

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN D. ZECHMAN,
Complainant

v.

COMMONWEALTH OF
PENNSYLVANIA, STATE POLICE,
Respondent

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:
: PHER Case No. **200501141**
: EEOC Charge No. **17FA660077**
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STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

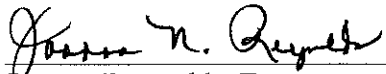
John D. Zechman,	:	
Complainant	:	
	:	
v.	:	PHRC Case No. 200501141
	:	
	:	
COP, State Police,	:	
Respondent	:	
	:	
	:	
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STIPULATIONS OF FACT

The parties hereby stipulate that the following facts are true and no additional proof thereof is required:

1. Complainant John D. Zechman is an adult and, at all times relevant, was a resident of Pennsylvania.
2. At all times relevant, Respondent Commonwealth of Pennsylvania, Pennsylvania State Police was an employer within the meaning of section 4 of the Pennsylvania Human Relations Act, 43 P.S. § 954.
3. Respondent hired Complainant on May 22, 1969 as a trooper.
4. Complainant was born on May 13, 1947
5. Complainant filed the captioned verified complaint with the Pennsylvania Human Relations Commission ("PHRC") on or about September 8, 2005 alleging that Respondent failed to promote him to the rank of Lieutenant because of his age (57).
6. A PHRC representative served a copy of the complaint on Respondent on or about October 18, 2005.
7. Respondent filed a timely verified answer to the complaint.
8. On or about February 9, 2009, the PHRC notified Respondent that it believed probable cause existed to credit the allegations of the complaint.

9. PHRC scheduled a conciliation conference for March 5, 2009.
10. Respondent declined to attend the Conciliation Conference.
11. The jurisdictional prerequisites for a public hearing have been satisfied.



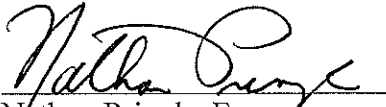
Joanna Reynolds, Esq.
For Respondent

Joseph Bednarik, Esq.
For Commission Staff

12-3-10

Date

Date



Nathan Pringle, Esq.
For Complainant

12/3/10

Date

FINDINGS OF FACT*

1. The Complainant herein is John D. Zechman, (hereinafter "Zechman"), a retired Pennsylvania State Police Officer, currently the Chief of Police in Mercersburg, PA. (N.T. 34, 35)
2. The Respondent herein is the Commonwealth of Pennsylvania, State Police (hereinafter the "PSP"). (SF 2)
3. The PSP employs approximately 6,400 to 6,500 individuals, 4,600 of whom are enlisted personnel. (N.T. 365)
4. PSP enlisted personnel begin their careers as troopers and can progressively attain higher ranks including: corporal; sergeant; lieutenant; captain; major; lieutenant colonel; and colonel. (J.E. 1a)
5. The ranks of Sergeant and below are non-commissioned officers while Lieutenants and above are commissioned officers. (N.T. 295, 373)
6. PSP officers follow a well-established chain of command. (N.T. 118, 309, 373)
7. The highest-ranking officer in the PSP is a Colonel who is appointed by the governor as the PSP Commissioner. (N.T. 178)

*The foregoing "Stipulations of Fact" are hereby incorporated herein as if fully set forth. 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
R.E. Respondent's Exhibit
S.F. Stipulation of Fact
J.E. Joint Exhibit

8. For the period January 2003 through August 2008, the PSP Commissioner was Colonel Jeffrey Miller, (hereinafter "Miller"). (N.T. 178, 365)
9. Promotions with the PSP to the ranks of corporal and sergeant are made directly from an officer's position on a list created after officers take a promotion test. (N.T. 402-03)
10. Ultimately, promotions to the commissioned ranks of lieutenant, captain and major are made at the discretion of the PSP Commissioner. (N.T. 369, 402-03)
11. The PSP Commissioner also recommends to the Governor appointments to the positions of Deputy Commissioners who hold the rank of Lieutenant Colonel. (N.T. 369)
12. The entry age to become an officer in the PSP is 21. (N.T. 137)
13. PSP officers become eligible for retirement after 20 years of service. (N.T. 137)
14. After either 25 years of service or attaining the age of 50, a PSP officer is eligible for full retirement. (N.T. 137-38, 139)
15. PSP officers have a mandatory retirement point at age 60. (N.T. 71, 406)
16. Zechman's date of birth is May 13, 1947. (N.T. 40)
17. On May 22, 1969, Zechman went to the PSP training academy to become a PSP officer. (N.T. 35)
18. For approximately 30 days, after graduating from the PSP academy, Zechman was assigned to Troop G to undergo Coach/Pupil Training. (N.T. 35)

19. Following this initial training, Zechman spent the next year at a PSP Troop in Bedford. (N.T. 35)
20. From Bedford, Zechman went to another Troop in McConnellsburg where he served as a patrol trooper, investigator and a deputy fire marshall.
(N.T. 35)
21. In 1984, Zechman was promoted to the rank of corporal and transferred to a PSP Troop in Millersburg where he served as a patrol supervisor.
(N.T. 35)
22. Zechman then transferred back to McConnellsburg serving as a patrol supervisor and criminal investigation unit supervisor. (N.T. 35)
23. For several extended periods, Zechman served as the acting station commander at McConnellsburg. (N.T. 35)
24. In 1997, Zechman transferred to the PSP's department headquarters in Harrisburg where he supervised the Criminal Records Section under the Bureau of Records and Identification. (N.T. 35, 61)
25. On March 21, 1998, Zechman was promoted to Sergeant. (J.E. 2)
26. Beginning in 1997, after serving 28 years in the field, Zechman remained at the PSP's headquarters for the next 10 years, until his retirement on April 21, 2007. (N.T. 35, 36, 60-61)
27. At the time of his retirement, Zechman was two weeks shy of turning age 60. (N.T. 51)
28. During the period 2003 to 2005, Zechman's chain of command included then Lieutenant Nancy Shaheen, his immediate supervisor; the Bureau of Records and Identification Director, Major John Theirwechter (hereinafter

- "Theirwechter"); and the Deputy Commissioner of Staff, Lieutenant Colonel Henry Oleyniczak, (hereinafter "Oleyniczak"). (N.T. 46, 47, 85, 508)
29. As Deputy Commissioner of Staff, Oleyniczak was over five bureaus: Records and Identification; Research and Development; Technology Services; Forensic Sciences, and Staff Services. (N.T. 85, 309)
 30. Zechman's primary job at PSP headquarters was to create and purge criminal history records and maintain the central repository of all criminal records. (N.T. 49)
 31. At PSP Headquarters, Zechman did not supervise PSP officers; instead, he supervised approximately 56 civilian employees. (N.T. 50)
 32. In the over 9 years Zechman worked in the criminal records section, he did not seek a transfer. (N.T. 60)
 33. In addition to being a PSP officer, Zechman served 38 years in the Army National Guard and Reserves until he retired in June 2003 at the rank of Lieutenant Colonel. (N.T. 46, 71)
 34. Periodically, an announcement is made indicating that an exam is to be given regarding promotion from the rank of Sergeant to Lieutenant. (N.T. 36, 131)
 35. Any Sergeant interested in a promotion to Lieutenant had to either notify their immediate supervisor of their interest or submit a letter indicating their desire to participate in the test. (N.T. 36, 131)
 36. In 2003, the test to become eligible for promotion to Lieutenant included a written component, an oral board and contingency exercises. (N.T. 36, 370, 409)

37. Zechman notified his immediate supervisor, Lieutenant Shaheen of his desire to take the Lieutenant test. (N.T. 36, 46)
38. In addition to Lieutenant Shaheen, Zechman also spoke to Theirwechter, Captain Tim Allue, Oleyniczak's executive officer, and Joanna Reynolds, an attorney in the PSP's Chief Counsel's office. (N.T. 46, 47, 71)
39. Zechman's score on the test was an 87. (N.T. 37)
40. The results of the 2003 Lieutenant test were recorded in two bands, those who scored 80 and above were listed as immediately eligible; and those who scored below 80 were listed as eligible. (N.T. 37, 370; C.E. 1; J.E. 2)
41. Promotion to Lieutenant lists last approximately 2 years. (N.T. 371)
42. Ultimately 116 Sergeants were listed on the 2003 immediately eligible for promotion to Lieutenant list. (N.T. 134; J.E. 2)
43. PSP's Bureau of Human Resources prepares and distributes an alphabetical list which includes a Sergeant's name; time in grade, date of enlistment; date of birth; gender; and race. (N.T. 91, 99, 131, 373; J.E. 2)
44. Only the Commissioner and his deputies are given the list.
(N.T. 123-24, 412)
45. Miller did not request to have a candidate's date of birth indicated on the 2003 list. (N.T. 375)
46. All Sergeants on the immediately eligible list were deemed substantially equal. (N.T. 370, 413)

47. Prior to Miller becoming the PSP Commissioner, management and the union agreed that the Commissioner would have the sole discretionary authority to promote to the commissioned ranks of Lieutenant, Captain and Major.
(N.T. 222)
48. Generally, the PSP procedures for promotion to Lieutenant are found in the PSP's Operation Manual, Chapter 2, Section D Eligibility Lists, Subsection 3 Lieutenant Eligibility List, and in a July 8, 2003 Special Order from Lieutenant Colonel Cynthia Transue, the PSP's then Deputy Commissioner of Administration. (N.T. 39, 42, 371-72; C.E. 1; J.E. 1 & 2)
49. In combination, these procedures outline the pertinent criteria the PSP Commissioner may use to select candidates to promote as follows:
 - a. time in grade as a Sergeant;
 - b. years in service with the PSP;
 - c. discipline or commendations within the past five years of a promotional review;
 - d. any founded Bureau of Professional Responsibility investigations within two years of a promotional review;
 - e. character;
 - f. comparison and evaluation of a position to be filled with the responsibilities of a vacancy and operational needs; and
 - g. rational suitability of a candidate. (C.E. 1; J.E. 1 & 2)
50. The criteria listed are not exclusive as other criteria may also be used at the discretion of the Commissioner. (N.T. 372; C.E. 1; J.E. 1 & 2)

51. In considering who to promote from Sergeant to Lieutenant off the 2003 Lieutenant Promotion list, Miller generally offered that he received the alphabetically oriented list electronically and the first thing he did was to electronically sort the list first by time in grade and second by time on the job. (N.T. 373, 375, 397, 398, 404, 422)
52. Miller testified that, to him the most important information on the list was a candidate's time in grade. (N.T. 391, 404)
53. Next, Miller stated that, to him, time on the job was also important. (N.T. 391, 404)
54. Between 2003 and 2005, of the 116 candidates on the immediately eligible list, Miller promoted 39 Sergeants to the rank of Lieutenant. (N.T. 39, 63; J.E. 2)
55. Between 2003 and 2005, Zechman was not promoted. (N.T. 50)
56. Miller testified that he would announce to his Deputies that he was considering promotions and was looking for relevant input. (N.T. 87)
57. Miller asked his Deputies to talk with Bureau Directors, Commanders, Area Troop Commanders, and Division Directors and seek their recommendations regarding who were outstanding candidates and whose skills and abilities would best fit a position to be filled. (N.T. 86, 203-04, 323, 339, 370-71, 377, 378)
58. Miller would then meet with his Deputies and collectively discuss vacancies and who the group considered to be the best candidate for an opening. (N.T. 376, 378, 404)

59. During such meetings, Deputies both relayed recommendations they had received and offered their own observations regarding knowledge they had of candidates. (N.T. 203-04, 312, 376, 404)
60. Deputies were free to offer their opinions and were able to fully express their reasons why they agreed or disagreed with consideration of a given candidate. (N.T. 377)
61. While Miller retained the ultimate decision, discussions among Miller and his Deputies almost always resulted in unanimous decisions regarding who to select to fill a vacancy. (N.T. 377)
62. Even if there were only one or two vacancies, Miller met multiple times with his Deputies. (N.T. 376, 404)
63. In order to not overlook someone, Miller would also reference the list and specifically ask his Deputies what about this person or that person.
(N.T. 399, 426, 440)
64. In all situations, Deputies provided Miller with recommendations. (N.T. 396)
65. The recommendation of a Deputy who was in the chain of command of a candidate was given more weight. (N.T. 87, 386)
66. The Deputy of Operations was over the majority of candidates. (N.T. 312)
67. Normally, recommendations given by a Deputy were detailed because supervisors would go out of their way to describe the qualities of candidates they considered outstanding. (N.T. 384-85, 388)
68. A Sergeant's performance evaluations were not considered. (N.T. 440)
69. Performance evaluations were not a good indicator with respect to evaluating a candidate for promotion because in the PSP, nearly every

officer is given evaluations which rate officers as outstanding in all areas.

(N.T. 195, 211, 224-25, 241, 265, 320, 346, 400, 474, 490, 496; R.E. 5, 6, 7, 8, and 9)

70. Miller testified that a candidate's date of birth was irrelevant and that he did not consider this factor. (N.T. 398, 404)
71. With 116 Sergeants on the immediately eligible list and only 39 promotions made, a considerable number of qualified candidates did not get promoted. (N.T. 320)
72. Frequently, officers had to be on more than one promotion list before they were promoted. (N.T. 194, 239, 246, 259)
73. Once Miller selected a candidate for promotion, that promotion was offered to an officer who was free to accept or decline the promotion. (N.T. 296)
74. When Zechman's name came up, Oleyniczak conveyed to Miller that in effect, Theirwechter had only said that Zechman should be considered due to his longevity in his current position. (N.T. 90, 121, 313, 317, 322, 323, 325, 331, 359-60, 384, 424, 431, 435)
75. Zechman had been in the same job for an extended period of time. (N.T. 426)
76. Because Theirwechter's recommendation lacked details of Zechman's abilities, Miller formed the opinion that Zechman was not exceptional and only an average performer. (N.T. 424, 426, 436)
77. Ten of the 39 Sergeants promoted had more time in grade than Zechman. (R.E. 1; J.E. 2)

78. Seven additional candidates had been promoted to Sergeant the same year as Zechman, 1998. (J.E. 2)
79. Zechman had less than 2 years more time in grade than eleven additional candidates. (J.E. 2)
80. The year of birth of those promoted and those not promoted from the 2003 Lieutenant Promotion list is summarized as follows:

<u>Year of Birth</u>	<u># Promoted</u>	<u># Not Promoted</u>
1947	0	1
1949	0	1 (retired)
1950	0	2
1952	1	0
1953	3	4 (2 retired)
1954	0	3
1955	2	4
1956	4	3
1957	2	4
1958	2	7
1959	3	6
1960	5	8
1961	1	5
1962	2	5
1963	3	8
1964	3	3
1965	3	2
1966	2	7
1967	2	2
1968	1	0
1969	0	1
1971	0	1
	39	77

81. The 39 promotions to Lieutenant were made to the following departments and

Bureaus:

- | | |
|---|--|
| 1 - Domestic Security Office | 3 - Bureau of Integrity and Professional service |
| 1 - Equal Opportunity Office | 2 - Bureau of Research and Development |
| 2 - Gaming Enforcement Office | 1 - Bureau of Information Technology |
| 3 - Bureau of Technology Services | 1 - Bureau of Liquor Control Enforcement |
| 1 - Department of Discipline Office | 2 - Bureau of Patrol |
| 3 - Executive and Administrative Office | 2 - Bureau of Training and Education |
| 1 - Recruitment and Special Services Office | 2 - Bureau of Criminal Investigation |
| 1 - Legislation Affairs Office | 11 - Troops |
| | 1 - Bureau of Records and Identification |

82. The single opening in the Bureau of Records and Identification, the Bureau in which Zechman worked, was a newly created Lieutenant position in the Megan's Law Unit. (N.T. 76, 89, 315)
83. The PSP's Megan's Law Unit had been run by a Sergeant until 2004. (N.T. 76, 259)
84. Shortly after Miller became Commissioner, an Auditor General's audit found that the Megan's Law Unit was not properly functioning and needed an immediate fix. (N.T. 261-62, 379)
85. One of the audit's recommendations was that a Lieutenant should head the Megan's Law Unit. (N.T. 379)
86. Considering the situation important and consistent with the Auditor General's recommendation, in 2004, Miller created a new Lieutenant position to oversee this unit which would continue to be highly visible to the public. (N.T. 262, 319, 449)
87. Miller mentioned then Sergeant Janet McNeal (hereinafter "McNeal"), as a possible candidate for the newly created Lieutenant position in the Megan's Law Unit. (N.T. 89, 315)
88. Oleyniczak informed Miller that he had worked with McNeal and that she would be an excellent choice. (N.T. 89, 315)
89. McNeal had graduated from the PSP Academy in September 1985 and worked as a Trooper in Troop G, Rockview until she was promoted to Corporal in 1993. (N.T. 251, 252)
90. As a Corporal, McNeal transferred to Troop P Wyoming, Dunmore and worked as a Patrol Corporal. (N.T. 252)

91. She then transferred to Troop F Montoursville, worked in Mansfield for 6 months, then returned as Patrol Corporal at Montoursville. (N.T. 252)
92. For three years, McNeal served as a Criminal Investigation Supervisor. (N.T. 252)
93. She also served as a Fire Marshal, an Intelligence Officer, an Auto Theft Officer and a Polygraph Officer. (N.T. 252)
94. McNeal then spent two years on several special assignments including: writing a sexual harassment policy and creating a training program; auditing of staff functions at Troop H; bringing an evidence room to a functioning condition after others failed; taking the PSP's Incident Infraction Management System (IIMS) from paper to electronics; analysis of software for mobile units and creation of policy and procedures for implementation as well as development of training. (N.T. 154, 255, 256-57, 288, 316, 317)
95. McNeal received letters of commendation for the special assignments on which she worked. (N.T. 258)
96. McNeal had supervised 80 or more enlisted officers before her selection to head PSP's Megan's Law Unit. (N.T. 267)
97. McNeal's test score on the Lieutenant test was approximately 93. (N.T. 290)
98. When Miller and his deputies discussed finding the best candidate to fill the newly created Lieutenant's position in the Megan's Law Unit, there was discussion that the position needed a strong leader, someone with exceptional attention to detail, outstanding communication skills which

would enable that individual to hold press conferences and generally be the face of the program. (N.T. 381)

99. Miller and his Deputies agreed that McNeal was the most outstanding candidate on the list. (N.T. 383, 445)
100. In April 2004, McNeal was promoted to Lieutenant to act as Commander of the PSP's Megan's Law Unit. (N.T. 50, 259)
101. In his PHRC Complaint, Zechman specifically alleged that he was better qualified for promotion than four named individuals: Mark Lavelle, Thomas McClung, Dennis Hile, and David Buckley. (N.T. 64-65)
102. In March 2005, after being on the Lieutenant list three times, Mark Lavelle (hereinafter "Lavelle"), was promoted to Lieutenant. (N.T. 239-246)
103. Prior to his promotion, Lavelle was the Crime Section Supervisor in Troop R. Dunmore. (N.T. 238)
104. Lavelle had been a Sergeant for six years before he was promoted to Lieutenant. (N.T. 238)
105. Lavelle also came highly recommended for promotion by his Troop Commander and his Area Commander. (N.T. 387)
106. The Deputy of Operations delivered these recommendations to Miller who then promoted Lavelle to Section Commander in charge of Criminal Investigations, Troop R. (N.T. 387)
107. Throughout his career, Thomas McClung, (hereinafter "McClung"), had been assigned mainly to the Rt. 1 corridor in the Delaware, Chester County area. (N.T. 389, 495)

108. For nearly his entire career, McClung worked in criminal investigation.
(N.T. 389)
109. The Deputy of Operations conveyed to Miller that McClung's Troop Commanders recommended him highly. (N.T. 389)
110. McClung had served nine years in grade as a Sergeant before he was promoted to Lieutenant. (N.T. 389)
111. Like Lavelle and McClung, Dennis Hile, (hereinafter "Hile") came highly recommended by both his Troop Commander and Area Commander.
(N.T. 394)
112. The Deputy of Operations indicated to Miller that Hile would be the best fit for the opening for which he was being considered. (N.T. 394)
113. After nine years in grade as a Sergeant, on March 26, 2005, Hile was promoted to Lieutenant. (N.T. 394)
114. At the time of his promotion to Lieutenant, Hile was 51 years old.
(N.T. 502)
115. As a Sergeant, David Buckley, (hereinafter "Buckley") was with the Bureau of Training and Education as the Commanding Officer of the PSP's Southeast Training Center. (N.T. 487)
116. Miller was given recommendations from Buckley's Division Director and Bureau Director indicating that he was an exceptional candidate for a higher position in the Bureau of Training and Education. (N.T. 392-93)
117. In March 2005, Buckley was promoted to a position at the PSP's training academy. (N.T. 393)

118. During his tenure as Commissioner, Miller promoted 32 individuals over the age of 50 to either Lieutenant, Captain or Major. (N.T. 405; R.E. 2)

119. Of those 32 individuals, 15 were promoted in the 2003-2005 timeframe.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The Parties have fully complied with the procedural prerequisites to the public hearing of this case.
3. Zechman is an individual within the meaning of the PHRA
4. The PSP is an employer within the meaning of the PHRA
5. Zechman established a *prima facie* case of an age-based failure to promote Zechman by showing:
 - a. That he is a member of a protected class;
 - b. That he applied for and was qualified to be promoted;
 - c. That he was not promoted; and
 - d. That other Sergeants of similar qualifications who were younger than Zechman were promoted.
6. The PSP articulated legitimate non-discriminatory reasons why Zechman was not promoted.
7. Zechman failed to establish by a preponderance of evidence that the PSP's reasons were pretextual.

OPINION

This case arises on a complaint filed by John D. Zechman (hereinafter "Zechman") against the Commonwealth of Pennsylvania, State Police, (hereinafter "PSP"), verified on September 9, 2005, at PHRC Case No. 200501141. In his Complaint Zechman alleged that between 2003 and March 2005, the PSP failed to promote him to the position of Lieutenant because his age. Zechman's allegation claims that the PSP violated 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)

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation of Zechman's claim and found probable cause to credit the allegation of discrimination. Subsequently, the PHRC and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on June 16 and 17, 2011, in Harrisburg, Pennsylvania, before a Hearing Panel consisting of Dr. Raquel O. Yiengst, Hearing Panel Chairperson and Sylvia A. Waters and Ismael Arcelay, Panel Members.

At the public hearing, Nathan Pringle, Esquire, represented Zechman and Joanna N. Reynolds, Esquire, represented the PSP. The state's interest in Zechman's allegation was overseen by PHRC Assistant Chief Counsel, Joseph Bednarik, Esquire. Post hearing briefs were filed by Zechman and the PSP. Zechman's post-hearing brief was

received in September 6, 2011, and the PSP post-hearing brief was received on September 1, 2011.

Section 5(a) of the PHRA provides in relevant part:

It shall be an unlawful discriminatory practice...[f]or any employer because of the...age...of any individual...to refuse to hire...or otherwise discriminate against such individual...with respect to...hire...terms, conditions or privileges of employment...if the individual...is the best able and most competent to perform the services required...(43 P.S: 955(a)) .

First, in his alleged failure to promote disparate treatment case, Zechman generally advances the theory that the PSP treated him less favorably than others because of his age. To prevail, Zechman is required to prove that PSP had a discriminatory intent or motive. Allegheny Housing Rehabilitation Corp. v. PHRC, 517 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). Zechman must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, supra; Mc Donnell 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 presume 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, 477 (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:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job which the employer was seeking applicants;
3. that, despite his qualifications, he was rejected; and
4. that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complaint'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, 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 Cases 1018 (6th Cir. 1987).

Here, we must adapt the McDonnell Douglas test because Zechman's claim involves an alleged age-based failure to promote. In effect, Zechman attempts to show that comparable persons not in his protected class were treated better. According, to establish a *prima facie* case, Zechman must show:

1. that he is a member of a protected class;
2. that he applied for and was qualified to be promoted;

3. that he was not promoted;
4. that other Sergeants of similar qualifications who were younger than Zechman were promoted. See Baron v. City of Highland Park, 87 FEP Cases 404, 407 (7th Cir. 1999), *citing* Wolf v. Buss (Am.) Inc., 77 F.3d 914, 919, 70 FEP Cases 130 (7th Cir. 1996). *see also*, Key v. Gillette Co., 50 FEP Cases 1613, 1617 (D.C. Mass. 1982), *citing* Bundy v. Jackson, 641 F. 2d 934, 951, 24 FEP Cases 1155 (D.C. Cir. 1981).

If Zechman can establish a *prima facie* case, the burden would shift to PSP to "articulate some legitimate, nondiscriminatory reason" for its actions.

McDonnell Douglas, 411 U.S. at 802. PSP 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 PSP. Id. at 255. However, PSP would not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeny, 439 U.S. 24, 25, 18 FEP Cases 520 (1982).

If PSP carries this burden of production, Zechman must then satisfy a burden of persuasion to show that the legitimate reasons offered by PSP are a pretext for discrimination. McDonnell Douglas, 411 at 804. To establish that a proffered reason is pretextual, Zechman must prove both that the reason offered was false and that discrimination was the real reason for the challenged failure to promote. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). This burden merges with Zechman'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 PSP intentionally discriminated against Zechman remains at all times with Zechman. *Id.* at 253.

On the initial question of whether Zechman can establish a *prima facie* case of an age-based failure to promote, Zechman clears this hurdle and easily sets for a *prima facie* case. Zechman was born May 13, 1947, which made him 55 years old at the beginning of 2003 and 57 in March 2005. Clearly, because of his age, Zechman is a member of a protected class. Next, Zechman took all appropriate steps to apply for a promotion to Lieutenant. Additionally, by achieving a score on the Lieutenant test which placed Zechman in the immediately eligible band of candidates for promotion, Zechman was qualified for promotion. Anyone in the immediately eligible band was deemed by the PSP to be substantially equal and qualified for promotion.

Without question, Zechman was not among the 39 Sergeants promoted to Lieutenant. Accordingly, Zechman established the third element of the requisite *prima facie* showing.

Finally, of the 116 Sergeants on the immediately eligible list, Zechman was the oldest. Accordingly, each Sergeant promoted to Lieutenant off the 2003 list was younger than Zechman. As for having similar qualifications, as previously noted, just being on the immediately eligible list meant that each of the 116 candidates was viewed as equally qualified. At the *prima facie* stage of the analysis we do not attempt to assess which of the candidates had the best qualification for a given position, we simply evaluate whether Zechman's qualifications were similar to those selected for promotion. Finding that Zechman's qualifications were similar to candidates who were promoted, we

conclude that, under the McDonnell Douglas burden shifting analysis, Zechman established a *prima facie* case of age discrimination. Because Zechman has demonstrated a *prima facie* case, the burden of production shifts to the PSP to present a legitimate, non-discriminatory reason for the failure to promote Zechman.

The PSP presented several compelling, legitimate, and non-discriminatory reasons why Zechman was not promoted. First, evidence was presented with respect to the impact of the PSP's retirement policies on the age of officers. Upon reaching the age of 50 or achieving 25 years of service, an officer became entitled to full retirement. Accordingly most PSP officers retire after 25 years of service or upon reaching age 50. Very few stay until they reach the mandatory retirement age of 60. Of course, unlike many others, Zechman remained a PSP officer well beyond the point when he could have received full retirement benefits. Because of this retirement policy, there are far less PSP officers over 50 years of age.

The next practical point to consider is that from the 116 Sergeants on the 2003 immediately eligible list, only 39 were promoted. As Miller indicated many good candidates had to be passed over. Indeed, it was common that many officers were on several lists before finally being promoted.

With respect to the promotion process, the evidence confirms that all promotions to Lieutenant, Captain and Major were made at the discretion of the PSP Commissioner. Between 2003 and 2005, Miller held the discretionary power to select all of the commissioned positions. (N.T. 222) The PSP offers that at no time did Miller discriminate when exercising the discretion he was given.

Generally, Miller offered that when filling a vacant Lieutenant position he attempted to find the most outstanding candidate whose skills and abilities best fit each opening so that the success of the PSP would be maximized. (N.T. 403) Miller testified that before filling openings, he frequently met with his Deputies to discuss the particular needs of each opening. Miller further offered that his Deputies were free to offer their opinions on candidates as well as relate relevant information about candidates conveyed to a Deputy by Commanders, Directors, Supervisors, Area Troop Commanders, Bureau Directors, and Division Directors(N.T. 377,403). Miller observed that when a superior candidate was identified, supervisors would go out of their way to describe the outstanding qualities of superior candidates. (N.T. 385)

Miller testified that he gave more weight to a Deputy's recommendation when that Deputy was in the chain of command of a candidate. (N.T. 386) In this respect, the undisputed evidence shows that all Miller heard about Zechman was that he should be considered for promotion given his longevity in his current position. Miller credibly testified that upon hearing this, he formed the opinion that Zechman was only an average performer. (N.T. 424, 426, 436). Further, in selecting candidates for promotion, Miller attempted to keep his officers close to their home as this tended to reduce requests for transfers shortly after a promotion. (N.T. 388).

Miller also identified several things he did not consider when selecting candidates for promotion. Neither performance evaluations nor a candidate's age were considered. (N.T. 398, 400, 404). Evaluations were not considered because nearly every officer was consistently given top marks in their evaluations. This,

effectively, made performance evaluation meaningless. As for a candidate's age, Miller credibly offered that age simply was not relevant (N.T. 404).

The PSP generally presented evidence to show that Miller promoted many officers over the age of 50. Indeed, during his tenure as Commissioner Miller promoted 32 officers who, at the time of the promotion, were over the age of 50 (N.T. 405; RE 2). Although Zechman argues that evidence of the promotion of officers other than to Lieutenant is prejudicial and of little probative value, we find this evidence useful as it generally corroborates Miller's testimony that age was not a consideration when exercising his discretion regarding selection for promotions.

In his complaint, Zechman specifically referenced 4 Sergeants that Miller promoted in March 2005: David C. Buckley, age 38; Mark Lavelle, age 46; Thomas McClung, age 47; and Dennis Aile, age 51. The PSP offered evidence in support of why each of these named individuals had been promoted over Zechman.

The PSP submits that Buckley's promotion was primarily a result of Buckley's assignments prior to his promotion to Lieutenant. Before his promotion, Buckley was with the PSP's Bureau of Training and Education as the Commanding Officer of the Southeast Train Center. The opening Buckley was selected to fill was with the PSP's Bureau of Training and Education at the training academy. Further, Buckley came highly recommended by both his Division Director and Bureau Director. The PSP submits that, of all the candidates, Buckley's skills and abilities best fit the particular vacancy being filled.

Next, the PSP offered that Mark Lavelle was promoted to Lieutenant as the Crime Section Commander of Troop R. Dunmore, because Miller found Lavelle to be the best fit for that particular vacancy. In 2000, Lavelle became Dunmore's Crime Section Supervisor and promoting Lavelle to the next level best fit operational needs (N.T. 237). Further, Miller had learned through his Deputy of Operations, that Lavelle's Troop Commander and Area Commander highly recommended Lavelle for promotion. (N.T. 387)

The PSP submits that Thomas McClung was promoted to Lieutenant over Zechman because McClung has worked nearly his entire career in criminal investigation mainly along the Route 1 corridor in the Delaware and Chester County area. Promoting McClung to become a Lieutenant in this area was prudent from an operational standpoint. Further, Miller had been informed by his Deputy of Operations that McClung's Troop Commanders highly recommended McClung for promotion.

Finally of the four individuals specifically named in Zechman's complaint, the PSP offers that Dennis Hile was promoted over Zechman because of Hile's experience as a criminal investigator. Hile also came highly recommended by both his Troop Commander and his Area Commander, Indeed the Deputy of Operations gave Miller his opinion that Hile was the best fit for the opening he was selected to fill. (N.T. 394).

Before evaluating whether Zechman presented sufficient evidence to establish the PSP's articulated reasons are pretextual we will review the only Lieutenant position in the Bureau of Records and Identification filled from the 2003 list. Zechman had been working in the Bureau of Records and Identification

for approximately 9 years before the PSP decided to create a new Lieutenant position in that Bureau's Megan's Law Unit.

In April 2004, Miller selected Janet McNeal to be the Lieutenant who would command the Megan's Law Section. With the combined testimony of Miller, the Bureau of Records and Identification Deputy and McNeal, the PSP submits that McNeal was the best choice to head the Megan's Law Section. Both Miller and the Deputy over the section contend that they were acutely aware of McNeal's excellent record, and her many attributes and characteristics that arguably made her the most outstanding candidate on the 2003 list. Indeed, the evidence presented leaves no question that McNeal was the right choice to head the Megan's Law Unit.

Turning to the question whether Zechman established that the reasons offered by the PSP for not promoting him are pretextual, we find that Zechman did not.

First, Zechman offers that his qualifications were equal to or better than the four Sergeants promoted in March 2005: Buckley, Lavelle, McClung, and Hile. On this point, the clearest instance where Zechman's qualifications were not better than the individual selected is his attempted comparison to Buckley.

Since 1997, Zechman had worked in the Bureau of Records and Identification at the PSP's headquarters. The Lieutenant position for which Buckley was selected was to be an instructor at the PSP Training Academy. Buckley's experience matched perfectly with the position as immediately prior to his promotion, Buckley was assigned to the Bureau of Training and Education as Commanding Officer of the Southeast Training Center. This promotion logically

promoted an individual immediately active within the Training and Education function of the PSP.

As to the remaining three individuals, Zechman submits that like Lavelle, McClung and Hile, he too had experience in criminal investigations. Once again, the dramatic difference between Zechman and Lavelle, McClung and Hile was that Lavelle, McClung and Hile's directly relevant criminal investigation experience was current and Zechman's was nearly a decade old. Further, in combination with the current experience factor, Lavelle, McClung, and Hile were selected for promotion in the general geographical areas where they had been working.

In general, we find that Zechman's attempt to compare his qualifications with Buckley, Lavelle, McClung and Hile fails to establish pretext. Indeed, for the promotions made, Zechman's qualifications were not equal to either Buckley, Lavelle, McClung or Hile's.

Zechman next submits that an adverse inference should be drawn from the fact that neither Miller nor Oleyniczak sought out references for Zechman from anyone in Zechman's chain of command. Zechman generally offers that, if asked, both Bureau Director, Their Wechter and Shaheen, Zechman's immediate supervisor, would have provided information supportive of Zechman being promoted.

The fundamental problem with his argument is that there was absolutely no evidence that either Miller or Oleyniczak ever actively sought out references for anyone. The evidence clearly shows that references were brought to Miller, he did not specifically seek them out for anyone.

Zechman's contention that Miller elected not to seek out a reference for Zechman because he knew the reference would be good is pure speculation. The undisputed evidence in this case clearly established that the flow of positive references always went from lower ranks upward. At no point did Miller do anything beyond asking his Deputies if he was missing anything with regard to Zechman. Miller credibly testified that he acknowledged both Zechman's time in grade and time in service and that this caused him to ask if he was missing anything. All that came back to Miller with respect to Zechman was that Zechman should be considered for promotion because he has longevity in his current position. Credibly, Miller testified that he considered such a lack luster recommendation as support for not selecting Zechman for promotion.

Indeed, while Zechman may have met his initial proof burden. Neither Zechman's membership in a protected class nor his suspicions sustain his burden of proof in the face of PSP's credible cogent explanations for not selecting Zechman for promotion. Zechman presented essentially no persuasive circumstantial evidence from which discriminatory intent could be reasonably inferred. The PSP proffered credible justification for promotion decision which Zechman did not sufficiently refute. Because of this, judgment should be entered in favor of the PSP.

However, before turning to our recommendation, we believe several peripheral observations are in order. First, the Hearing Panel is hopeful that Zechman does not perceive his failure to be promoted as a depreciation of his years of public service. Clearly, he has been a faithful public servant. And second, during the course of the public hearing, Miller's demeanor and professionalism

made it clear as to why he had been selected as PSP Commissioner. Conversely, during the public hearing, most unfortunately, the hearing panel observed instances of what we consider unbecoming behavior of several senior officers of the PSP. At N.T. 344, a hearing panel member observed an instance of inappropriate laughter coming from the back of the hearing room as the hearing panel was receiving testimony dealing with the PSP's performance evaluation system.

Subsequently, at N.T. 362-363, the Panel Chairperson found it necessary to remind several PSP officers in attendance that the PHRC proceedings are serious. The Panel Chairperson noted that the behavior being displayed was disruptive to the point she felt it incumbent to issue a stern warning that continued disruptive behavior would result in the removal of disruptive individuals. Frankly, the actions considered disruptive were behaviors one would not expect from senior officers of the PSP.

Lastly, the hearing panel members were again surprised and disappointed in the behavior of Lieutenant David Buckley. As Buckley took the witness stand and began to testify, a question was presented by Zechman's counsel about notes Buckley carried with him to the witness stand. When the question was posed, Buckley crumbled his notes and abruptly threw them on the table of the PSP counsel. The hearing panel considered Buckley's presumptuous action highly disrespectful to the hearing panel and the PHRC process.

These observations are made in an effort to help PSP officers better understand the detrimental consequences that negative actions have on the PSP's image and the image of its officers.

An appropriate order follows

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN D. ZECHMAN,
Complainant

v.

**COMMONWEALTH OF
PENNSYLVANIA, STATE POLICE,**
Respondent

PHRC Case No. **200501141**
EEOC Charge No. **17FA660077**

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above captioned case, this Hearing Panel finds that the Complainant has failed to prove discrimination in violation of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Panel's Recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, this Hearing Panel recommends issuance of the attached Final Order.

Sept. 26, 2011
Date

Dr. Raquel O. Yiengst
Panel Chairperson, Dr. Raquel O. Yiengst

Sept. 26, 2011
Date

Sylvia A. Waters
Commissioner, Sylvia A. Waters

September 26, 2011
Date

Ismael Arcelay
Commissioner, Ismael Arcelay

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN D. ZECHMAN,	:	
Complainant	:	
	:	
	:	PHRC Case No. 200501141
v.	:	EEOC Charge No. 17FA660077
	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, STATE POLICE,	:	
Respondent	:	

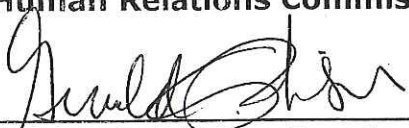
FINAL ORDER

AND NOW, this *25th* day of *October*, 2011 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 Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the hearing Panel. Furthermore, the full Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings 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 the complaint in this case be, and the same hereby is dismissed.

Pennsylvania Human Relations Commission

By: 
 Gerald S. Robinson, Esquire
 Chairman

Attest

 Dr. Daniel D. Yun, Secretary