

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

City of Philadelphia, Philadelphia Prison System,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1175 C.D. 2009
	:	Argued: May 17, 2010
Pennsylvania Human Relations Commission,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**  
**HONORABLE BERNARD L. MCGINLEY, Judge**  
**HONORABLE JOHNNY J. BUTLER, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: August 5, 2011**

The City of Philadelphia, Philadelphia Prison System (Prison System), petitions for review of the decision and order of the Pennsylvania Human Relations Commission (PHRC), which found that the Prison System had unlawfully discriminated against Renee D. Johnson (Johnson) in violation of Section 5(d) of the Pennsylvania Human Relations Act (PHRA), Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. § 955.<sup>1</sup>

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<sup>1</sup> Section 5(d) of the Act provides:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such

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Johnson began working for the Prison System as a Correctional Officer in 1988. In 1996, Johnson was promoted to Sergeant. During the course of her employment, Johnson received satisfactory performance evaluations, although her supervisors repeatedly warned her over the years about time of arrival and attendance issues. Johnson was disciplined twice. In 1989, she received 30-day and 10-day suspensions for, respectively, sleeping on duty and disobeying a lawful order.

In 2002 and 2004, Johnson applied for a promotion to Lieutenant, but she was not selected. Johnson was told that she was passed over because of her issues with attendance and punctuality. On March 10, 2003, Johnson filed a complaint with the PHRC, claiming that she was denied a promotion in 2002 based upon her race and gender.

On September 20, 2004, Johnson was arrested. On that date, Johnson intervened while police were in the process of arresting her daughter. Although the facts regarding the incident are disputed, according to the police report, police officers were attempting to disperse a crowd of about 200 people and were in the process of arresting a woman when Johnson came running down the street saying, "You are not locking up my daughter!" Reproduced Record (R.R.) at 242a. When

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association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

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(d) For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

one of the officers turned around, Johnson punched him and continued to hit him as she pulled him to the ground by his police vest. Johnson had to be restrained by four other officers.

Johnson claimed, however, that she saw her daughter being handled abusively by police officers, and when she approached an officer to ask why her daughter was being arrested, he kicked and punched her. Then they began fighting. Johnson admits that she ignored commands to let the officer go and continued to hold him by his vest. When a captain ordered her to let go of the officer, she complied and was placed under arrest and charged with criminal conspiracy, aggravated assault, recklessly endangering another person, riot, failure to disperse, and disorderly conduct.

The police department notified Johnson's shift commander of her arrest, and Johnson was immediately suspended. Thereafter, Johnson and the president of her union met with Prison System Commissioner King,<sup>2</sup> and about three months after the arrest, Commissioner King permitted Johnson to return to work. The Commissioner did not find Johnson's version of events to be ridiculous, so he decided to give her the benefit of the doubt pending resolution of the charges.

In early May, 2006, Johnson was found guilty of resisting arrest, a misdemeanor. She was found not guilty of aggravated assault, simple assault, and criminal conspiracy, and the other charges against her were withdrawn. In mid to late May, 2006, she informed the Prison System of her conviction and of her intention to appeal.

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<sup>2</sup> Commissioner King became the Commissioner of the Prison System after Johnson was passed over for promotion in 2002. There is no allegation that the Commissioner was involved in the prior decision concerning Johnson's promotion.

On June 9, 2006, Johnson amended her PHRA complaint to add claims that she was again discriminatorily denied a promotion in 2004 because of her race and gender, and in retaliation for filing her previous complaint. After informing the Prison System of her conviction and filing her amended complaint, Johnson received notice that she would be subject to a hearing before the Prison's Disciplinary Hearing Board (Disciplinary Board) concerning her conviction. This timing is consistent with Prison System policy that in cases where an employee has been arrested for misconduct that occurs outside of the Prison System, as was the case here, the Prison System does not make a determination as to discipline until criminal court proceedings have concluded.

On September 14, 2006, the Disciplinary Board held a hearing on charges that, due to her conviction, Johnson had violated Prison System General Order 6, which requires that, "employees refrain from engaging in unprofessional or illegal behavior ... off-duty that could in any manner reflect negatively on [the Philadelphia Prison System]." R.R. at 215a. Disciplinary infractions in the Prison System fall into four categories. Johnson was charged with conduct falling into the most serious category (Level 4), conduct which typically warrants dismissal on a first offense but may be addressed with a multi-day suspension. The Disciplinary Board recommended to Commissioner King a 20 day suspension with credit for time that Johnson had already served.

Commissioner King had the discretion to accept, reject or modify the Disciplinary Board's recommendation. The Commissioner modified the Disciplinary Board's recommendation and ordered that Johnson be dismissed. The Commissioner stated that he did not accept this recommendation because he could not have a law enforcement officer working in the prison who had been convicted

of resisting arrest. During his testimony before the PHRC Hearing Panel, King stated, “[t]he point was the lady was convicted of resisting arrest. She’s a law enforcement officer. She can’t do that.” R.R. at 103a.

The Commissioner issued a formal Notice of Intention to Dismiss on December 1, 2006. Johnson appealed her dismissal to the Philadelphia Civil Service Commission, which sustained her appeal and ordered that she be reinstated with backpay. The Prison System appealed, and on February 21, 2008, common pleas vacated the order of reinstatement and upheld the dismissal. Common pleas found that any reasonable person would conclude that an individual who resists arrest and assaults a police officer is not suitable to serve as a supervisor in a prison. Johnson appealed on January 16, 2009, this court affirmed common pleas. *See City of Philadelphia v. Civil Serv. Comm’n (Johnson)*, 967 A.2d 1034, 1041 (Pa. Cmwlth. 2009). This Court agreed that the Civil Service Commission had erred because Johnson’s conviction alone constituted just cause for her dismissal. *Id.* at 1040-41.

On December 17, 2006, Johnson filed a third complaint with the PHRC, alleging that the City unlawfully retaliated against her by firing her for engaging in conduct protected under Section 5(d) of the PHRA. On November 5, 2007, the PHRC issued a Finding of Probable Cause to credit Johnson’s allegations of retaliation.

On November 18, 2008, a hearing examiner conducted a hearing before a two member panel of the PHRC.<sup>3</sup> The Prison System informed the Hearing Panel that Johnson was also pursuing a Civil Service Commission action.

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<sup>3</sup> The Hearing Panel was composed of two PHRC commissioners, J. Whyatt Mondesire and Daniel L. Woodall, Jr.

The decisions of the Civil Service Commission and common pleas were submitted into the record and the Prison System argued that the civil service proceeding was the more appropriate forum to address the propriety of Johnson's discharge. Johnson testified on her own behalf and Commissioner King testified for the Prison System. The following documents were submitted into the record: Prison System memoranda regarding internal affairs investigations of correctional officers who had been arrested, Prison System disciplinary memoranda, Prison System policy and procedure documents, the arrest and court records relating to Johnson, Johnson's performance evaluations, Johnson's complaints regarding failure to promote and the Prisons System's answers, a notice of intent to dismiss and the notice of dismissal. The parties submitted proposed findings of fact and conclusions of law and briefing support.

On May 19, 2009, the PHRC approved the Hearing Panel's Findings of Fact, Conclusions of Law and Opinion. The PHRC found that Commissioner King's proffered reason for firing Johnson, her conviction for resisting arrest, was pretextual, and that the Commissioner was in fact retaliating against Johnson for filing her Amended Complaint in June, 2006. The PHRC ordered the Prison to reinstate Johnson and awarded back pay.

The PHRC noted that the temporal proximity between protected activity, the filing of Johnson's Amended Complaint, and her discharge was not strong, nevertheless, the PHRC found that Johnson had proved pretext for two reasons. First, it found that Commissioner King incorrectly stated that a conviction for resisting arrest required a finding that one must have assaulted a police officer even though he knew that assault was not an element of the crime. Second, the PHRC found that Johnson had received much harsher treatment than five other

employees who were convicted of misdemeanors and violated the same General Order that Johnson had violated.

On May 28, 2009, the Prison System filed a motion for reconsideration to bring to the PHRC's attention this court's opinion in Johnson's civil service case, which was issued after the hearing; the motion also asserted the preclusive effect of that decision. On June 17, 2009, the Prison System filed its petition for review. On July 9, 2009, the Commission denied the Prison System's motion for reconsideration.

The Prison System alleges error on PHRC's part on several grounds. First, the Prison System asserts that Johnson's action under the PHRA is barred by the doctrines of claim preclusion and issue preclusion. In the alternative, the Prison System maintains that PHRC's findings regarding pretext are not supported by substantial evidence.<sup>4</sup> The PHRC maintains that the Prison System has waived its right to raise the doctrines of claim preclusion and issue preclusion because the Prison System did not raise these matters until the filing of its motion for reconsideration. The PHRC also asserts that claim preclusion and issue preclusion are not applicable to Johnson's PHRA claim. Finally, the PHRC maintains that its decision finding that the Prison System unlawfully discriminated against Johnson is supported by substantial evidence.

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<sup>4</sup> The Prison System, at minimum, requests remand with instructions that: (1) the PHRC properly consider the nature of Johnson's offense and the judicial findings of just cause as part of the pretext analysis; and (2) that the PHRC take into account all underlying circumstances of other arrested employees who were not discharged, in considering whether Commissioner King's decision not to discharge them raised an inference that Johnson's firing was for illegal reasons.

## PRECLUSION

The Prison System asserts that Johnson's retaliatory discharge claim under the PHRA is barred by claim preclusion<sup>5</sup> and issue preclusion.<sup>6</sup> The PHRC contends that the Prison System failed to properly present claim preclusion and issue preclusion before the PHRC and can not assert these doctrines for the first time on appeal.

The Prison System specifically raised preclusion for the first time in its timely motion for reconsideration. The Hearing Panel denied the Prison System's motion for reconsideration pursuant to 16 Pa. Code § 42.131(c)(1).<sup>7</sup> The Hearing Panel stated that the PHRC's Special Rules of Administration and Procedure do not provide for a motion for reconsideration following the issuance of a final order.<sup>8</sup>

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<sup>5</sup> Under Pennsylvania law, the doctrine of claim preclusion applies where the prior action and the action before the court share an identity of: (1) the thing sued on; (2) the cause of action; (3) persons and parties to the action; and (4) quality or capacity of parties being sued. *Vaughn v. Zoning Hearing Bd.*, 947 A.2d 218, 225 (Pa. Cmwlth. 2008).

<sup>6</sup> The doctrine of issue preclusion applies where the following four factors are met: (1) an issue of law or fact decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Frog, Switch & Mfg. Co. v. Pa. Human Relations Comm'n*, 885 A.2d 655, 661 (Pa. Cmwlth. 2005).

<sup>7</sup> 16 Pa. Code § 42.131(c)(1) provides:

(c) The motions commissioner or motions examiner designated by the Commissioners have the authority:

(1) To rule upon all motions or objections, except that a ruling on a motion or objection which would constitute a final determination of the proceedings will be ruled upon by the Commissioners.

<sup>8</sup> However, the court notes that the Rules of Administrative Practice and Procedure generally provide parties with the right to file a motion for reconsideration. 1 Pa. Code § 35.241. Section 35.241(a) provides:

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The PHRC relies upon Section 703(a) of the Administrative Agency Law (AAL), 2 Pa. C.S. § 703(a), Appellate Rules of Procedure 302(a) and 1551, and *Ramsey v. Pennsylvania Milk Marketing Board*, 572 A.2d 21 (Pa. Cmwlth. 1990), to support its contention that the Prison System failed to properly preserve claim preclusion and issue preclusion for appellate review.

Section 703(a)<sup>9</sup> of the AAL prohibits parties from raising an issue on appeal that was not raised at the agency level. Appellate Rule 302(a) provides that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Appellate Rule 1551 states that review of quasi-judicial orders shall be conducted by this court on the record made before the government unit and no questions shall be considered which were not raised before the government unit, with three limited exceptions.<sup>10</sup> In *Ramsey*, this court held that raising issues

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*Form, filing and service.* An application for rehearing or reconsideration may be filed by a party to a proceeding within 15 days, or another period as may be expressly provided by statute applicable to the proceeding, after the issuance of an adjudication or other final order by the agency. The application shall be made by petition, stating specifically the grounds relied upon.

<sup>9</sup> Section 703(a) provides:

A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

2 Pa. C.S. § 703(a).

<sup>10</sup> Appellate Rule 1551(a) provides three exceptions to the general rule:

(a) Appellate jurisdiction petitions for review. Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:

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in an application for reconsideration does not preserve those issues for appellate review. 572 A.2d at 25.

The PHRC notes that the Prison System specifically failed to raise either claim preclusion or issue preclusion during the administrative hearing process or in its post-hearing brief and only argued that Johnson had failed to establish a prima facie case of retaliation. The PHRC also maintains that the Prison System's assertion of claim preclusion and issue preclusion does not fall under one of the three exceptions listed in Appellate Rule 1551(a). The PHRC asserts that taken together, *Ramsey*, Section 703(a) of the AAL, and Appellate Rules 302(a) and 1551(a), preclude this court from addressing either issue or claim preclusion as the Prison System has failed to properly preserve such issues.

The Prison System acknowledges that a strict application of the waiver doctrine would defeat its preclusion claims. However, the Prison System suggests that an exception to the waiver rule should apply in this instance. The Prison System notes that at the PHRC hearing, its counsel notified the PHRC that Johnson was pursuing a claim before the Civil Service Commission. Counsel argued that the Civil Service Commission was the more appropriate forum for Johnson to pursue her claims. The Prison System further argues that it raised and

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- (1) Questions involving the validity of a statute.
- (2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.
- (3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit. If, upon hearing before the court, the court is satisfied that any such additional question within the scope of this paragraph should be so raised, it shall remand the record to the government unit for further consideration of the additional question.

Pa. R.A.P. 1551(a).

fully briefed the issue of preclusion through its motion for reconsideration while the PHRC still had jurisdiction and, that, as preclusion is an issue of law, the PHRC would not have been required to take additional evidence or conduct additional hearings to resolve the matter. Finally, the Prison System argues that an exception to the waiver doctrine is appropriate in this matter because the PHRC chose to ignore a binding, precedential opinion of the Commonwealth Court, thus resulting in unreconciled, competing opinions in tension with one another regarding the validity of Johnson's termination.

Whether claim preclusion or issue preclusion is preserved for appeal when raised for the first time in a motion for reconsideration has not been considered extensively by this court. In *Sariano v. Unemployment Compensation Board of Review*, 487 A.2d 1064, 589 n.1 (Pa. Cmwlth. 1985), this court held that a party who raises the issue of res judicata in a motion for reconsideration effectively raises the issue. This court rejected the Unemployment Compensation Board of Review's assertion that Section 703(a) of the AAL and Appellate Rule 1551 precluded a party from preserving the issue of res judicata by the filing of a motion for reconsideration.

Notwithstanding *Sariano*, the Pennsylvania Supreme Court and this court generally have held that an issue raised for the first time in a motion for reconsideration is not preserved for appellate review. In *Bedford Downs Management Corp. v. State Harness Racing Commission*, 592 Pa. 475, 926 A.2d 908 (2007) (per curiam), in a motion for reconsideration, the appellant raised a due process challenge to the Statement of Policy, 7 Pa. Code §§ 133.1-133.7, which applied to pending and new license applications. The Statement of Policy declared, *inter alia*, that the Commission would treat applicants as a comparative group and

that the Commission would not be obligated to issue any license despite the fact that a license was available. Our Supreme Court held that a due process challenge to the Statement of Policy raised for the first time in a party's motion for reconsideration of the agency's adjudication cannot be regarded as raising the issue while the matter was before the agency. 592 Pa. at 501, 926 A.2d at 924 [citing *Frankford Hosp. v. Dep't of Pub. Welfare*, 466 A.2d 260 (Pa. Cmwlth. 1983)].<sup>11</sup> Therefore, the Supreme Court concluded the party had waived its due process challenges to the Statement of Policy. *Id.*

In *Ramsey*, the Milk Marketing Board held a series of hearings regarding a proposed rise in retailer minimum milk price. Ramsey, a milk consumer, did not participate in the hearings. Following the hearings, the Milk Marketing Board issued an order raising the retailer minimum milk price. Ramsey filed an application for reconsideration with the Milk Marketing Board and petition for review with this court. Before this court, the Milk Marketing Board argued that none of the issues raised by Ramsey were ever presented to the Board in the course of the hearings, post-hearing brief, or pre-order conference, and therefore, the

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<sup>11</sup> In *Frankford Hospital*, this court held that new issues raised for the first time in a motion for reconsideration "cannot be regarded as raising those issues while the matter was before the agency." 466 A.2d at 262. Frankford Hospital (Frankford) appealed from an order of the Department of Public Welfare's (DPW) Office of Hearings and Appeals (OHA), which granted DPW's motion to dismiss Frankford's agency appeal from DPW's refusal to reimburse the hospital for non-acute care. Frankford had filed seventeen appeals challenging DPW's denial of reimbursement pursuant to Section 9421.74(q) of the Medical Assistance Manual. DPW filed a motion to dismiss Frankford's appeals on the grounds of res judicata and laches. Frankford failed to file a response to the motion to dismiss. OHA granted the motion to dismiss because Frankford had indicated no basis for a hearing in which to make a record. Frankford filed a motion for reconsideration in which it raised various defenses to DPW's motion to dismiss. An appeal to this court followed. This court refused to address the merits of the defenses raised in Frankford's motion for reconsideration because the issues were not properly raised before the agency. *Frankford Hospital*, 466 A.2d at 262.

issues were not reviewable by this court. Ramsey argued that the issues were properly raised in her application for reconsideration. This court held that Ramsey had not properly preserved her issues because she sought alternative findings which would require reconvening the Board for additional testimony. 572 A.2d at 25. The court further stated that, “[m]erely raising the issues before the Board *after* all hearings were held is insufficient to preserve them for this court.” *Id.* (emphasis in original).

Thus, there seems to be competing authority regarding the preservation for appellate review of preclusion claims. In *Sariano*, this court specifically addressed whether raising res judicata in a motion for reconsideration properly preserved the defense for appellate review and found in the affirmative. The other line of cases has generally held that an issue initially raised in a motion for reconsideration is not raised in a timely manner while the action was before an agency, and therefore, the issue is not preserved for appellate review. In *Ramsey*, it should be noted that the issues raised by Ramsey would have required the Milk Marketing Board to reconvene, take additional evidence and make additional findings of fact. In the case at hand, the PHRC would not have been required to conduct additional hearings or take additional evidence. Rather, the application of issue preclusion and claim preclusion are issues of law.

Of greater importance, however, is that the preclusion claim was not available at the time of the PHRC hearing, because the prior decision was not yet final, and finality is a necessary element of a preclusion claim. The determination in the Civil Service case did not become final until the time expired for seeking allowance of appeal from this court’s January 2009 decision, and the PHRC hearing occurred in November of 2008. Admittedly, while the Prison System did

all it could at the hearing – advise the PHRC panel of the pendency of the prior action – it could have advised the PHRC of the final decision before it issued its opinion in May of 2009. Nonetheless, under the circumstances presented here, we believe the Prison System adequately preserved the issue and will follow the rule in *Sariano*.

### **SUBSTANTIAL EVIDENCE**

Even if we were to reject the preclusion claim, we would find the PHRC decision was not grounded on substantial evidence. In order to prove a claim of retaliatory discharge, a plaintiff is required to satisfy a shifting burden test.<sup>12</sup> The plaintiff has the initial burden of proving that: (1) he or she engaged in protected activity; (2) the employer was aware of the protected activity; (3) after engaging in such activity, the complainant suffered adverse employment action; and (4) a causal connection between the participation in the protected activity and the subsequent adverse employment action. *Frog, Switch & Mfg. Co. v. Pa. Human Relations Comm'n*, 885 A.2d 655, 660 n.4 (Pa. Cmwlth. 2005) (citations omitted). The employer then bears the burden of going forward with a legitimate, non-discriminatory reason for the adverse employment action. *Id.* The burden shifts back to the plaintiff to prove that such proffered reasons were merely pretextual. *Id.* The Prison System asserts that the PHRC's decision is not supported by substantial evidence for two reasons. First, the Prison System contends that the

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<sup>12</sup> When analyzing a PHRA claim, Pennsylvania courts are not bound by the federal courts' interpretations of similar federal law. However, state courts generally do interpret the PHRA in accord with its federal counterparts. *Chmill v. Pittsburgh*, 488 Pa. 470, 491, 412 A.2d 860, 871 (1980); *Infinity Broad. Corp. v. Pa. Human Relations. Comm'n*, 893 A.2d 151, 158 n.10 (Pa. Cmwlth. 2006).

PHRC's finding that Commissioner King's proffered reason for discharge was merely pretext is not supported by substantial evidence. Second, the Prison System asserts that the PHRC's analysis of similarly situated individuals was flawed and not supported by substantial evidence.

The PHRC found that Commissioner King's proffered reason for discharging Johnson was pretext because he misstated the elements of misdemeanor resisting arrest. PHRC Opinion at 26. Section 5104 of the Crimes Code defines misdemeanor resisting arrest as follows:

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa. C.S. § 5104. "Thus, the crime of resisting arrest requires some proof of a person's intent to prevent a public servant from legally arresting someone or performing any other duty, and by so acting the person either creates a risk to the public servant or requires the public servant to use substantial force to overcome the resistance to the arrest." *Johnson*, 967 A.2d at 1040-41. Commissioner King testified before the Hearing Panel that he believed that second degree misdemeanor resisting arrest involved touching or injuring a police officer. R.R. at 111-12a, 156a. The PHRC reasoned that because Commissioner King had initially given Johnson the benefit of the doubt regarding the truthfulness of her version of events and allowed her to return to work pending trial and because Commissioner King, as a lawyer, was familiar with the charge of resisting arrest, he knew that resisting

arrest did not require an injury to an officer. Therefore, Commissioner King's reason for discharging Johnson was merely a pretext. PHRC Opinion at 26-27.

The Prison System argues that Commissioner King's misstatement of the elements of misdemeanor resisting arrest is immaterial to the pretext analysis. The Prison System contends that the PHRC was required to focus on the nature of the incident, the gravity of Johnson's offense and the fact that Johnson's conduct constituted sufficient grounds for dismissal under state law. Specifically, the Prison System asserts that the PHRC never considered whether Johnson's conduct raised doubts regarding whether she was capable of performing her duties as a corrections officer, never acknowledged that Johnson's behavior endangered officers and bystanders in an already chaotic situation, or that Johnson admitted grabbing an officer.

Johnson was required to demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Prison System's proffered legitimate reasons for its action such that a reasonable factfinder could rationally find them "unworthy of credence." *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). The PHRC's analysis on this issue is extremely weak. It appears that the PHRC determined that Commissioner King's decision had been inconsistent and contradictory because he did not immediately reject Johnson's version of events, but instead gave her the benefit of the doubt until she was convicted. Whether or not Commissioner King originally credited Johnson's version of events is irrelevant. Once Johnson was convicted of resisting arrest, Commissioner King was bound by that conviction. *See City of Philadelphia v. City of Philadelphia Civil Serv. Comm'n (Carter)*, 895 A.2d 87, 95 (Pa. Cmwlth.



2006) (rule of conclusive effect of prior misdemeanor convictions extends to proceedings before an administrative agency).

The PHRC also determined that Commissioner King's proffered reason for terminating Johnson was not worthy of credence because he rejected the Disciplinary Board's recommendation that Johnson receive a 20 day suspension. This conclusion fails to recognize that Commissioner King, as the agency head, had the discretion to make decisions that he believed were required for the good of the service and that such discretionary decisions should be given deference. *City of Philadelphia v. Civil Serv. Comm'n (In re Boles)*, 965 A.2d 389, 394 (Pa. Cmwlth. 2009).

In addition, the PHRC found it implausible that Commissioner King would mistake the elements of misdemeanor resisting arrest and, therefore, that omission along with his (in its view) inconsistent and contradictory behavior demonstrated that he was motivated by retaliatory animus. The PHRC relied upon Commissioner's King's extensive experience as an attorney with the City Solicitor's office, his experience as an intern with the Equal Employment Opportunity Commission and the Massachusetts Commission Against Discrimination to conclude that the only reason Commissioner King would misstate the elements of resisting arrest was retaliatory animus. A mere misstatement of the elements of a crime by an attorney who specialized in administrative and labor law is an exceedingly slim basis upon which to infer retaliatory animus. We fail to see the logical connection, particularly since the nature and circumstances of the offense for which Johnson was convicted provided ample basis for King to base his decision. As he stated, "[t]he point was the lady

was convicted of resisting arrest. She's a law enforcement officer. She can't do that." R.R. at 103a.

The PHRC also found that the proffered reason for discharge was pretextual because similarly situated correctional officers were not discharged. The PHRC examined the cases of six correctional officers who were also charged with Level Four offenses. Five of the six correctional officers were disciplined with suspensions, while the sixth correctional officer was discharged.

To be deemed similarly situated, courts have found that employees must be involved in or accused of the same offense and be disciplined in different ways. *Wheeler v. Aventis Pharmaceuticals*, 360 F.3d 853, 858 (8th Cir. 2004); *see also, Opsatnik v. Norfolk Southern Corp.*, 335 Fed. Appx. 220, 223 (3d Cir. July 7, 2009) (while "similarly situated" does not mean identically situated, purported comparators must have committed offenses of "comparable seriousness"). Specifically, the individuals with whom a plaintiff seeks to be compared must have "engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Opsatnik*, 335 Fed. Appx. at 222-23 [quoting *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-18 (7th Cir. 2000) (citation omitted)]. Analysis of differential treatment can include consideration of "mitigating factors such as [employees who accept] responsibility for their conduct." *Frog, Switch*, 885 A.2d at 667. Further, evidence of differential treatment of "a single member of the non-protected class is insufficient to give rise to an inference of discrimination." *Pivrotto v. Innovative Sys.*, 191 F.3d 344, 359 (3d Cir. 1999) [citing *Simpson v. Kay Jewelers*, 142 F.3d 639, 646 (3d Cir. 1998)].

The PHRC examined evidence regarding Sergeant Robert Segal. Segal was charged with possession of an instrument of crime, simple assault, aggravated assault, and recklessly endangering another person stemming from a purported “road rage” incident. The police report states that Segal allegedly cut off another driver, who happened to be an off-duty police officer, allowed the off-duty officer to pass him, commenced tailgating him, and then, as the two vehicles proceeded down I-95, Segal pulled along side the officer and pointed a loaded handgun at the police officer. The issue of which driver cut-off the other driver and which driver tailgated was disputed as another corrections officer witnessed the incident and gave testimony contradictory to the police report. Segal did not dispute that he brandished his weapon. However, the exact status of Segal’s conviction was disputed at the PHRC hearing, but Commissioner King believed that it had been overturned. The Disciplinary Board recommended that Segal receive a 30 day suspension. Commissioner King testified that he wished to terminate Segal, but did not do so because the Prison System’s counsel advised him that because Segal’s criminal conviction had been overturned, a termination would not survive a challenge before the Civil Service Commission.

The PHRC also compared Johnson to Officer Tyric Robinson. Robinson was arrested for presenting a fraudulent prescription for 90 Oxycontin pills to a pharmacy and charged with criminal conspiracy, intent to deliver a controlled substance, possession of a controlled or counterfeit substance, fraudulently obtaining a controlled substance, and insurance fraud. In attempting to obtain the controlled drug, Robinson was also associating with a former inmate. Robinson was convicted on one count of forgery, one count of criminal conspiracy and two counts involving a controlled substance. Robinson received a 30 day

suspension from the Disciplinary Board. Commissioner King did not amend the Disciplinary Board's recommendation.

The PHRC also compared Sergeant Angelo Fergone to Johnson. Fergone was arrested and charged with recklessly endangering another person, criminal mischief, carrying an unlicensed firearm on public streets, and DUI. He received a 15 day suspension. Another comparator was Officer Harry Bolton. Bolton was arrested and found guilty of a DUI. He also failed to inform the Prison System of his arrest and conviction and that his driver's license was suspended. He received a three day suspension, which Commissioner King did not amend.

Finally, the PHRC compared Officer Lawrence J. Murphy, Jr. to Johnson. Murphy was arrested and charged with DUI and fleeing a police officer. Murphy was convicted of DUI but the fleeing a police officer charge was dropped. In its brief, the PHRC relies upon the fleeing an officer charge to equate Murphy to Johnson. The PHRC argues that "Murphy, like Ms. Johnson, "demonstrate[ed] total disregard for law enforcement authority" by fleeing from a police officer." Commissioner King approved, without amending, the Disciplinary Board's recommendation of a 30 day suspension.

The Prison System argues that the PHRC erred for several reasons. First, the Prison System maintains that the PHRC failed to take into account that none of Ms. Johnson's comparators intentionally flouted and obstructed a law enforcement officer. The Prison System notes that Bolton, Robinson, Fergone and Murphy all committed substance-abuse related offenses. Second, the Prison System argues the PHRC failed to take into account mitigating factors such as accepting responsibility for their conduct. Robinson admitted to drug addiction resulting from dependence upon prescription pain killers prescribed to him the

prior year when he was shot. Robinson entered and successfully completed a drug rehabilitation program. Fergone admitted that he was wrong and volunteered to speak to training academy recruits regarding the dangers of drinking and driving. Bolton also admitted his mistake. Commissioner King testified that he was inclined not to dismiss employees who admitted that their actions were wrong. R.R. at 126a. Finally, the Prison System notes that Johnson never accepted any blame for what happened or admitted any wrongdoing. Thus, both the nature of their offenses and the remorse shown provides a more than ample basis for Commissioner King to treat them more leniently than Johnson.

With regard to Segal, the Prison System admits the seriousness of the charges against him. However, as the Prison System notes, Segal acknowledged the gravity of his actions. Also, at the time of his disciplinary hearing, the status of Segal's conviction was uncertain. Commissioner King testified that he believed that Segal's conviction had been overturned and that he had been advised by attorneys not to terminate Segal because the problems with his conviction would lead to his discharge being overturned.

We must conclude that the PHRC's finding of pretext was not based upon substantial evidence.

For all of the foregoing reasons, we reverse.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

Judge Butler dissents.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

City of Philadelphia, Philadelphia	:	
Prison System,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 1175 C.D. 2009
	:	
	:	
Pennsylvania Human Relations	:	
Commission,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 5th day of August, 2011, the order of the Pennsylvania Human Relations Commission is hereby REVERSED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge