IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ezekiel Wilson,	:	
Petitioner	:	
	:	
v.	:	No. 2779 C.D. 2010
	:	Submitted: October 21, 2011
Pennsylvania Human Relations Commission,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: December 22, 2011

Ezekiel Wilson petitions *pro se* for review of an order of the Pennsylvania Human Relations Commission (Commission) imposing certain sanctions upon Wilson's former employer, Concern Professional Services (Employer), for employment discrimination based upon race. The Commission's order required, *inter alia*, Employer to cease and desist from racially based termination decisions, and ordered the submission of a plan to train Employer's managers and staff in regards to the rights and responsibilities of employees pursuant to the Pennsylvania Human Relations Act (Act).[1] The Commission did

[1] Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951-963.

not order that Wilson be reinstated to his former position with Employer, and did not award Wilson any back time compensation.

On July 23, 2002, Wilson filed his complaint with the Commission, alleging violations of the Act by Employer. Following the Commission's investigation of Wilson's allegations, public hearings ensued before a three-member Commission Hearing Panel.[2] However, prior to issuing its recommendation to the full Commission, two of the three members of the Hearing Panel that heard Wilson's complaint resigned. Resultantly, the Commission issued an Opinion and Final Order dated July 22, 2007 (Commission Opinion and Order I)[3] that was based upon the recommendation of the one remaining Commissioner

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[2] Section 9(g) of the Act authorizes the appointment of a Hearing Panel thusly:

> Procedure
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> * * *
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> (g) The Commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure [in effecting the purposes of the Act] and its own actions thereunder. Three or more members of the Commission or a permanent hearing examiner designated by the Commission shall constitute the Commission for any hearing required to be held by the Commission under this act. The recommended findings, conclusions and order made by said members or permanent hearing examiner shall be reviewed and approved or reversed by the Commission before such order may be served upon the parties to the complaint. The recommended findings, conclusions and order made by said members or permanent hearing examiner shall become a part of the permanent record of the proceeding and shall accompany any order served upon the parties to the complaint.

43 P.S. §959(g).

[3] In Commission Opinion I, the Commission adopted the recommendation of the Hearing Panel, which had found that Wilson was discriminated against and unlawfully discharged in violation of the Act. The Commission ordered Employer to cease and desist from discriminating against individuals because of their race in regard to promotions and terminations from

(Continued....)

from the three-member Hearing Panel. Employer appealed therefrom to this Court, which vacated the decision and remanded the matter to the Commission. We found reversible error where the Commission's issuance of its Order I was based on the Recommendation of the Hearing Panel, which was composed of only one current Commissioner at the time of the adoption and entry of Opinion and Order I. Concern Professional Services, 974 A.2d at 1225. Our remand order instructed that the Commission hold a new hearing before three current and valid members of the Commission, and issue a new decision and order therefrom. Id.

On remand, and prior to the commencement of the new hearing, Wilson and Employer filed a Joint Motion To Include The Entire Record Of Prior Public Hearing Testimony Of Witnesses In The Current Public Hearing Record (the Joint Motion), requesting that the Hearing Panel accept into evidence the testimonial and exhibit evidence from the prior proceedings, including the testimony of nine witnesses. The Joint Motion was denied in a pre-hearing conference,[4] which denial was repeated on the record during the subsequent hearing. See Original Record (O.R.), Item 5, Hearing Transcript at 15. At the beginning of the hearing on remand, Wilson and Employer each further moved that the testimony of two witnesses from the prior proceeding be accepted into evidence due to the purported unavailability of those witnesses. Id. at 18-21. Neither opposing Counsel objected to their counterpart's motion. Id. The Hearing

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employment, to pay Wilson the lump sum of $73,968.00 within 30 days of the effective date of the order for back pay, to pay interest of six percent per annum on the back pay, and to report to the Commission regarding its compliance with the terms of the order. See Concern Professional Services v. Pennsylvania Human Relations Commission, 974 A.2d 1220, 1224 (Pa. Cmwlth. 2009), petition for allowance of appeal denied, 605 Pa. 689, 989 A.2d 919 (2010).

[4] The record to this matter contains no record of the pre-hearing proceedings.

Panel, however, denied the motions for both witnesses. Id. at 18, 21. The Hearing Panel provided no explanation for its denial, to the parties at the time of the motions during the hearing, or in its subsequent recommended opinion in this matter.

Following the completion of the rehearing, the Hearing Panel made the following findings of fact in this matter. Employer is a non-profit child welfare organization that deals with foster care, adoption, and adjudicated youth, at its facility in Westfield, Pennsylvania. Wilson, an African American man, worked for Employer as a supplemental counselor[5] from May 10, 2000, until May of 2002. At the time of his hire, Wilson was the sole African American counselor that worked for Employer, and he made known to Employer his desire to eventually obtain a full time counselor position.

Wilson worked an average of 19 hours per week during January and February of 2001. Thereafter, Wilson did not work for 12 consecutive weeks. In January, 2002, Employer hired two additional full time residential counselors, both of whom were Caucasian. At least two of Wilson's supervisors noted that Wilson was available for his last minute assignments 70-75% of the time, that Wilson volunteered his time when not scheduled, and that Wilson was a very effective counselor, especially in the area of disciplinary matters.

On March 11, 2001, Employer sent a letter to Wilson requesting that he complete a required medical form. Wilson contended that he never received the form because it was not sent to his current address, which he had previously

[5] Employer employed full time, part time, and supplemental counselors. Supplemental counselors worked on an as-needed basis, and on unplanned shifts in response to Employer's needs.

provided to Employer. In a memorandum dated May 2, 2002, Employer directed Wilson to submit the required medical form. On May 3, 2002, Employer's Director of Human Services informed Wilson that his employment was terminated. By letter dated May 9, 2002, Wilson informed Employer that he was unaware of the medical form requirement, that he would send in the form as soon as possible, and that he wished to be reinstated pending his completion of the form. By letter dated May 20, 2002, Employer informed Wilson that it considered him to have voluntarily resigned, citing to his purported unavailability and his failure to communicate with supervisors.

Following the conclusion of the hearings before it, the Hearing Panel issued an Opinion and Recommendation. The Hearing Panel concluded that Wilson had established a *prima facie* case for Employer's failure to promote him, but that Employer had met its subsequent burden to show a non-pretextual reason for not promoting Wilson; namely, that Wilson had never formally applied for a full time position.[6] The Hearing Panel further concluded that Wilson had

[6] Pennsylvania's Supreme Court has set out the nature of the evidence needed for a complainant to establish a *prima facie* case of discrimination under the Act, quoting to the analytical model developed by the United States Supreme Court for employment discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973):

> In McDonnell Douglas, the Court stated that the burden of establishing a *prima facie* case could be met by showing "(i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the complainant's] qualifications." 411 U.S. at 802 … This standard is, to be sure, adaptable to accommodate differences in the nature of the discrimination alleged (e.g., sex rather than race) and in the action alleged to be improper (e.g., discharge rather than refusal to

(Continued....)

hire). The form it takes, however, must be appropriate to its function …

* * *

[T]he nature of the burden that "shifts" to the defendant when a *prima facie* case is established is simply to produce evidence of a "legitimate, non-discriminatory reason" for the discharge. McDonnell Douglas, 411 U.S. at 802 … If such evidence is presented, the question for the Commission is whether, on *all* the evidence produced, the plaintiff has persuaded it by a preponderance of the evidence that the employer intentionally discriminated against her. Whether the plaintiff must eliminate a certain non-discriminatory reason as part of making a *prima facie* case, or discredit the evidence of that same reason produced by the employer after plaintiff's *prima facie* case has been made, the result is the same; the plaintiff must persuade the fact finder by a preponderance of the evidence.

* * *

If the plaintiff produces sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred, the defendant must be heard in response. Absent a response, the "presumption" of discrimination arising from the plaintiff's *prima facie* case stands determinative of the factual issue of the case. In other words, if the employer rests without producing evidence, the plaintiff must prevail if he or she has produced sufficient evidence to make out a *prima facie* case. If, however, the defendant offers a non-discriminatory explanation for the dismissal, the presumption drops from the case. … Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes."… The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does preponderate to prove discrimination.

Allegheny Housing Rehabilitation Corporation v. Pennsylvania Human Relations Commission, 516 Pa. 124, 127-31, 532 A.2d 315, 317-19 (1987) (citations omitted).

established a *prima facie* case of racially based discharge by Employer, and had further established that Employer's articulated reasons for the discharge were pretextual. Finally, the Hearing Panel concluded that the record before it did not enable the Hearing Panel to sufficiently assess the amounts Wilson would have earned had he not been terminated, or the amounts Wilson either did earn or should have earned after his termination. Thus, the Hearing Panel declined to recommend a back pay award to Wilson. The Hearing Panel did not recommend that Wilson be reinstated.

Following its review of the record, the Commission thereafter approved and adopted the Hearing Panel's Findings of Fact, Conclusions of Law, and Opinion (Commission Opinion II). By Final Order dated October 26, 2010, the Commission ordered that: 1.) Employer cease and desist from discriminating against individuals on the basis of race in termination decisions; 2.) Employer submit to the Commission, to its satisfaction, a plan regarding the training of Employer's managers and staff with respect to the rights and responsibilities of employees under the Act, and; 3.) Employer report to the Commission within thirty days of the date of the Final Order on the manner of Employer's compliance with the Final Order's terms. Wilson now petitions for review of the Commission's October 26, 2010, Final Order.[7,8]

We will first address Wilson's multiple arguments regarding the Hearing Panel's denial of the parties' Joint Motion to admit the testimony from the

[7] This Court's scope of review from a determination of the Commission is whether it is in accordance with the law, whether constitutional rights have been violated, and whether the findings are supported by substantial evidence. Garner v. Pennsylvania Human Relations Commission, 16 A.3d 1189 (Pa. Cmwlth. 2011).

[8] Employer has intervened in the instant appeal.

first proceedings on Wilson's complaint, at the second panel hearing.[9] Wilson first[10] argues that the Hearing Panel erred in refusing to grant the parties' Joint Motion. Wilson emphasizes that the testimony that both parties sought to introduce was testimony offered, during the first proceeding before the prior Hearing Panel, on the exact same subject as the subsequent proceeding, and that the testimony was fully subject to direct and cross-examination by all parties. Wilson further argues that no provision exists within the Pennsylvania General Rules of Administrative Practice and Procedure for the disallowance of admissible evidence.

As Wilson points out, there is no dispute that the Hearing Panel is generally empowered to receive the testimony offered in the Joint Motion, under the General Rules of Administrative Practice and Procedure within the Pennsylvania Administrative Code, and under the Commission's Special Rules of Administrative Practice and Procedure. See, respectively, 1 Pa. Code §35.187; 16 Pa. Code §42.111 (providing for, respectively, hearing commissioners and permanent hearing examiners, and officers presiding thereover, to rule upon offers of proof and receive evidence). Further, it is beyond dispute that, pursuant to Section 505 of the Administrative Agency Law, 2 Pa.C.S. §505, "[t]he liberal rules of evidence relating to administrative agencies give such agencies broad discretion

[9] The Commission argues that Wilson has waived this issue by failing to either renew the Joint Motion during the proceedings before the Hearing Panel, and/or by failing to address the issue in his post-hearing brief. We disagree. The written Joint Motion is inarguably a part of the record to this matter, and the Hearing Panel did address it during the proceedings. R.R. at 72a-78a. Wilson included the issue in his Petition for Review. See Pa. R.A.P. 1513(d) (Petition for Review shall contain a general statement of the objections to the order of which review is sought). As such, Wilson did not waive this issue.

[10] Wilson's issues have been reordered and consolidated in the interests of clarity.

in admitting or excluding evidence, so that the exclusion alone may not constitute a procedural defect." News-Chronicle Co. v. Pennsylvania Human Relations Commission, 672 A.2d 400, 402 (Pa. Cmwlth. 1996) (citation omitted).

Notwithstanding the Hearing Panel's denial of the parties' Joint Motion, the record makes clear that Wilson was afforded a full opportunity to present his case, including the vast majority of the witnesses who testified in the first proceedings, and including an opportunity to depose the one witness that Wilson did not call in the second proceedings. As such, we will defer to the Hearing Panel's broad discretion in determining evidentiary matters,[11] and we will not disturb its ruling on the Joint Motion in our appellate function.[12,13] Section 505 of the Administrative Agency Law, 2 Pa.C.S. §505; News-Chronicle Co.

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[11] We note that the Hearing Panel's exercise of its discretion in disallowing prior testimony, in the instant circumstance where the vast majority of the prior witness were available to, and actually did, testify in the second proceeding, is to be afforded deference especially in light of the Commission's role as the sole arbiter of credibility. Circle Bolt & Nut Co., Inc. v. Pennsylvania Human Relations Commission, 954 A.2d 1265 (Pa. Cmwlth. 2008), petition for allowance of appeal denied, 600 Pa. 765, 967 A.2d 961 (2009) (questions of credibility and the weight of the evidence are for the Commission to decide).

[12] Wilson also argues that Rule 804(b)(1) of the Pennsylvania Rules of Evidence, Pa. R.E. 804(b)(1), would allow the admission of the prior testimony as excluded from the definition of inadmissible hearsay. However, there is no basis within the record - either explicit or implicit - to infer that the Hearing Panel's denial of the parties' Joint Motion was based upon hearsay grounds. As such, Wilson's argument on this issue is without merit. Where no such basis excluded the prior testimony on hearsay grounds is evident from the record, we will defer to the Hearing Panel's broad discretion over evidentiary matters as noted above. News-Chronicle Co.

[13] Wilson further cites to Subsection 42.53(a)(3) of the Commission's Special Rules of Administrative Practice and Procedure, 16 Pa. Code §42.53(a)(3), which provides for the admission into evidence of deposition testimony in circumstances where, *inter alia*, a witness (whether or not a party) is at a greater distance than 100 miles from the place of the hearing at issue. Subsection 42.53(a)(3) further provides for the admission of such deposition testimony in cases where a party was unable to procure witness attendance by subpoena, and where, upon application and notice, "such exceptional circumstances exist as to make it desirable, in the

(Continued....)

Wilson also argues that the Hearing Panel's denial of the parties' Joint Motion without any indication of the basis for that denial violates the administrative regulation governing motions procedure. Wilson cites to Section 42.34(e) of the Commission's Special Rules of Administrative Practice and Procedure, which reads:

> Motions.
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> * * *
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> (e) Upon the filing and consideration of a motion, any replies thereto, and other information the Commission may deem necessary or appropriate to obtain, the Commission will issue and serve the parties with a written ruling thereon, including the reasons for the ruling.

16 Pa. Code §42.34(e).

However, given the Hearing Panel's broad discretion in matters of the acceptance of evidence before them, as noted above, we conclude that any failure on the part of the Hearing Panel to comply with the written mandate of Section 42.34(e) is harmless error. The Hearing Panel was free to accept or reject the prior testimony, and its rejection of that evidence in light of both parties' full

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interests of justice" to allow the deposition to be used. Similarly, Wilson argues that Pennsylvania Rule of Civil Procedure 4020(3), Pa.R.C.P. No. 4020(3), allows for the introduction into evidence of deposition testimony where a witness is unavailable. However, as Wilson acknowledges, the testimony resulting from the prior hearing in this matter is not deposition testimony. Thus, Wilson's arguments regarding the admissibility of deposition testimony are not relevant to the issue of the admission of prior hearing testimony. As the Commission notes, Wilson was free to depose any of the witnesses whose testimony he sought to enter via the Joint Motion. There is no evidence of record that Wilson sought to depose any witness herein. Having chosen not to do so, we will not now entertain Wilson's attempts to equate the prior hearing testimony to deposition testimony.

opportunity to present their respective cases in the second hearing proceedings without written explanation therefor is, at worst, harmless error.

Reversible error requires that a determination "must not only be erroneous, but also harmful or prejudicial to the complaining party." Garner v. Pennsylvania Human Relations Commission, 16 A.3d 1189, 1200 (Pa. Cmwlth. 2011) (quoting D.Z. v. Bethlehem Area School District, 2 A.3d 712, 726 (Pa. Cmwlth. 2010)). As noted in our foregoing analysis, because Wilson was afforded an opportunity for a full and complete hearing during the second proceedings on his complaint, including his opportunity to call any and all witnesses, and/or to depose any unavailable witnesses, the Hearing Panel's failure to issue a written explanation resulted in no specific harm or prejudice. Thus, the Hearing Panel's failure to adhere to the mandate of Subsection 42.34(e) in its rejection of the parties' Joint Motion was harmless. An order of an administrative agency, including the Commission, will not be disturbed for harmless error. Id.

The gravamen of Wilson's complaint against Employer centers on his assertion that Employer discriminated against him, on the basis of his race, when it failed to promote him to a full time counselor position, and by discharging him. Wilson argues that Employer's conduct violated Section 5(a) of the Act, which reads, in relevant part:

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

> (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

43 P.S. §955(a).

Wilson argues that selected facts of record support Wilson's contention that he was not required to apply in writing for the promotion that he sought from Employer. On that issue, the Commission noted that "[w]hile Wilson may have believed that it was sufficient to orally request full time employment, **the credible evidence shows that [Employer] required any such request be in writing**." Commission Opinion II at 5 (emphasis added).

Wilson's argument on this issue is essentially a request that this Court reweigh the evidence presented before the Commission, and/or to revisit the credibility determinations made thereby. However, in regards to administrative proceedings such as those at issue instantly, it is irrelevant whether the record reveals evidence that would support a contrary finding; given this Court's scope of review, the relevant inquiry is whether the record contains substantial evidence supporting the actual findings that were made. Allegheny Ludlum Corp. v. Workers' Compensation Appeal Board (Holmes), 998 A.2d 1030 (Pa. Cmwlth.), petition for allowance of appeal denied, 608 Pa. 670, 13 A.3d 480 (2010). Additionally, it is beyond dispute that questions of credibility, and of the weight to

be assigned to the evidence presented, are solely for the Commission to decide. Circle Bolt & Nut Co. As such, our inquiry on this issue does not encompass whether or not evidence of record exists that would provide support for Wilson's preferred finding. Rather, we must examine the record for substantial evidence supporting the actual findings made by the Commission.[14] Garner.

Before the Commission, one of Wilson's supervisors, Byron Lee, did indeed testify that an existing employee must, ultimately, supply Employer with something in writing indicating that the employee was seeking an available work vacancy. R.R. at 529a-530a. Mr. Lee's testimony constitutes substantial evidence supporting the Commission's finding that Wilson was required to ultimately submit any application for an Employer vacancy in writing. As such, Wilson's citation to testimony of record supporting a finding opposite of that made by the Commission is unavailing.

Finally, Wilson argues that the Commission erred in failing to order Wilson's hiring, reinstatement, or upgrading in the wake of the Commission's conclusion that Employer violated Section 9 of the Act, 43 P.S. §959. Specifically, Wilson cites to Section 9(f)(1) of the Act, which reads:

> (f) (1) **If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging 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**

[14] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. McGlawn v. Pennsylvania Human Relations Commission, 891 A.2d 757 (Pa. Cmwlth. 2006) (citation omitted).

> **action, including, but not limited to,** reimbursement of certifiable travel expenses in matters involving the complaint, **compensation for loss of work in matters involving the complaint, hiring, reinstatement or upgrading of employes, with or without back pay,** admission or restoration to membership in any respondent labor organization, the making of reasonable accommodations, or selling or leasing specified housing accommodations or commercial property upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of housing accommodations or commercial property, upon such equal terms and conditions to any person discriminated against or all persons, and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice, provided that, in those cases alleging a violation of section 5(d), (e) or (h) or 5.3 where the underlying complaint is a violation of section 5(h) or 5.3, the Commission may award actual damages, including damages caused by humiliation and embarrassment, as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

43 P.S. §959(f)(1) (emphasis added). Wilson argues that the Commission, pursuant to the language of Section 9(f)(1), must take the non-discretionary action(s) of ordering "hiring, reinstatement or upgrading of employes, with or without back pay" in the matter *sub judice*, given the Commission's legal conclusion that Wilson was unlawfully terminated because of his race. Given the plain language of Section 9(f)(1), and the Commission's conclusion that Wilson was unlawfully and discriminatorily terminated under the Act, we agree.

We acknowledge that the Commission's discretionary power to fashion remedies is virtually plenary, and exclusive. Albert Einstein Medical Center v. Pennsylvania Human Relations Commission, 486 A.2d 575, 576 (Pa.

Cmwlth. 1985) (citation omitted). This Court has previously held that the Commission's expertise in matters relating to the Act's purposes and remedies is broad enough to accomplish whatever overall relief will effectuate the purposes of the Act. Id. at 576. Further, in fashioning an award under the Act, including the remedial measures to be included, the Commission has extremely broad discretion and its actions are entitled to deference by a reviewing court. Pennsylvania State Police v. Pennsylvania Human Relations Commission, 512 Pa. 534, 517 A.2d 1253 (1986).

The parties do not dispute that the Commission concluded as a matter of law that Wilson satisfied his burden to show that Employer's proffered reasons for Wilson's termination were pretextual, and that the real reason Wilson was terminated was because of his race. Commission Opinion II at 18. The Commission, accordingly, issued a cease and desist order regarding such unlawful discriminatory actions by Employer and further directing Employer to institute, submit, and record compliance with a training plan regarding the rights and responsibilities of employees under the Act. Id. at 21-22. The Commission thusly fulfilled the mandate of the initial portion of the directive of Section 9(f)(1) of the Act. However, while the Commission determined that Claimant established unlawful discrimination under the Act and recognized that one of the purposes of Section 9(f)(1) of the Act is to fashion a remedy "to restore the injured party to his/her status before the discriminatory actions and make him/her whole",[15] the Commission failed to restore Wilson to his status before he was discriminated against by Employer. In addition, the Commission failed to explain why it did not

[15] Commission Opinion II at 18 (citing Consolidated Rail Corporation v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (Pa. Cmwlth. 1990)).

restore Wilson to his status before he was unlawfully terminated. Moreover, the Commission declined to award back pay because the record did not enable it to sufficiently assess either the amounts Wilson would have earned with Employer had he not been terminated or the amount he either did earn or should have earned after his termination. The Commission specifically pointed out that there were "gaps in the record information critical to making an informed decision regarding" the calculation of an appropriate back pay award. Commission Opinion II at 19.

Accordingly, we hold that the Commission's failure to fashion a remedy, as set forth above, in accordance with Section 9(f)(1) of the Act was an abuse of discretion and we are constrained to remand this matter to the Commission to either fashion an award in accordance with Section 9(f)(1) of the Act or explain its reasons for not restoring Wilson to his status as supplemental counselor. In addition, the Commission is directed to take additional evidence to fill in the critical gaps so that it may make an informed decision as to whether Wilson is entitled to an appropriate back pay award.

Therefore, the Commission's Final October 26, 2010, Order is affirmed to the extent the Commission directed Employer to: (1) cease and desist from discriminating against individuals because of their race in regard to decisions to terminate an employee; (2) submit a plan to the Commission for approval, within 60 days of the date of the order, regarding the training of Employer's managers and staff with respect to the rights and responsibilities of employees under the Act; (3) submit training plans until the Commission expresses satisfaction with such training plan; and (4) report to the Commission, within 30 days of the effective date of the order, on the manner of its compliance with the terms of the order. To the extent the Commission's order failed to fashion a

remedy in accordance with Section 9(f)(1) of the Act, this matter is remanded for further proceedings and the taking of additional evidence in accordance with this opinion.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ezekiel Wilson, Petitioner	:	
v.	:	No. 2779 C.D. 2010
Pennsylvania Human Relations Commission, Respondent	:	

O R D E R

AND NOW, this 22nd day of December, 2011, the order of the Pennsylvania Human Relations Commission dated October 26, 2010, is affirmed to the extent the Commission directed Concern Professional Services to: (1) cease and desist from discriminating against individuals because of their race in regard to decisions to terminate an employee; (2) submit a plan to the Commission for approval, within 60 days of the date of the order, regarding the training of Concern Professional Services' managers and staff with respect to the rights and responsibilities of employees under the Act; (3) submit training plans until the Commission expresses satisfaction with such training plan; and (4) report to the Commission, within 30 days of the effective date of the order, on the manner of its compliance with the terms of the order. To the extent the Commission's order failed to fashion a remedy in accordance with Section 9(f)(1) of the Pennsylvania Human Relations Act, 43 P.S. §959(f)(1), this matter is remanded for further proceedings and the taking of additional evidence in accordance with this opinion.

Jurisdiction relinquished.

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JAMES R. KELLEY, Senior Judge