

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

**CHARLES E. DEAN, II, Complainant**

**v.**

**LARRY McCRAE, INC., Respondent**

**PHRC CASE NO. 200209681**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

**FINAL ORDER**

### FINDINGS OF FACT \*

1. The Complainant herein is Charles E. Dean, II, (hereinafter “Dean”), an adult with the mailing address of P.O. Box 33352, Philadelphia, Pennsylvania 19142. (N.T. 12)
2. The Respondent herein is Larry McCrae, Inc. (hereinafter either “McCrae” or “Respondent”).
3. On or about May 29, 2003, Dean filed a PHRC complaint against McCrae, alleging that on December 20, 2002, Dean was laid off by McCrae in retaliation for Dean having previously filed PHRC complaints. (C.E. 3; O.D. 1)
4. On or about June 19, 2003, PHRC Philadelphia regional office staff served Dean’s complaint on McCrae. (O.D. 1)
5. McCrae failed to file a properly verified answer to Dean’s PHRC complaint. (O.D. 4)
6. Under cover letter dated May 19, 2004, PHRC Philadelphia regional office staff filed and served on McCrae a “Petition for Rule to Show Cause” pursuant to 16 Pa. Code §42.33(c). (O.D. 1)
7. On May 25, 2004, PHRC Motions Commissioner Toni M. Gilhooley, issued and caused to be mailed to McCrae, a Rule to Show Cause Order which extended another opportunity to McCrae to file a properly verified answer on or before June 25, 2004. (O.D. 2)

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

N.T. Notes of Testimony  
O.D. Official Docket  
C.E. Complainant Exhibit

8. Having received no answer, the PHRC, on July 27, 2004, issued an Order which provided “that probable cause is found and judgment is hereby entered for the Complainant on the issue of liability...” (O.D. 4)
9. Conciliation efforts having failed, a Notice of Public Hearing was mailed to the parties on September 28, 2004. (O.D. 6)
10. Having been duly notified, Larry C. McCrae appeared at the Public Hearing held on Friday, November 12, 2004.
11. Dean is an Inside Journeyman Electrician, and for 24 years has been a member of Local 98, Electrical Workers Union (hereinafter “Union”). (N.T. 12-13)
12. For the entire 24 years, Dean’s employment always came from Union referrals. (N.T. 14, 23)
13. Whenever a union member is unemployed, they place their name on a list and receive a number that reflects their place on the out-of-work list. (N.T. 13)
14. When an unemployed member’s number comes up, the Union contacts that member and refers them to a job. (N.T. 13)
15. On or about December 20, 2002, McCrae laid off Dean. (N.T. 17-18)
16. Almost immediately, Dean went to the Union and placed his name on the out-of-work list. (N.T. 19, 20)
17. On April 29, 2003, the Union contacted Dean and referred him to a job with Fischback and Moore, working as an electrician at the same location from which he had been laid off. (N.T. 20-21)
18. Between December 20, 2002 and April 29, 2003, Dean did not attempt to apply for non-union work because, as a Union member, Dean was not allowed to. (N.T. 22-23)

19. Had Dean applied for a non-union electrician job, he could have been expelled from the Union. (N.T. 23)
20. Dean was aware that some unemployed union members made attempts to solicit jobs under an informal "SOJ" system, (solicit ones own job). (N.T. 26, 32-33)
21. As an African American, Dean considered the SOJ process a nepotism system that did not work well, if at all, for minorities. (N.T. 27, 30, 31, 40)
22. Dean had tried the SOJ system in 1991 to no avail and, considering it futile, never attempted it again. (N.T. 30)
23. At the time of his layoff, Dean's rate of pay was \$34.69 per hour for straight time and \$52.03 per hour for overtime. (N.T. 25; C.E. 1)
24. While employed with McCrae, Dean worked an average of 37.4 hours a week on straight time, and an additional 8 hours per week overtime. (N.T. 15; C.E. 1)
25. After the Union referral on April 29, 2003, Dean consistently earned more than he had been earning at the time of his layoff. (N.T. 22)
26. Dean's hours were increased after April 29, 2003 to 12 hours a day, 7 days a week. (N.T. 22)

### **CONCLUSIONS OF LAW**

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of the Complainant's complaint.
2. A combination of Section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31(c) requires a Respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.
3. 16 Pa. Code §42.31(d) declares that the failure of a Respondent to timely answer a complaint places a Respondent in default.
4. Under 16 Pa. Code §42.33, when a Respondent has not answered a complaint a Rule to Show Cause may be issued.
5. Under Pa. Code §42.33(d)(4), when a Respondent does not respond to a Rule to Show Cause, the PHRC may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of appropriate damages.
6. In this matter, the Respondent's failure to file a properly verified answer or to respond to a Rule to Show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.
7. The PHRC has broad discretion in fashioning a remedy.

### **OPINION**

This case arose on a complaint filed by Charles E. Dean, II (hereinafter "Dean") against Larry McCrae, Inc. (hereinafter "McCrae"). Dean's complaint at PHRC Case No. 200209681 alleges that on December 20, 2002, McCrae laid him off in retaliation for Dean having filed prior PHRC complaints. Dean's complaint states a claim under Section 5(d) of the PHRA.

Dean's verified complaint was filed on or about May 29, 2003. By correspondence dated May 19, 2004, the PHRC Philadelphia regional office petitioned Motions Commissioner Gilhooley for a Rule to Show Cause, indicating that McCrae had not properly answered Dean's complaint. The Petition indicated that by correspondence dated March 17, 2003, McCrae was notified that McCrae's failure to properly answer Dean's complaint could result in a judgment being entered for Dean.

On May 25, 2004, a Rule to Show Cause was issued directing McCrae to respond on or before June 25, 2004. After no response was filed, on July 13, 2004, Motions Commissioner Gilhooley recommended a finding of liability to the full PHRC. On July 27, 2004, the full PHRC determined that Dean's December 20, 2002 layoff was in retaliation for Dean having filed prior PHRC complaints.

After the finding of liability in this case, conciliation efforts were unsuccessfully attempted. After conciliation efforts failed, this matter was approved for a public hearing on the limited issue of appropriate damages.

The public hearing on the issue of appropriate damages was held on November 12, 2004 in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Charles L. Nier, III, Esquire, PHRC Assistant Chief Counsel, oversaw the state's interest in the complaint. Larry C. McCrae appeared as a representative of McCrae.

Following the public hearing, Attorney Nier filed a post-hearing brief that was received on February 14, 2005. McCrae did not file a post-hearing brief.

Since liability had been found after McCrae failed to file a properly verified answer, the only question at the Public Hearing was what damages Dean could establish. Under Section 9(f)(1) of the PHRA, the PHRC is empowered to order McCrae "to cease and desist from such unlawful discriminatory practice and to take such affirmative 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 ... reinstatement...with or without back pay...and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice...as, in the judgment of the Commission, will effectuate the purposes of this act..."

Dean presented neither evidence of any loss of work associated with the complaint nor certifiable travel expenses. Additionally, Dean does not seek reinstatement. All Dean seeks is back pay lost for the period between December 21, 2002 and April 29, 2003.

Indeed, Dean was out of work for approximately 18 weeks. At the time of his layoff, Dean was earning \$34.69 per hour and had been working approximately 37.4 hours of straight time per week. In straight time, Dean lost approximately \$1,295.91 per week for a total of \$23,353.31 in lost back pay for straight time. Additionally, Dean lost 8 hours of overtime per week for 18 weeks. Dean's overtime rate was \$52.03 per hour. Lost overtime wages for the 18 week period was \$7,492.32. The total lost wages for the period was therefore \$30,845.63.

At the Public Hearing, Larry McCrae's questions of Dean on cross examination implied that Dean did not sufficiently attempt to mitigate his loss. In effect, Larry McCrae submits that Dean could have used the informal SOJ process and sought electrician jobs rather than simply wait for the Union to contact him with an opening. On this point, Dean credibly testified that the "solicit one's own job" process that some union members informally use, did not work well for minorities. Dean described the SOJ process as basically a nepotism system and that in 1991 he did try the SOJ process but was wholly unsuccessful.

After reviewing the entire record, it is clear that Dean immediately placed himself in a position to be assigned work. The fact that he was not assigned until April 29, 2004, 18 weeks after his layoff, was through no fault of his own. Placing himself on the out-of-work list was a sufficient gesture with

regard to Dean's responsibility to attempt to mitigate his damages. Accordingly, the back pay lost, as calculated above, should not be reduced.

Further, Dean was prevented from seeking and taking just any electrician job. His Union had a strict rule that Union members were not permitted to take non-union jobs when they were out of work. Doing so could mean a member would be expelled from the Union. Under this circumstance, Dean adequately attempted to mitigate his loss.

In addition to a back pay award, Dean is also entitled to an award of interest on the lost back pay. See Goetz v. Norristown Area School District, 328 A.2d 579 (1974).

Accordingly, relief should be ordered as listed with specificity in the Final Order that follows.

**COMMONWEALTH OF PENNSYLVANIA  
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**CHARLES E. DEAN, II, Complainant**

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**LARRY McCRAE, INC., Respondent**

**PHRC CASE NO. 200209681**

**RECOMMENDATION OF THE PERMANENT HEARING EXAMINER**

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Dean suffered damages. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

April 4, 2005  
Date

By:   
Carl H. Summerson  
Permanent Hearing Examiner

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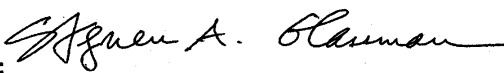
**FINAL ORDER**

AND NOW, this 19<sup>th</sup> day of April, 2005, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Recommendation of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Recommendation into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

**ORDERS**

1. That McCrae shall cease and desist from retaliation against any employee that files a PHRC claim.
2. That McCrae shall pay to Dean, within 30 days of the date of this Final Order, the lump sum of \$30,845.63, which amount represents back pay lost for the 18 week period between December 20, 2002 and April 29, 2003.
3. That, additionally, McCrae shall pay interest of six percent per annum on the back pay award.
4. That within 30 days of the effective date of this Final Order, McCrae shall report to the Commission on the manner of its compliance with the terms of this Final Order by letter addressed to Charles L. Nier, III, Esquire, in the Commission's Philadelphia Regional Office, 711 State Office Building, Broad and Spring Garden Streets, Philadelphia, PA 19130-4088.

**PENNSYLVANIA HUMAN RIGHTS COMMISSION**

By: 

**Stephen A. Glassman**  
Chairperson

**ATTEST:**



**Daniel D. Yun**  
Secretary