (RE 2 & 19; NT 1 119; NT 2 106).
21. In January 2002, Concern hired a full-time CTUB III counselor, Edgar Allen, and promoted supplemental counselor Marc Case to full-time. (JE 11, 24, 27, & 28; NT 2 128; S 8).
22. Concern did not consider Wilson for these two full-time counselor positions because he neither expressed an interest in them nor applied for them. (NT 1 194-195; NT 2 128).

23. The only full-time position in which Wilson expressed interest was to become a fitness instructor. (NT 2, 127)
24. This was a position that did not exist and would have required Concern to create a new position. (NT 2 125-127, 150).
25. Byron Lee would have interviewed Wilson for an available full-time position, but Wilson told him that he could not commit to work any of the available regularly scheduled full-time counseling shifts. (NT 2 126-127; 149-150).
26. Wilson told his supervisor, Jeffery Persing, that he was "busy" and could not work more hours at Concern due to his new business venture, which included a fitness center, and later a "Ze'Box Aerobic Boxing" program with DVDs and videos, and a line of fitness clothing. (JE 8; NT 2 37, 197-198, 200, 215-216).
27. Wilson told his supervisor Jeffery Persing that he did not want a full-time counseling position at Concern. (NT 2 200).
28. During January-February 2001, Wilson averaged 19 hours of work per week as a supplemental counselor. (JE 17).
29. Starting in March 2001, Wilson did not work any hours at Concern for as many as twelve weeks in a row. (JE 17).
30. As a result of Wilson's opening a fitness center and starting related business ventures, his hours available for work at Concern dropped dramatically in March 2001. (JE 17; NT 1 57-58, 117-118, 201; NT 2 196,200).
31. There was no policy change at Concern that caused the dramatic reduction in Wilson's hours worked beginning in March 2001.
32. Concern never restricted Wilson's hours. (NT 2 117-118,176).

33. Wilson's hours increased soon after Jeffery Persing started scheduling him for work in June 2001. (JE 17; NT 2 118. 212).

34. Wilson's supervisor, Jeffery Persing, wanted Wilson to work more hours, but Persing had difficulty contacting Wilson to schedule him for work from the very beginning of his supervision of Wilson in 2001. (NT 2 22, 176, 191-195,211-212).

35. Concern's ability to contact Wilson was extremely important because supplemental counselors worked unplanned shifts as needed, in response to the immediate coverage needs of the program, such as replacing sick employees. (NT 2 190, 194).

36. In spring 2002, Jeffery Persing frequently expressed to Byron Lee his frustration with his inability to contact Wilson to schedule him for work. (NT 2 142).

37. After Jeffery Persing discussed with Byron Lee his frustration with Wilson's unavailability and lack of communication, Lee told Persing to discuss it with Juliee Franey (hereinafter "Franey"), Director of Human Resources as a "potential for termination." (NT 2 129-130, 202-204).

38. Wilson was unavailable to work for Concern for several weeks in 2000 when he traveled to Boston. (NT 1 186-188).

39. Although, throughout his tenure at Concern Wilson would "stop in" to "chitchat" at Concern's facility for a short period of time and to check on residents, and occasionally respond to brief emergency calls, he was never available to work eight-hour shifts. (NT 2 196-99, 231-232).

40. Concern notified Wilson by letter dated March 11, 2002 that DPW required Concern to file an Employee Medical Form for him. (JE 11; NT 1 79).

41. Concern's letter dated March 11, 2002 requested that Wilson complete the required DWP Employee Medical Form and return it to Concern by May 2, 2002. (JE 11).

42. Before 2001, DPW had required Concern to file Employee Medical forms for certain employees upon initial hire. (NT 2 273).

43. In 2001, DPW regulations changed to require an Employee Medical Form every two years as well as upon initial hire for all direct-care employees, including CTUB III counselors. (JE 12; NT 2 273, 293).

44. In 2002, Wilson's two-year Employee Medical Form was due but he did not return it to Concern by May 2, 2002. (JE 11, 12 & 15; NT 2 129,204).

45. In May 2002, Juliee Franey decided to terminate Wilson's employment because he did not communicate with his supervisors and she considered him to have effectively resigned. (JE 10, 15& 31; NT 2 130, 204, 291-293).

46. On May 3, 2002, Jeff Persing, per the instruction of Juliee Franey, informed Wilson that his employment with Concern was terminated. (S 9)

47. Wilson's Termination Form states that the reason for his termination was his unavailability, and failure to communicate with supervisors, not his failure to return the medical form. (JE 31; NT 2 276-277, 292-293).

48. Concern discharged Wilson because he was unavailable for work and was not communicating with Concern staff about his job, including whether he intended to return his DPW Employee Medical Form. (NT 2 276-277; JE 10, 15 & 31).

49. Wilson was aware of Concern's formal grievance procedure. (NT 2, 242-244).

50. Wilson did not file any grievances regarding his evaluations or any other work related issues, including complaints of discrimination or unfair treatment. (NT 2, 242-244).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Complainant Ezekiel V. Wilson ("Wilson") in an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. Respondent Concern Professional Services ("Concern") is an employer within the meaning of the PHRA.
5. Wilson bears the burden of establishing a *prima facie* case for each of his claims of discrimination.
6. To establish a *prima facie* case a failure to hire as a full-time counselor position, Wilson must show that:

    (a) he is a member of a protected class;

    (b) he applied for a full-time position for which Concern was seeking applicants;

    (c) his application was rejected; and

    (d) Concern gave the position to an individual not in Wilson's protected class with equal or fewer qualifications than Wilson.

7. Wilson has not met his burden of establishing a *prima facie* case because he did not satisfy the second requirement, since the record reveals that he did not properly apply for a full-time position.
8. Wilson also did not satisfy the fourth prong of the *prima facie* because Wilson did not show Concern gave full-time positions to whites with equal or less qualifications.
9. In order to establish a *prima facie* case for unlawful discharge, Wilson must show that:

    (a) he is a member of a protected class;

    (b) he was qualified for the job he was performing;

    (c) he was discharged from the position; and

    (d) Concern did not discharge similarly-situated white employees.

10. Wilson has not met his burden to establish a *prima facie* case because he presented no evidence that similarly-situated employees outside his protected class were not discharged.
11. Assuming *arguendo* Concern articulated a legitimate, non-discriminatory reason for discharging Wilson, *i.e.* he was unavailable to work.
12. Wilson bears the burden of showing that Concern proffered reasons for discharging him are pretextual.
13. Wilson failed to prove that the legitimate, non-discriminatory reasons offered by Concern for discharging him were pretextual.

OPINION

This case arises out of a complaint filed by Ezekiel V. Wilson (hereinafter "Wilson") against Concern Professional Services (hereinafter "Concern") on or about July 23, 2002 at PHRC Case No. 20020400. Wilson alleged that Concern discriminated against him on the basis of race, Black, when it failed to promote him to a full time counselor position and by discharging him. Wilson alleged that Concern's actions are in violation of the Pennsylvania Human Relations Act of October 27, 1995, P.L. 744, as amended, 42 P.S. Section 955 (a) (hereinafter "PHRA").

The PHRC staff investigated the allegations and at the conclusion of the investigation, found probable cause to credit the allegations. Thereafter the PHRC staff attempted to resolve the matter through conference, conciliation and persuasion, but such efforts proved unsuccessful. Thereafter, the parties were notified that a public hearing was approved.

A public hearing was originally held on January 24 and 25 and June 27, 2007 before a three Commissioner panel. Rev. James Earl Garmon Sr was the Hearing Panel Chairperson and the other two panel members were Commissioner Toni M.Gilhooley and Commissioner David A. Alexander. Prior to presenting the full Commission with a recommendation from the three member panel, Commissioner Gilhooley resigned from the Commission to pursue a seat in the United States Congress. Also Commissioner Alexander resigned from the Commission after becoming an employee of the

Commonwealth. On July 22, 2007 the PHRC issued a Final Order based, only on the recommendation of Commissioner Garmon, in favor of Wilson. Subsequently, Concern appealed the Final Order to Commonwealth Court. On May 28, 2009, Commonwealth Court issued an Order vacating the Commission's decision and remanded the case to the Commission for a new hearing because the Final Order had been based on the recommendation of only one of the assigned three Hearing Panel Commissioners.

The public hearing in the matter on remand was held on May 17 and May 18, 2010 in Wellsboro, PA. The case was heard by a new three Commissioner Panel. Commissioner Gerald S. Robinson served as the Hearing Panel Chairperson. The other two panel members were: Commissioner Sylvia A. Waters and Commissioner Dr. Raquel O. Yiengst. Phillip A. Ayers, Permanent Hearing Examiner served as Panel Advisor. The case on behalf of the complaint was presented by PHRC Assistant Chief Counsel William Fewell and G. Thompson Bell, Esquire appeared on behalf of Concern. Following the public hearing, all parties were given an opportunity to file post hearing briefs. The Commission, Concern and Wilson filed post- hearing briefs on July 16, 2010.

In a case involving disparate treatment allegations, we often apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department Community Affairs v. Burdine. 450 U.S. 248, 254 (1981) The Complainant must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) Once a Complainant meets his/her initial burden, a Respondent must articulate a legitimate, nondiscriminatory reason for its

action. Once a Respondent articulates a legitimate, nondiscriminatory reason, a Complainant must prove that the stated reason was merely a pretext for discrimination. Clearly, the ultimate burden is on the Complainant to persuade that discrimination occurred by a preponderance of the evidence.

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

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

In the instant case, Wilson first alleges the Concern discriminated against him when Concern failed to promote him to a full-time counselor position. In order to set forth a *prima facie* cause of failure to promote, Wilson must show;

1.) he is a member of a protected class;

2.) he applied for a full-time position;

3.) his application was rejected; and

4.) Concern hired an individual not in his protected class with equal of less qualifications than Wilson. PHRC v. Johnstown Redevelopment Authority, 527 Pa. 71, 588 A.2d 497 (1991)

There is no question that Wilson meets the first prong of the *prima facie* in that he is African American. However Wilson does not satisfy the second prong of the *prima facie* showing. Essentially, in this case, Wilson alleged that Concern did not promote him to two available full-time counselor positions because of his race. In order to satisfy this prong, Wilson must show that he applied for either of the positions in question. There was no evidence presented at the public hearing showing that Wilson ever properly adhered to Concern's procedures in applying for either of these positions. Wilson had every reason to be aware of the full-time vacancies that arose during his employment at Concern. (NT 1 at 207-210) All qualified employees were given the opportunity to apply for available positions by circulating memos to all employees, announcing vacancies in daily reports and newspapers. (NT 2 119, 124; JE 20, 24, 26) Wilson's assertion that he had no knowledge of vacancies is simply not credible. Indeed, on cross examination, Wilson admitted that he was aware of available full-time positions during his employment with Concern. (NT 1 206-210)The record reflects that the only full-time

position Wilson discussed with Byron Lee, his first supervisor, was a fitness instructor position. (NT 2 at 125-127) Interestingly no such position existed at Concern. Even though Wilson talked about a full-time position, he never applied for any vacancies because he refused to commit to a regular specific shift. (NT 2 126, 127) Wilson simply cannot show he properly applied for either of the two positions filled in January 2002.

Wilson also failed to meet the fourth element of the *prima facie* case in that he failed to show that Concern hired individuals not in the protected class with equal or less qualifications. The two openings for which Wilson could have applied occurred in January 2002 and were filled by Marc Case and Edgar Allen. (NT 2, 128, JE 27, 28) As aforementioned, Wilson never applied for either position. (JE 27, 28)

Wilson did not attempt to show that he was either equally qualified or more qualified then the two individuals selected for full-time counselor positions. Therefore Wilson failed to show that Concern hired these two individuals to these full-time positions with equal or lesser qualifications. Wilson simply failed to establish a *prima facie* case of failure to promote.

Next Wilson alleges that Concern discharged him because of his race. In order to establish a *prima facie* case for unlawful discharge, Wilson must show that:

1.) he is a member of a protected class;

2.) he was qualified for the position;

3.) he was discharged from the position; and

4.) Concern did not discharge similarly situated white employees.

Wilson certainly meets the first three prongs of the *prima facie* showing. However, Wilson did not show that Concern treated similarly situated white employees more favorably. Wilson attempted to point to two allegedly similar situated white employees whom he asserts did not turn in Employee Medication Forms and were not discharged. It must be noted that the failure to timely submit a medical form was not the proffered reason for discharging Wilson. In order to meet the burden of showing that another employee is similarly situated, Wilson must produce evidence of an employee who is directly comparable to him in all material respects. Patterson v. Avery-Dennison Corp, 281 F.3d 676, 680 (7th Cir. 2002) The first employee, Cathleen Marengo testified that when she told her supervisor she could not return the form because of prior engagements, she was told it was "okay" and she should return the form as soon as she could. (NT 1 156-157) The record reflects that the effect of the delay was not being scheduled for work until the form was returned. (JE 15, NT 1 171) Furthermore, the same consequence was set forth in a memorandum regarding Wilson's overdue form. Moreover, Marengo is not similarly situated to Wilson because the record does not reflect that she was generally unavailable for work or failed to communicate with her supervisor. In fact the record reflects the opposite, Marengo was available and communicated with her supervisor, and Wilson did not.

The testimony of the second former employee offered by Wilson also does not support his assertion that similarly situated white employees were treated more favorably. Dale Niles completed all of the required medical forms required by Concern. He was hired in 1999 and filed an initial report in February 1999. (NT 1 at 113) He then filed subsequent reports in October 2001 and October 2003. The Department of Public

Welfare regulation changed in October 1999, requiring the filing of a health report for direct care workers every two years after the initial report. (JE 12, 29; NT 2 272) Niles timely filled his reports with Concern. Since Wilson has presented no evidence indicating that similarly situated white employees were treated more favorably, he failed to establish a *prima facie* showing.

Assuming *arguendo*, that Wilson was able to set forth prima *facie* showing, Concern articulated legitimate non-discriminatory reasons for discharging Wilson. The reasons articulated for Wilson's discharge were that he was too frequently unavailable for work, did not communicate with supervisors and did not return phone calls. (JE 31) Those reasons were specifically enumerated in Wilson's Employee Termination Form signed by Juliee Franey. (JE 31) It is Wilson's burden to show that Concern's articulated reasons are pretextual Wilson simply cannot do so.

Wilson's evaluation for the period from May 10, 2001 until November 10, 2001 specifically mentioned Wilson's unavailability due to his work at his fitness center. (JE 8) Clearly Wilson's time at the fitness center impacted his ability to commit to a specific shift that might open up. (NT 2 126) Furthermore Wilson signed his evaluation and did not dispute that he was unavailable because of the fitness center. Also, though given the opportunity, Wilson never filed a grievance concerning his shortage of hours or his failure to be hired full-time.

Jeff Persing and Byron Lee testified as to Wilson's unavailability for work. Both of these men supervised Wilson and were in a position to evaluate Wilson's availability. Niles testified that Wilson was available 70-75 percent of the time he called him. However, Niles was not primarily responsible for scheduling Wilson or any other

counselor. (NT 1 116) It was the primary responsibility of Lee and Persing. Moreover, Wilson's own time records do not support Nile's testimony that Wilson was available for work. (JE 17) If Wilson was available and was called in frequently by Niles, the time records would reflect that fact. The records do not reflect Wilson's version.

It is important to note that Concern's primary witnesses, Lee and Persing, were consistent in their testimony and, more importantly, their testimony is supported by credible documentary evidence. Wilson's testimony was, however, inconsistent and unsupported by documentary evidence.

Any judgment of the credibility of a witness is a responsibility entrusted to the trier of fact. Carr v. Com. State Board of Pharmacy, 48 Pa Cmwlth, 330, 409 A.2d 941 (1980) In assessing credibility, consideration is given to the witness' motive, state of mind, memory and demeanor while testifying. Consideration is also given to whether a witness' testimony was contradicted, and the interest, prejudice and intent, if any, of each witness. During the course of the public hearing, Wilson contradicted himself numerous times and changed his testimony on several occasions when confronted with documentary evidence. For example, Wilson also denied discussing his evaluations with his supervisors. When confronted with uncontested deposition testimony, he reluctantly admitted that he had discussions regarding his evaluations. (NT 1 202-203) Wilson denied working while employed by Concern when, in fact, he admitted that he was working as a boxing instructor and boxing promoter. In regard to his "availability" for work, Wilson testified that the only time he was unavailable was a brief trip to Florida before he was terminated in 2002. The testimony revealed that he had traveled to Boston numerous times, including a two week period for the trial of a lawsuit filed in

Massachusetts federal court. (NT 1 72, 107-108). Lastly, Wilson's testimony regarding his fitness center and any revenue derived thereof, his employment since leaving Concern and his finances in general was evasive at the very least. Wilson's was contradicted at times by not only his own but by his wife's testimony. Wilson, for example, testified that the fitness center did not generate any revenue. His wife directly contradicted his testimony, admitting that the fitness center revenue paid "the rent and the bills". (NT 1 221; NT 2 85) Wilson's testimony, as a whole, is simply not credible.

Accordingly Wilson has not established a *prima facie* case of discrimination in regard to a failure to promote to full-time counselor and Wilson has not established a *prima facie* case in regard to his discharge by Concern.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON	:	
Complainant	:	**PHRC CASE NO. 200200400**
v.	:	**EEOC CASE NO. 17FA261480**
	:	
CONCERN PROFESSIONAL	:	
SERVICES	:	
Respondent	:	

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

Upon consideration of the entire record in the above-captioned matter, I find that the Complainant has not proven discrimination in the instant case. It is therefore, my Recommendation that the attached Stipulations, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, I recommend issuance of the attached Final Order.

9/27/10
Date

Commissioner Gerald S. Robinson
Hearing Panel Chairperson

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON	:	
Complainant	:	**PHRC CASE NO. 200200400**
v.	:	**EEOC CASE NO. 17FA261480**
	:	
CONCERN PROFESSIONAL	:	
SERVICES	:	
Respondent	:	

FINAL ORDER

AND NOW, this _____ day of _____, 2010, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing, Stipulations, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel Chairperson. Further, the Commission adopts said Stipulations, Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By._____

Stephen A. Glassman
Chairperson

_____

Attest: Dr. Daniel D. Yun
Secretary