

**COMMONWEALTH OF PENNSYLVANIA  
EXECUTIVE OFFICES  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**WALLACE M. SWINEHART, Complainant**

**v.**

**THE MILTON S. HERSHEY MEDICAL CENTER, PENNSYLVANIA STATE  
UNIVERSITY, Respondent**

**DOCKET NOS. E-21734-D and E-21119-D**

**FINDINGS OF FACT**

The foregoing Stipulation of Facts is hereby incorporated herein as if fully set forth. The following abbreviations will be used throughout this opinion:

N. T. Notes of Testimony  
C. E. Complainant's Exhibit  
R. E. Respondent's Exhibit  
J. E. Joint Exhibit  
S. F. Stipulation of Fact

1. Complainant Wallace M. Swinehart, at all times relevant to this case, had a sincerely held religious belief which prevented him from working on his Sabbath; he observed his Sabbath from sunset on Friday until sunset on Saturday. (N. T. 21 -23)
2. Respondent Hershey Medical Center operates a hospital, medical school, research facilities, and outpatient treatment clinics, occupying 35 buildings on 388 acres of land. (N. T. 128 -131)
3. At least part of the Center's operation is maintained seven days a week, 24 hours a day. (N. T. 129)
4. Respondent's security department provided security coverage for the Center around the clock, seven days a week. (N. T. 24)
5. Security personnel at the Center performed routine patrol duties; they also transported blood and drugs between the Center and other facilities, subdued unruly patients and visitors, responded in general to emergencies, and participated in drills for various emergency situations such as fire. (N. T. 26 -27, 132 -135, J. E. 1 and 2)
6. Respondent security officers were assigned permanently to one of three shifts; Complainant's was the daylight shift. (N. T. 24, 99)

7. In the fall of 1980, four people including Complainant were assigned to the Center's daylight security shift; two or three worked on any given day. (N. T. 24, 99 -100)
8. In the fall of 1980, weekend security coverage on the daylight shift consisted of two or three officers on alternate weekends. (N. T. 101)
9. In the fall of 1980, Respondent decided to increase weekend daylight shift security coverage to a minimum of three officers at all times because of increased activity at the Center. (N. T. 102 -4)
10. On weekends, a security officer was assigned to the reception desk in the hospital's main lobby at all times; the desk served as a communications center. (N. T. 103 - 104)
11. Respondent attempted to accommodate Mr. Swinehart by the use of volunteers from the Security department to cover his assigned Saturdays and by arranging a transfer into a position requiring no Saturday work; neither accommodation could be implemented. (N. T. 106 -109, 138 -139, 142 -144)
12. Respondent determined initially that no additional expense could be incurred for the purpose of accommodating Mr. Swinehart. (N. T. 137)
13. Respondent's security chief, George Crowther, contacted one of the three local security firms to inquire about hiring a part-time substitute for Complainant; he learned that a Globe guard would require \$5.75 hourly, and that Globe would assign two guards to the Center to ensure consistent coverage. (N. T. 115 -116).
14. At the time of his discharge Complainant was earning \$58 daily. (N. T. 93, 149)
15. Respondent rejected the possibility of allowing Complainant to regularly use leave without pay because of the cost of preparing the necessary personnel action forms each pay period. (N. T. 153)
16. Had Complainant continued to be employed by Respondent as Security Sergeant, he would have earned: \$290 weekly between his termination and June 30, 1982; \$316 weekly between July 1, 1982 and June 30, 1983; and \$333 weekly between July 11, 1983 and June 30, 1984, (N. T. 93, 94)
17. After his discharge by Respondent, Complainant received \$7,497 in unemployment compensation benefits. (N. T. 94)
18. Complainant's earnings between his discharge and the public hearing in this case on December 13, 1983, totaled \$12,644.05. (N. T. 94)
19. Following his discharge, Complainant paid \$1,888.26 for health insurance coverage which would have been provided by Respondent, had he not been terminated. (N-I T. 94)

### **CONCLUSIONS OF LAW**

1. Complainant is an individual within the meaning of Sections 4 and 5 of the Act.
2. Respondent is an employer within the meaning of Section 4 and 5(a) of the Act.
3. The parties and the Commission have complied with the procedural prerequisites to a public hearing in this case.
4. The Commission has jurisdiction over the parties and subject matter of this case.
5. Respondent is not an agency of the Commonwealth within the meaning of Section 5.1 of the Act.
6. Complainant has established a prima facie case of discrimination under Section 5(a) of the Act by proving that:
  - a. He had a sincerely held religious belief which prevented him from working on his Sabbath;

- b. He informed his employer of his belief and his unwillingness to work on his Sabbath; and
  - c. His employer took adverse action against him by discharging him because of his religious beliefs.
7. Respondent failed to establish that it could not reasonably accommodate Complainant's religious beliefs without undue hardship to its business operation.
8. Respondent discriminated against Complainant by failing to reasonably accommodate his religious belief, in violation of Section 5(a) of the Act.
9. After a finding of discrimination, this Commission is empowered by Section 9 of the Act to award relief which may include reinstatement and lost wages.

### **OPINION**

This case originated with a complaint filed by Wallace M. Swinehart ("Complainant") against the Milton S. Hershey Medical Center, Pennsylvania State University ("PSU" or "Respondent") with the Pennsylvania Human Relations Commission ("Commission") on September 21, 1981, at Docket No. E-21119. Mr. Swinehart alleged that Respondent violated Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 *et seq.* ("Act") by disciplining him when he did not report for work on his Sabbath, thereby denying him a reasonable accommodation of his religious beliefs. Mr. Swinehart filed a second complaint on December 2, 1981 at Docket No. E-21734, alleging a separate violation of Section 5(a) of the Act in his termination from employment by Respondent on September 27, 1981, following a second failure by him to report for work on his Sabbath. Both complaints were subsequently amended to add a claim that Section 5.1 of the Act had been violated as well.

Commission staff investigated and found probable cause to credit the allegations of discrimination. When efforts to resolve the situation through conference and conciliation were unsuccessful, the case was set for public hearing. The hearing was held on December 13, 1983 in Harrisburg, Pennsylvania, before Commissioners Doris M. leader, Rita Clark, and Raquel Otero de Yiengst.

Initially we must determine whether both sections of the Act cited by Complainant may properly be applied to Respondent. The parties agree that Respondent is an employer within the meaning of Section 4(b) of the Act, and thus subject to the provisions of Section 5(a). The applicability of Section 5.1 is disputed.

Section 5.1(a) prohibits certain practices by "...any officer, agency or department of the State or any of its political subdivisions..."; Section 5.1(b) by its terms provides protection to any "...person employed by the State or any of its subdivisions..." Mr. Swinehart contends that Respondent is an agency of the Commonwealth; Respondent disagrees. The Act does not define "agency". The issue has not been previously addressed by this Commission or by any Pennsylvania court. For the reasons which follow, we find that Respondent is not an agency of the Commonwealth within the meaning of Section 5.1.

Complainant first argues that PSU was and is a creature of statute, created and heavily regulated by the Commonwealth. We agree with that characterization but not with the conclusion drawn from it. Public utilities are heavily regulated by the state; they are not state agencies. See 66 Pa.

C.S.A. §§ 101 et seq. Similarly, the counties of the Commonwealth are created by statute, see 16 P.S. §§ 101 et seq.; they are nonetheless not state agencies.

Complainant also relies on the state and federal cases holding that actions by PSU are "state action". Brush v. Pennsylvania State University Board of Trustees et al., Pa. Super. 375 A.2d 810 (1977), *aff'd* Pa. 414 A.2d 48 (1980); Penner v. Oswald, 592 F.2d 174 (3d Cir. 1979). The cases do so hold; rather than showing that PSU is an agency of the Commonwealth, however, they demonstrate that it is an entity apart from the state.

State action analysis is applied by courts to determine when the conduct of entities which are separate from but intertwined with government should be subject to limitations, such as those in the Fourteenth Amendment to the U.S. Constitution, which by their terms apply only to governmental conduct.

The Third Circuit Court of Appeals in Benner, *supra*, framed its inquiry in terms of "...the considerations necessary to determine whether the conduct of a private entity falls within the rubric of state action." 592 F.2d at 178 (emphasis added). As Respondent argues, if PSU were a part of the Commonwealth, no state action analysis would be necessary.

The essence of Complainant's position is well conveyed by his final argument. Citing a definition of "agency" as "a fiduciary relationship by which a person confides to another the management of some business to be transacted in the former's name or on his account, and by which such person assumes to do the business and render an account of it," (Ballentine's Law Dictionary, 3d ed. 1969, p.49), Complainant argues that PSU is an agency of the Commonwealth in that it performs for the Commonwealth the business of agricultural education and research. As in his previous arguments, Complainant essentially cedes that PSU and the Commonwealth are two separate entities, but maintains that they are so closely involved that the former's actions should be attributable to the latter.

We think this would extend Section 5.1's coverage too far. The question is not free from difficulty; rather than a clear dichotomy between public and non-public entities, we are confronted by a continuum. While PSU has an unquestionably close connection with the Commonwealth, however, we find that its separateness places it beyond the Section's coverage.

A helpful analysis which supports this conclusion is set out in a separate opinion by Superior Court Judge Hoffman, in Brush, *supra*, 375 A.2d at 816 -821, deciding that PSU is not an "agency" of the Commonwealth within the meaning of the Appellate Court Jurisdiction Act, 17 P.S. §211.101 et seq. That Act, like the Human Relations Act, does not define Commonwealth "agency". Judge Hoffman examined a number of factors which he concluded established PSU's separateness from the Commonwealth, including its status as a non-profit corporation chartered for educational purposes, whose board of trustees retains significant authority over disposition of the corporation's property, independent of review by the Commonwealth. Id. at 818-9. He then went on to conclude that PSU's actions were nonetheless "state actions" for purposes of constitutional analysis.

Having concluded that PSU is not subject to Section 5.1 of the Act, we turn to consideration of Mr. Swinehart's Section 5(a) claims. Section 5(a) provides in relevant part:

It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification...(a) For any employer because of the...religious creed...of any individual to refuse to hire or employ, or to bar or discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions, or privileges of employment...

Our decision in Snyder v. Pennsylvania Power & Light, E-17361, decided September 22, 1982, sets out the elements of a prima facie case of discrimination in a similar case brought under this Section of the Act. To make out a prima facie case, Mr. Swinehart must prove:

1. He had a sincerely held religious belief which prevented him from working on his Sabbath;
2. He informed his employer of his belief and of his unwillingness to work on his Sabbath; and
3. His employer took adverse action against him with respect to compensation, tenure, or other terms or conditions of employment because of his religious beliefs.

Snyder, p. 16; McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973); General Electric Corporation v. PHRC, 365 A.2d 649 (1976). We also held in Snyder that a Respondent could overcome such a showing by proof that it could not reasonably accommodate the Complainant's religious beliefs without undue hardship to its business operation.

The parties here do not seriously dispute that Mr. Swinehart has made out his prima facie case, and we find that he has. His own credible testimony established that his sincerely held beliefs prevented him from working on his Sabbath. The parties stipulated that Respondent was advised by Mr. Swinehart of his beliefs and consequent unwillingness to work on his Sabbath. Nor is it disputed that his termination was a direct result of his unwillingness to work on his Sabbath.

The sole area of disagreement in this case involves the extent of Respondent's obligation to reasonably accommodate Mr. Swinehart's Sabbath observance. While not disputing that the obligation exists, Respondent strenuously argues that accommodation in this case would have caused it undue hardship. Resolution of this claim requires analysis of the facts of this case within the framework established by our Snyder decision.

The Milton S. Hershey Medical Center, located in Hershey, PA. is an administrative unit of the Pennsylvania State University. The Center's operations include a hospital, medical school, research facilities, and outpatient treatment clinics, occupying 35 buildings on 388 acres of land. At least part of the operation goes on twenty-four hours a day, seven days a week.

Mr. Swinehart was hired by the University in October, 1967 as a patrol officer at the Center. He was upgraded to Security Sergeant in March of 1968 and held that position until his termination.

Joint Exhibits 1 and 2, job descriptions for the positions of patrol officer and security supervisor, reflect a clear distinction between patrol officer and security supervisor duties; the record as a whole suggests considerable overlap, particularly on weekends when Mr. Swinehart did regular patrol duties. In addition to routinely patrolling the Center and controlling traffic and parking, security personnel regularly had to transport blood and drugs between the Center and other area hospitals, subdue unruly patients and visitors, and in general respond to emergencies including fires and mechanical failures. The Center maintained plans to be used in the event of fire, external disaster, and bomb threat. Security personnel had to be familiar with these plans, and participate in drills whose frequency ranged from once-a-month fire drills to yearly disaster drills.

Mr. Swinehart became a member of the World Wide Church of God in 1977 but did not experience scheduling difficulties immediately; at that time he worked from 8:00 a.m. to 5:00 p.m., Monday through Friday.

At all relevant times, security coverage was provided at the Center around the clock. Each officer was assigned permanently to one of three shifts; Mr. Swinehart's was the daylight shift. Four officers were assigned to the daylight shift; this included Mr. Swinehart. Only two or three worked on any given day. Up to the time of the events giving rise to this case, weekend coverage on the daylight shift consisted of two officers, rotating in alternate weeks with three officers.

George Crowther, the Center's chief of the Department of Safety and Security, testified that in the fall of 1980 a decision was made to increase daylight shift weekend coverage to a minimum of three officers at all times.

His uncontradicted testimony was that increased activity at the Center made this change necessary. Specifically, on weekends a security officer was assigned at all times to the reception desk in the main hospital lobby, which served at those times as a communications center. On weekends when only two officers were assigned to the daylight shift, a difficult situation could arise if for example one officer were in Harrisburg picking up blood and a call came in to the other officer requiring his presence in the emergency room; the second officer would then have to choose between leaving the communications center and postponing any response to the emergency call.

Mr. Crowthers testified that he informed Mr. Swinehart of the proposed change in coverage, and that the change would require Mr. Swinehart to work five out of each six weekends. Mr. Swinehart's response was that he could not work Saturdays. Mr. Crowthers then implemented an interim schedule which required Mr. Swinehart to work on alternate weekends but never on a Saturday. This went into effect in January of 1981 and remained in place while Mr. Swinehart and the Center explored various solutions. When no solution which satisfied the Center was found, Mr. Swinehart was scheduled to work on September 12, 1981 and September 26, 1981, both Saturdays. He declined to do so and was terminated.

Our decision in Snyder listed factors to be considered in determining whether a given accommodation of religious belief would subject the employer to undue hardship. These were:

1. The nature of the employer's business;

2. The frequency and duration of the proposed accommodation;
3. The nature and uniqueness of the work done by the person seeking accommodation;
4. The likelihood that substantial costs will be incurred, including decreased efficiency of the employer's business operation;
5. The extent to which other employees will be burdened by the proposed accommodation.

Snyder, pp. 21 - 22. The list was not intended to be exhaustive. Analysis of Respondent's proof within the framework of these factors persuades us that Respondent has failed to carry its burden of establishing undue hardship .

The record establishes that only two possible accommodations were seriously explored by Respondent: coverage of Mr. Swinehart's assigned Saturdays by volunteers from the security force (who were not offered their shift differential or overtime pay), and a lateral transfer into a position which did not require Saturday work. Neither proved to be feasible. The parties stipulated that "...a consistent pool of volunteers could not be maintained indefinitely." (S. F. 21) No suitable position was found at the Center or the other PSU facility in the area.

We find however that Respondent has failed to prove that other possible accommodations would have caused it undue hardship: Using volunteers and allowing them to maintain their shift differentials, or paying them overtime, or employing a part time guard from a local service such as Globe Security to cover Complainant's assigned Saturdays, while allowing Mr. Swinehart to take leave without pay or use vacation time. Apparently because it decided at the outset that no additional cost of any kind could be incurred for the purpose of accommodating Mr. Swinehart, Respondent never determined the cost of these possibilities.

Mr. Crowther testified that he contacted only one of the available local services, Globe, to inquire about hiring a part time guard; he learned that the service would charge \$5.75 hourly and would assign two guards to the Center. From this, Respondent concluded that the cost of training and using outside guards would be between \$500 and \$1,000. No explanation of the variation between these figures was offered; nor did Respondent rebut Complainant's assertion that it would save money in the long run, as Globe's guards could be paid a lower salary than Mr. Swinehart.

No figures at all were introduced into the record regarding the cost of paying premium wages to volunteers from the Center's own security force, or the possibility of offsetting such cost by placing Mr. Swinehart on leave without pay for the days when a substitute was needed. Respondent argued that such regular leave without pay would make Mr. Swinehart a part-time employee, not entitled to fringe benefits; it claims to have dismissed the possibility because Mr. Swinehart himself never offered to forego his benefits. This begs the question; as Complainant asserts, the record does not indicate that he was ever asked to forego his benefits, or even told that that issue was a barrier to accommodating him. The record does however strongly suggest that Respondent's objection to such regular use of leave without pay was in actuality based on the cost of preparing the necessary personnel action form once each pay period; this cost too was not made part of the record.

Respondent thus relies on the financial hardship which the above alternatives would have posed without ever producing calculations as to actual costs which would have been involved. Reliance is placed on the decision of the United States Supreme Court in Trans World Airlines v. Hardison, 432 U.S. 63 (1977), holding that Title VII does not require an employer to incur more than de minimus cost to accommodate an employer's Sabbath observance. We explicitly rejected the Hardison standard in our Snyder decision, however, and now reaffirm that rejection. Snyder instead looked to the factors already listed above, including the extent to which substantial cost would be involved. We find that Respondent has not proved that accommodating Mr. Swinehart would have exposed it to substantial cost; indeed, on this record, it would be difficult to determine whether even a de minimus cost would have been incurred.

Nor are we persuaded on this record that other employees would have been unduly burdened. Respondent expresses strong distaste for forced overtime; on this record, however, we cannot conclude that other members of the security force would not have volunteered to cover Saturdays for Mr. Swinehart, had they been offered an overtime premium.

At bottom, Respondent's argument that accommodation of Complainant would have forced it to discriminate against other employees seems to us to reflect an unwillingness to treat him differently. In our view, accommodation of religious belief such as Mr. Swinehart's requires unequal treatment. As Justice Marshall's eloquent dissent in Hardison argued, "...if an accommodation can be rejected simply because it involves preferential treatment, then the [EEOC] regulation and the statute [Title VII], while brimming with 'sound and fury'; ultimately 'signify[y] nothing.'" 432 U.S. at \_\_\_\_.

We therefore conclude that Respondent discriminated against Complainant in violation of Section 5(a) of the Act, and direct that relief be provided as described in the order which follows.



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**RECOMMENDATION OF HEARING PANEL**

Upon consideration of the entire record in this case, the Hearing Panel concludes that Respondent violated Section 5(a) of the Human Relations Act, and therefore recommends that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.

October 29, 1984  
Date:

Doris M. Leader  
DORIS M. LEADER  
Chairperson, Hearing Panel

October 29, 1984  
Date:

Rita Clark  
RITA CLARK  
Hearing Commissioner

October 29, 1984  
Date:

Raquel Otero de Yiengst  
RAQUEL OTERO DE YIENGST (dual)  
Hearing Commissioner

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**ORDER**

AND NOW, this 1<sup>st</sup> day of November, 1984, the Pennsylvania Human Relations Commission hereby adopts the foregoing findings of fact, conclusions of law, and opinion, in accordance with the recommendation of the Hearing Panel, pursuant to Section 9 of the Human Relations Act, and therefore

**ORDERS**

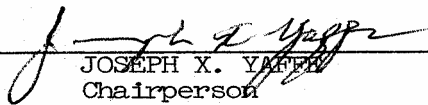
1. Respondent shall cease and desist from discriminating against Complainant on the basis of his religious beliefs.
2. Respondent shall reinstate Complainant to the position of Security Sergeant at the Center within thirty (30) days of the effective date of this order.
3. Respondent shall not schedule Complainant for work during the period from sunset on Friday to sunset on Saturday.
4. Respondent shall pay to Complainant a lump sum of \$17,456.26, being the difference between what Complainant would have earned between his termination and December 13, 1983, had he not been terminated, and the amount actually earned, along with his out of pocket expenses for medical insurance.

Respondent shall also pay to Complainant the difference between his actual earnings and the amount he would have earned had he remained in Respondent's employ for the period beginning December 14, 1983 and ending at such time as a bona fide offer of reinstatement is made to Complainant.


Interest of six per cent per annum shall also be paid by Respondent to Complainant on all amounts described above.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

  
JOSEPH X. YAFFEY  
Chairperson

ATTEST:

  
ELIZABETH M. SCOTT  
Secretary