

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

DORIS FOLMAR, Complainant

v.

**MOSHANNON VALLEY CITIZENS, INC.,
d/b/a PHILIPSBURG AREA HOSPITAL, Respondent**

PHRC CASE NO. 200100574

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

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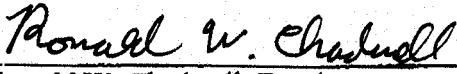
**PHRC DOCKET NO. E-100573-D
PHRC CASE NO. 200100574**

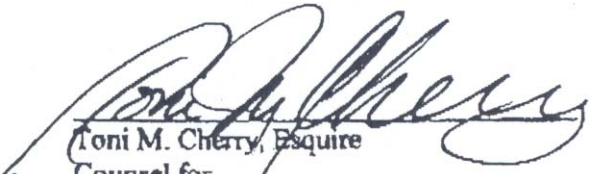
STIPULATIONS OF FACT

Respondent and Pennsylvania Human Relations Commission, Harrisburg regional Office staff hereby stipulate to the following facts:

1. The Complainant - Doris Folmar ("Folmar") - is a competent adult who resides in Drifting, Pennsylvania 16834.
2. Respondent—Moshannon Valley Citizens, Inc., d/b/a Philipsburg Area Hospital - is an "employer" for purposes of the Pennsylvania Human Relations Act, with a mailing address of 210 Loch Lomond Road, Philipsburg, Pa 16866.
3. The employment actions challenged in the Complaint allegedly occurred in Centre County.
4. Folmar filed a timely Complaint with the Pennsylvania Human Relations Commission (the "PHRC"), alleging that Respondent terminated her employment because she is female, in violation of the Pennsylvania Human Relations Act.
5. Respondent filed an Answer and an Amended Answer with New Matter in both of which Respondent denied that it had terminated Folmar's employment because she is female.
6. PHRC Harrisburg Regional Office staff docketed the Complaint on October 10, 2001.
7. PHRC Harrisburg Regional Office staff served Respondent with a true and correct copy of the Complaint on October 29, 2001.
8. PHRC Harrisburg Regional Office staff served Respondent with a Probable Cause Finding on May 1, 2003.
9. By letter dated May 1, 2003, PHRC Harrisburg Regional Office staff invited Respondent to attend a Conciliation Conference.
10. The case did not conciliate.
11. PHRC Hearing Examiner convened a mediation conference in this matter on April 8, 2004.
12. The case did not settle.
13. All jurisdictional prerequisites for a public hearing have been satisfied.
14. Complainant is female.
15. Respondent hired Complainant as its Human Resource Manager on February 20, 1995.

16. Respondent terminated Complainant's employment on March 30, 2001.
17. Respondent advised Complainant that the position of Human Resource Manager and the position of Development Fund Coordinator had been combined into one job that would be performed by Joseph Dugan, a male.


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Date: 11/2/04

Date: 11/2/04

FINDINGS OF FACT*

1. In March 1991, the Philipsburg State General Hospital was forced to close. (N.T. 54, 215, 238)
2. In 1991, Moshannon Valley residents formed Moshannon Valley Citizen's Inc. in an effort to secure state authorization to reopen the local hospital. (N.T. 55, 214, 215, 365)
3. Moshannon Valley Citizen's Inc. lobbied for the opportunity to run the hospital and in December 1992, the hospital reopened. (N.T. 214, 215)
4. Moshannon Valley Citizen's, Inc., d/b/a Philipsburg Area Hospital (hereinafter "the Hospital") is the Respondent in this case. (S.F. 2)
5. Since December 1992, the small non-profit community 50 bed Hospital has been run by an eight member board made up of Moshannon Valley residents. (N.T. 55, 132, 184, 185, 226)
6. The eight members on the Hospital's board are not paid for their services. (N.T. 238)
7. Members of the Hospital Board serve on various committees. (N.T. 188, 216)
8. The Hospital's fiscal year ends on June 30 and each year a financial audit is conducted and the Board receives an audit report in or about October/November. (N.T. 238, 239, 298)

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

9. Since reopening in 1992, the Hospital has operated on a very tight budget. (N.T. 57, 134, 201)
10. Many of the Hospital's employees are unionized. (N.T. 103)
11. On February 20, 1995, the Complainant, Doris Folmar, (hereinafter "Folmar"), was hired by the Hospital as the Human Resource Manager. (S.F. 15)
12. In 1977, Folmar graduated with distinction from Penn State University with a major in Labor Studies. (N.T. 22, 49)
13. After college, Folmar worked for approximately 1½ years for Womeldorf Incorporated as a Personnel and Safety Supervisor. (N.T. 23)
14. Subsequent to working for Womeldorf Incorporated, Folmar attended Boyd Career Schools where she obtained a diploma in "traveling". (N.T. 22-23)
15. Next, Folmar worked for Penn Traffic Company between September 1979 and March 1980. (N.T. 23; C.E. 2)
16. From March 1980 through October 1981, Folmar worked in Youngstown, Ohio as a Customer Service Representative with Crown Airways, a Division of Brockway Glass Company. (N.T. 23; C.E. 2)
17. In October 1981, Folmar was transferred to Brockway Glass Company's manufacturing facility in Brockway, Pennsylvania where she assumed the position of Assistant Personnel Manager. (N.T. 23; C.E. 2)
18. In October 1984, Folmar was promoted to Personnel Manager and remained in that position through a 1988 merger of Brockway Glass Company with Owens Illinois Glass Company. (N.T. 24; C.E. 2)
19. In or about June or July 1990, Folmar was transferred to Clarion, Pennsylvania where she held the position of Industrial Relations Director. (N.T. 23-24; C.E. 2)
20. In June 1994, Owens Illinois Glass Company eliminated all Industrial Relations Director positions in all of its manufacturing facilities. (N.T. 24)
21. Once Folmar assumed the Hospital's generalist position of Human Resource Manager in 1995, her duties generally involved all areas of employment, training, benefits, contract policy, administration, maintenance of employee records, payroll, etc. (N.T. 24)
22. During the time Folmar held the position of Human Resource Manager, the job description for the position of Human Resource Manager listed as minimum qualifications either:

Bachelor's Degree in Human Resources or Business Administration and four (4) years experience in Human Resources Management; including wage and benefits administration, employee and labor relations, and recruitment.

or

Five (5) years hospital experience with three (3) years Human Resources Generalist experience; including wage and benefits administration, employee and labor relations and recruitment.

(C.E. 1)

23. The Human Resource Manager job description lists the following as "Essential Responsibilities & Duties":

Recruit and screen applicants for all wage and salaried employees and assist the department manager in the final selection decision.

Manage employee and labor relations, prevent and mediate disputes and grievances.

Keep the CEO abreast of employee and labor relations issues and assist with labor negotiations.

Identify appropriate training programs and coordinate training with Department Managers.

Coordinate the orientation schedule of new employees with the Education Coordinator and Department Managers.

Educate and reinforce the managers' practice of fair, legal and organizationally consistent management initiatives.

Administer the compensation, benefits program and policies and recommend changes which better meet employees' needs, promote hospital values and are most cost-effective.

Review and update job descriptions with the Department Managers to reflect new job structure and technology.

Advise department managers on performance issues and assist with disciplinary and termination procedures.

Implement policies and procedures to ensure compliance with the applicable local, state and federal laws.

Be able to interpret and implement the collective bargaining agreement as it applies to pay policies, job bids, seniority, benefits, etc.

Maintain accurate information on employees (addresses, phone numbers, license verifications, tax status, etc.)

Input and maintenance of employee information into the payroll system (deductions, insurance, wage attachments, personal information, status, wage rates).

Coordinate implementation of new and/or existing benefit programs and annual re-enrollment process.

Attend required meetings and participate on committees as required.

Develop and recommend a department operating budget and ensure that the department operates within the budget.

Performs other related duties as required.

(C.E. 1)

24. The Human Resource Manager job description also listed the following requisite “Knowledge, Skills & Abilities”:

Knowledge of Federal and State laws regulating employment and labor contracts; i.e. Civil Rights Act, ADA, ADEA, ERISA, Taft-Hartley, COBRA, HIPPA

Knowledge of organizational and job design approaches and continuous quality improvement.

Knowledge of merit and skill based compensation strategies.

Knowledge of benefits administration procedures.

Knowledge of hospital employee licensure, degree, licensure and certification requirements.

Interpersonal alertness/sensitivity.

Oral and written communication and presentation skills.

Organization/Planning skills

Interview skills

Sociability

Ability to work independently

(C.E. 1)

25. The first performance evaluation Folmar received was dated January 19, 1996, and rated her as meeting standards in 5 of 7 categories and as exceeding standards in the remaining two categories. (N.T. 31; C.E. 3A)
26. Folmar’s supervisor noted that Folmar “has proven to be a valuable employee and resource. She can be counted on frequently to perform difficult assignments in a highly competent and professional manner. She remains an asset to PAH.” (C.E. 3A)
27. Folmar’s next evaluation in January 1997 rated her as exceeds standards in all seven categories rated. (N.T. 31; C.E. 3B)
28. Folmar’s then supervisor noted that Folmar “is a distinct asset to our organization. She has conducted all matters assigned to her in a efficient, effective and courteous manner. Very dependable employee.” (C.E. 3B)
29. In April 1997, Michael Kennedy was hired by the Hospital as an accountant. (N.T. 86)
30. Approximately three months later, Michael Kennedy (hereinafter “Kennedy”) became the Hospital’s Chief Financial Officer (“CFO”). (N.T. 86)
31. Approximately three months after that, Kennedy assumed the duties of Chief Executive Officer (“CEO”) and CFO. (N.T. 86)
32. Approximately six months later, the Hospital’s Board approved Kennedy’s recommendation that the positions of CEO and CFO be consolidated. (N.T. 87)

33. As Folmar reported to the CEO, once Kennedy became the CEO, he became Folmar's immediate supervisor. (N.T. 73, 87)
34. Kennedy first evaluated Folmar in January 1998. (N.T. 31; C.E. 3C)
35. Kennedy's January 1998 evaluation of Folmar rated her as exceeds standards in 6 categories and meets standards in the remaining category. (C.E. 3C)
36. Kennedy also noted that Folmar, "is a very competent Human Resources director. She exceeds all standards for performance..." (C.E. 3C)
37. Folmar's 1999 evaluation from Kennedy rated her as exceeds standards in four categories and meets standards in the remaining three categories. (C.E. 3D)
38. Kennedy's April 2000 evaluation of Folmar rated her as exceeds standards in five categories and meets standards in two categories. (C.E. 3E)
39. In his notes on the April 2000 evaluation, Kennedy indicated that Folmar "continually demonstrates the ability to perform the duties of HR manager on a daily basis. The department runs efficiently. [Folmar] looks for ways to improve employee relations and solves day-to-day problems with skillful aptitude. She maintains positive attitude and suggests improvements routinely." (C.E. 3E)
40. Kennedy's February 7, 2001 evaluation of Folmar again rated her as exceeds standards in five of seven categories. (C.E. 3F)
41. In the comments section, Kennedy noted that Folmar "continually demonstrates the ability to perform the duties of HR manager on a daily basis. [Folmar] looks for ways to improve employee relations and solves day-to-day problems skillfully. I would request that she continues to maintain a positive attitude and enhance the Hospital's presence in the community." (C.E. 3F)
42. Effective October 2, 2000, the Hospital hired Joseph Dugan (hereinafter "Dugan"), for the full-time position of Development Fund Coordinator at an annual salary of \$20,000.00. (N.T. 33-34, 491; C.E. 4)
43. At the time of Dugan's hire, the Board had a Development Committee but decided to hire Dugan as a coordinator. (N.T. 387)
44. Dugan had no education beyond the high school level. (N.T. 403)
45. Dugan's work experience included working as a District Office Manager for a local political representative, 25 years as a wrestling referee, sales and marketing, and serving as an elected member of the local school board for 13 years. (N.T. 403-408)
46. In February, 2001, after approximately four months of employment, Kennedy evaluated Dugan's performance noting that Dugan exceeded standards in only one category, met standards in 4 categories, and marked Dugan as doing a bit more than meeting standards in one category and doing a bit less than meeting standards in one category. (N.T. 114; C.E. 12A)
47. In October/November of 2000, the Hospital Board was both displeased and astounded to learn that the audit report for the fiscal year 1999/2000 revealed there was approximately a \$850,000.00 shortfall. (N.T. 57, 131, 219, 239, 299)
48. In previous years, the Board had acted on the Hospital's CEO's suggestions to consolidate positions in an effort to save money. (N.T. 60, 61, 67, 136, 207)
49. Additionally, in or about November/December 2000, the Board had asked management employees to take a voluntary 3% pay cut. (N.T. 134, 301, 369)
50. After learning of the shortfall, Mark Harry, (hereinafter "Harry"), the chairperson of the Board's Finance Committee, asked Kennedy for a list of all Hospital managers and their salaries. (N.T. 216, 220, 303, 370)

51. After repeatedly requesting such a listing from Kennedy and not being provided with the list, in March 2001, Harry requested the list directly from Folmar who provided Harry with the information he requested. (N.T. 303-304)
52. With such a large deficit showing up in the 1999/2000 fiscal year financial audit, the Board decided to consolidate the positions of Human Resource Manager and Development Fund Coordinator. (N.T. 221, 304)
53. Kennedy advised the Board against consolidation of these two positions. (N.T. 246)
54. At the time the Board was comprised of seven men and one woman. (N.T. 185)
55. On March 28, 2001, after an executive session of the Board, then Chairperson, David Wulderk, (hereinafter "Wulderk") called Kennedy and advised him that the Board had decided to consolidate the positions of Human Resource Manager and Development Fund Coordinator and that Kennedy was to terminate Folmar and inform Dugan that he had been selected to take on the new consolidated position and Dugan would be given a \$5,000.00 raise. (N.T. 106, 149)
56. Kennedy responded that Dugan was not doing a good job in the Development Fund Coordinator position and that he did not think Dugan could do the Human Resource job. (N.T. 154, 258)
57. Wulderk told Kennedy that Dugan is a "good guy" and that he would work well. (N.T. 108, 154)
58. The next day, when Kennedy informed Dugan of the Board's instruction, Dugan initially responded that he cannot do the job because he does not know anything about human resources. (N.T. 109, 154-155)
59. Dugan repeated three or four times that he knows nothing about human resources. (N.T. 157)
60. Upon hearing this, Kennedy informed the Board of Dugan's response. (N.T. 154-155)
61. Additionally, Kennedy was not in favor of Dugan's selection because in Kennedy's opinion, Dugan lacked abilities needed to run the Human Resources department and Kennedy did not want to lose Folmar. (N.T. 108, 148)
62. On March 30, 2001, Kennedy informed Folmar that the Board had instructed him to terminate her employment. (N.T. 33, 75)
63. Folmar had no idea that her job had been in jeopardy. (N.T. 33)
64. When Kennedy informed Folmar that she was terminated, he made no mention of concerns regarding her job performance. (N.T. 73)
65. Following Dugan's selection for the consolidated position, Dugan rewrote the job qualifications for the consolidated position by adding the following additional possible minimum job qualification: "Five (5) years experience or more in administrative position with emphasis in research and communication and fund raising experience." (N.T. 114; C.E. 11)
66. Before this qualification was added, Dugan did not meet the minimum qualifications listed for the Human Resource Manager position. (N.T. 113; C.E. 1)
67. When Folmar was the Human Resource Manager, she had one Secretary/Assistant. (N.T. 123)
68. When Dugan assumed the consolidated position, he had no computer skills. (N.T. 115-116, 402)
69. Initially, when Dugan assumed the position, the permanent Secretary was out on maternity leave and a casual employee was filling in. (N.T. 150)
70. When the permanent Secretary returned, the casual Secretary stayed and, over time her presence in the office increased. (N.T. 150)

71. When Dugan was the Development Fund Coordinator, he did not have an assistant. (N.T. 124)
72. In the Summer or 2001, Kennedy was given a \$15,000.00 raise. (N.T. 126, 385)
73. In July 2002, the Board announced that Dugan would receive in four intervals a \$6,500.00 raise. (N.T. 122; C.E. 13)
74. Between November 2000 and November 2003, Dugan raised \$30,947.40 in furtherance of the Development Fund Coordinator component of the consolidated position. (N.T. 392; C.E. 15)
75. Prior to placement in the consolidated position, Dugan's salary was \$20,000.00 per year. (N.T. 13)
76. After April 1, 2001, Dugan's salary in the consolidated position increased to \$25,000.00 per year. (N.T. 13)
77. At the time of Folmar's termination, her salary was \$31,687.40 per year. (N.T. 14)
78. As a Hospital employee, Folmar had medical insurance coverage as a benefit of employment. (N.T. 15)
79. From April 2001 to February 2002, in order to continue medical coverage after her termination, Folmar paid COBRA payments to the Hospital in the amount of \$1,709.26. (N.T. 14-15)
80. From March 2002 through January 2003, Folmar paid \$109.00 per month for medical coverage through her husband's employer. (N.T. 46)
81. From February 2003 through April 2003, Folmar paid \$120.00 per month for medical coverage through her husband's employer. (N.T. 46)
82. From May 2003 through November 2003, Folmer paid \$15.00 per month for medical coverage through her husband's employer. (N.T. 46)
83. In December 2003, in order to obtain "Short-term Major Medical" coverage, Folmar paid \$432.00 for 90 days of coverage. (N.T. 45; C.E. 8)
84. On March 8, 2004, Folmar paid an additional \$127.00 for coverage for part of March 2004. (N.T. 46-47; C.E. 9)
85. From April 2004 through the date of the Public Hearing, Folmer paid \$205.80 per month for medical coverage. (N.T. 47-48; C.E. 10)
86. After her termination, Folmar earned \$11,645.34 from other employment in 2001. (N.T. 42-43; C.E. 6)
87. In 2002, Folmer earned \$1,884.25 from a job with a local temporary agency. (N.T. 43-44; C.E. 7)
88. After being terminated, Folmer attempted to find alternate work by applying to numerous businesses in the Clearfield/Philipsburg area. (N.T. 48)
89. In October 2001, Folmer applied to PennDOT for the position of Community Relations Coordinator. (N.T. 48)
90. In October 2002, Folmer applied to be an Administrative Assistant with Colonial Courtyard. (N.T. 48)
91. Folmer reviewed Career Link ads, answered blind ads and submitted applications to Appalachian Wood, Lock Haven University, Gannet Fleming Engineers, Wal-Mart, the Dubois Campus of PSU, and sought human resource jobs with Penn State. (N.T. 48, 77)
92. Folmer was interviewed by Colonial Courtyard and the West Branch School District but was not hired. (N.T. 77)
93. The last time Folmar worked was for a temporary agency in 2002. (N.T. 48-49)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter “PHRC”) has jurisdiction over the parties and subject matter of this case.
 2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
 3. Folmar is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter “PHRA”).
 4. The Hospital is an employer within the meaning of the PHRA.
 5. Section 5(a) of the PHRA, 43 P.S.(a) § 955(a), prohibits employers from unlawfully discriminating against employees because of their sex regarding discharge.
 6. Folmar has met her initial burden of establishing a *prima facie* case of sex-based failure to award her a consolidated position by proving that:
 - a. she is a member of a protected class;
 - b. she was qualified for the combined position in question;
 - c. despite her qualifications, she was denied the new position; and
 - d. the newly created position was awarded to an individual with either equal or less qualifications than Folmar’s and who is not a member of her protected class .
- See PHRC v. Johnstown Redevelopment Authority*, 527 Pa. 71, 588 A.2d 497 (1991).
7. The Hospital articulated legitimate nondiscriminatory reasons for terminating Folmar.
 8. Demonstrations of weakness, implausibility, inconsistencies or contradictions in an employer’s articulated explanations for its actions may form the basis to rationally find that such explanations are unworthy of credence. *See Tumolo v. Triangle Pacific Corp.*, 80 Fair Empl. Cas. (BNA) 574 (E.D. Pa. 1999) citing *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 331 (3d Cir. 1995).
 9. A belated reliance on purported criticisms tends to show pretext. *See Levin v. Analysis & Technology, Inc.*, 960 F.2d 314 (2d Cir. 1992).
 10. The evidence establishes by a preponderance that the Hospital’s reasons are pretextual.
 11. Folmar has established by a preponderance of evidence that the Hospital unlawfully discriminated against her because of her sex, female, in violation of Section 5(a) of the PHRA.
 12. The PHRC has broad discretion in fashioning a remedy.
 13. Folmar is entitled to lost wages plus 6% interest.
 14. Folmar is entitled to the money she has paid in order to replace her medical insurance plus 6% interest.
 15. Folmar is also entitled to reinstatement.

OPINION

This case arises on a Pennsylvania Human Relations Commission (hereinafter “PHRC”) complaint filed on or about September 20, 2001 by Doris Folmar (hereinafter “Folmar”), against Moshannon Valley Citizens, Inc., d/b/a Philipsburg Area Hospital (hereinafter “Hospital”). Folmar’s complaint alleges that she was terminated from her position as Human Resources Manager because of her sex, female. This allegation alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 *et seq* (hereinafter “PHRA”).

PHRC staff investigated the allegation and at the conclusion of the investigation, the Hospital was informed that probable cause existed to credit Folmar’s allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and

persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the Hospital that it had approved a Public Hearing.

The Public Hearing was held on November 4 and 5, 2004, in State College, Pa., before Permanent Hearing Examiner Carl H. Summerson. PHRC staff attorney Ronald Chadwell presented the case on behalf of the complaint. Toni M. Cherry, Esquire, appeared on behalf of the Hospital. Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. The PHRC post-hearing brief on behalf of the complaint was received on February 7, 2005, and the Hospital's post-hearing brief was received on February 10, 2005. Additionally, on February 24, 2005, PHRC attorney Chadwell filed a reply post-hearing brief in response to the Hospital's post-hearing brief.

Section 5(a) of the PHRA states in pertinent part:

It shall be an unlawful discriminatory practice...[f]or any employer because of the...sex...of any individual...to discharge from employment such individual...

In this case, the Hospital's consolidation of two positions, in effect, created a totally new position with new job requirements made up of a combination of the job requirements for Human Resource Manager and Development Fund Coordinator. No effort is made in the Hospital's post-hearing brief to articulate the elements of a requisite *prima facie* case. All the Hospital's post-hearing brief says is that the Complainant has the burden of establishing a *prima facie* case. The PHRC Harrisburg regional office post-hearing brief suggests this is a reduction in force case, however, this case is actually a reorganization scenario in which an entirely new position was created after the consolidation of two positions. In effect, the Hospital only considered Folmar and Dugan for the newly created position. Under the circumstances present, the proper *prima facie* analysis is more appropriately an alleged discharge after refusal to instate Folmar into the consolidated position. Accordingly, to establish a *prima facie* case of sex-based discharge and refusal to instate, the Complainant must show:

1. that she is a member of a protected class;
2. that she was qualified for the combined position;
3. that despite her qualifications, she was denied the new position which resulted in her termination;
4. that the newly created position was awarded to an individual with either equal or less qualifications than Folmar, and who is not a member of Folmar's protected class.

PHRC V. Johnstown Redevelopment Authority, 527 Pa. 71, 588 A.2d 497 (1991).

If Folmar can establish a *prima facie* case, the burden of production then shifts to the Hospital to "articulate some legitimate, nondiscriminatory reason" for not retaining Folmar. McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802 (1973). The Hospital would be required to rebut the presumption of discrimination created by the *prima facie* showing by producing evidence of an explanation which must be "clear and reasonably specific," and "legally sufficient to justify a judgment" for the Hospital. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). Said differently, if Folmar does establish a *prima facie* case, the Hospital would not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If Folmar presents a *prima facie* case and the Hospital carries the relatively light burden of production, Folmar would then be required to satisfy the burden of persuasion and show that any

legitimate reasons offered by the Hospital were not its true reason, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden then merges with Folmer's burden of persuading us that Folmar has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that the Hospital intentionally discriminated against Folmar remains at all times with Folmar. Id., at 253.

On the initial question of whether Folmar can establish a *prima facie* case, there is no question that Folmar meets the first and third elements of the requisite *prima facie* showing. As a female, she is a member of a protected class and without question, she was terminated after being denied the newly created consolidated position. Regarding the second requisite element, Folmar presented substantial evidence that she was eminently qualified for the human resource component of the combined position. Folmar also presented evidence that in prior employment she had performed a fund raising function. She also presented evidence that she had facilitated some fund raising while an employee of the Hospital.

On the question of whether Folmar established that she was at least equally qualified as Dugan, a male, for the consolidated position, the evidence shows that Folmar's qualifications were far superior to Dugan's with regard to the primary duties associated with the consolidated position. Both the Board's Chairperson, David Wulderk, (hereinafter "Wulderk"), and the Chairperson of the Board's Finance Committee, Mark Harry, (hereinafter "Harry"), testified that the human resource role of the consolidated position was the most important component of the consolidated position. (N.T. 249, 268) Harry even testified that there was Board consensus that the human relations component was recognized as the most important part of the combined position. (N.T. 249) The evidence shows that Dugan had very little human resource experience. While he may have previously participated in negotiating several collective bargaining agreements while a school board member, contract negotiation was only one function among the multifaceted job duties associated with the position of Human Resource Manager. While Folmar had demonstrated qualifications for every component of the newly created position, hiring Dugan to perform the full range of human resource duties can best be described as experimental. Hospital Board member Patrick Couturiaux, (hereinafter "Couturiaux"), in effect testified that despite Dugan not having the qualifications, maybe Dugan would be good at the job and that because he might work-out, Dugan should be given a chance. (N.T. 379) Considering the record as a whole, Dugan's qualifications for the consolidated position were sorely lacking when compared to Folmar's qualifications.

Clearly, Folmar has established by a preponderance of evidence each of the four elements of the requisite *prima facie* showing. Accordingly, we turn to the question of whether the Hospital has articulated legitimate nondiscriminatory reasons for terminating Folmar instead of Dugan. Generally, the reasons offered by the Hospital involved purported issues with Folmar's job performance and a financial concern. At the Public Hearing, the Hospital offered the testimony of numerous Board members and several individuals who at relevant times were Union officers. The Hospital's post-hearing brief summarizes the Hospital's reasons by stating that Folmar had a history of poor interpersonal relationships with employees and that the Board had received complaints about a strained relationship between Folmar and union members. The Hospital also offered that Folmar was weak and the Board was not satisfied with Folmar's performance in contract negotiations. Further, the Hospital offered that Folmar did not provide answers to questions on a regular basis. Finally, the Hospital asserts that the selection of Dugan was made for financial reasons in that by selecting Dugan, the Hospital would save money.

Fundamentally, the Hospital satisfies its production burden by articulating these reasons. Because the Hospital has successfully articulated legitimate nondiscriminatory reasons, Folmar has the task of proving that the reasons proffered are not worthy of belief and that the true reason for not selecting her for the consolidated position and terminating her was sex-based discrimination. Folmar must, “demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable fact finder *could* rationally find them ‘unworthy of credence’ and hence infer “that the employer did not act for [the asserted] nondiscriminatory reasons.”” Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1999), quoting McDonnell Douglas Corp., 911 U.S. at 802, see also Santiago-Ramos v. Centennial P.R. Wireless, 83 FEP 569, 575 (1st Cir. 2000).

The Pennsylvania Supreme Court also articulated principles which are useful in the ultimate resolution of this case. The court stated that:

[A]s in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? 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.” Aikens, 460 U.S. at 716, 103 S. Ct. at 1482. 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. She is not, however, entitled to be aided by a presumption of discrimination against which the employer’s proof must “measure up.”” Allegheny Housing Rehabilitation Corp. v. PHRC, 517 Pa. 124, 532 A. 2d 315 (1987).

The PHRC regional office post-hearing brief correctly observes several important principles as we approach the evidence in this case. Indeed, the Pennsylvania Supreme Court noted: “One intent on violating the law against discrimination cannot be expected to disclose or announce his purpose.” PHRC v. Chester School Dist., 427 Pa. 157, 233 A.2d 290, 298 (1967). Further, the U.S. Supreme Court noted, “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.” U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). We do recognize that “[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered.” Jackson v. University of Pittsburgh, 826 F.2d 230, 236 (3rd Cir. 1987), cert denied, 484 U.S. 1020 (1988). In Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3rd Cir. 1987), cert. denied, 483 U.S. 1052, the court recognized that discrimination is often subtle. Further, discrimination is uniquely difficult to prove and often proof depends on circumstantial evidence. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3rd Cir. 1996) and Krodell v. Young, 748 F.2d 701, 707 (D.C. Cir. 1984) (quoting Cuddy v. Carmen, 694 F.2d 853, 859 (1985)). Because of a susceptibility to discriminatory abuse, close scrutiny is required where a hiring decision is made on subjective, unarticulated criteria. See Royal v. Missouri Highway & Transportation Comm’n, 655 F.2d 159, 164 (8th Cir. 1981). Pragmatically, evidence on both sides must be carefully and thoroughly weighed and the appropriate inferential force assigned to various evidence and testimony. Further, as with any case, witness credibility must be assessed.

Another controlling principle that covers situations like the one present in this case is that the PHRC may not act as a “super board of directors” reviewing bona fide management decisions. See Bishop v. Jelleff Assoc., 398 F. Supp 579 (D.D.C. 1974). The Hospital’s post-hearing brief correctly observes that employers need not be wise, shrewd, prudent or even competent and that decisions may even be wrong or misguided. See Dejarnette v. Corning, Inc., 75 FEP 1088, 1092 (4th Cir. 1999). We agree that it would be an error to substitute our own standard of appropriate personnel performance in place of the Hospital’s standard. Instead, the inquiry must assess whether the Hospital’s stated reason that Folmar’s performance was unsatisfactory is credible. If a proffered personnel decision appears credibly based simply on unsound poor business judgment it would not be proper to impose a judicial standard of business judgment on such a seemingly bad decision. On the other hand, we are also mindful that at times, a decision is “so plainly wrong that it cannot have been the employer’s real reason.” Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 413 (3rd Cir. 1994). Courts have also observed that situations where there has been a failure to give fair consideration to the qualifications of a female can be uncovered as simply a ruse disguising discrimination. See Pond v. Braniff Airways Inc., 500 F.2d 161 (5th Cir. 1974), and U.S. v. Wattsburg Area Sch. Dist., 15 FEP 731, 737 (W.D. Pa. 1977).

The basic guiding principle at this stage of the analysis is that since the Hospital has articulated legitimate nondiscriminatory reasons for its actions, Folmer must show both that the Hospital’s reasons are pretextual and that the true reason is discriminatory. See Thomas v. Eastman Kodak Co., 183 F.3d 38, 56 (1st Cir. 1999) cert. denied, 120 S.Ct. 1174 (2000). Indeed, there must be a determination that Folmar’s sex was a determining factor in why she was not selected for the combined position and terminated.

This said, critical inferences drawn from circumstantial evidence presented in this case leads to the conclusion that Folmar’s sex was a determining factor in the Hospital’s failure to select Folmar for the consolidated position and ultimately for her termination. In the aggregate, there are so many unexplained inconsistencies, irregularities, and holes in the Hospital’s proffered legitimate nondiscriminatory reasons that such reasons simply cannot be believed. Essentially, the Hospital’s evidence of nondiscriminatory reasons is rejected because, individually and collectively, such reasons lack credibility. Although each flaw may individually appear small, when viewed together, the Hospital’s explanations crumble.

Initially, Dugan’s initial hiring raises concern. From the testimony we learn that at the time of Dugan’s hiring the Board already had a Development Committee. (N.T. 387) There was no dispute that since reopening in 1992, the Hospital operated on a very tight budget. (N.T. 57, 134, 201) The Board had repeatedly requested that Kennedy find ways to cut costs. (N.T. 135) Indeed, there had been an ongoing directive to cut costs. (N.T. 60) Further, Kennedy credibly testified that prior to the end of the 1999/2000 fiscal year on June 30, 2000, Kennedy had been telling the Board of looming financial concerns. (N.T. 130) In fact, the record shows that the fiscal year 1999/2000 audit revealed a financial loss of approximately \$850,000. (N.T. 131) At about the same time as the Board received this unpleasant financial news, Dugan was hired to coordinate fund raising. (N.T. 419)

A very troubling feature of the hiring of Dugan is the evidence that between November 2000 and November 2003, only \$30,947.40 was raised. (C.E. 15) Had the positions not been consolidated, at an annual salary of \$20,000, Dugan would have been paid \$60,000 to raise just under \$31,000.

Not a very prudent action when there was already a Development Committee. One is led to ask, is this really why Dugan was hired?

Next, it is clear that the Board learned of the financial shortfall in or about October/November 2000, however, the action to consolidate the Human Resources Manager position with the Development Fund Coordinator position did not occur until the end of March 2001 approximately five months later. Was this delay simply taken to afford Dugan an opportunity to become more familiar with the Hospital's operation?

Harry offered that the delay was attributable to the Board not promptly getting information from Kennedy regarding a list of all managers and their salaries. (N.T. 303) Certainly, the Board knew of the existence of the two positions they eventually consolidated. The Board has just approved the hiring of Dugan in October of 2000 and certainly, they knew that Folmar was serving as their Human Resource Manager. While the precise information was finally requested from Folmar and she promptly provided the requested information, we are asked to believe the Board only decided to consolidate the Human Resource Manager position with the Development Fund Coordinator position after receipt of the listing of managers and their salaries.

While, prior to March 2001, the Board had approved consolidation recommendations from staff, Board member Mary Ann Moore, (hereinafter "Moore"), testified that the consolidation of the Human Resource Manager and Development Fund Coordinator positions was the first time the Board acted in a manner autonomous of staff recommendations. (N.T. 304) It is also worthy of mention that after learning of the financial shortfall in the fall of 2000, the Board acted to consolidate no other positions until approximately September 2003, over two years later. (R.E. 5) Only the Human Resource Manager and Development Fund Coordinator positions were affected in 2001. By consolidating only these two positions at the time, only one salary would be saved. This certainly would not go very far towards addressing the \$850,000 shortfall that was reported. In other words, this measure minimally addressed the financial problem. It would seem that if the financial issue motivated the Board, certainly more than these positions would have been affected. It is true that the Board did take action to request that management employees voluntarily take a 3% pay cut. (N.T. 134, 310, 369) On this point, the evidence shows that only 47% agreed to this suggestion. (N.T. 134)

Kennedy offered vague testimony that in the fall of 2000, he attempted to explain to the Board that "set asides" negatively affected the audit report and that in the following year there could even be a profit shown. (N.T. 132) Exactly what he was trying to say was not made clear. What was clear was that Kennedy offered that the Board was told that the financial shortfall shown on the audit may just have been an accounting technique that would adjust the following year.

A major discrepancy in the Hospital's purported reasons can be seen in the evidence offered that by the fall of 2000 the Board had lost confidence in Kennedy. (N.T. 256, 300, 316) Board members testified that there was a frustration that when Kennedy would be asked for recommendations for deeper cuts, he would repeat that the Hospital was already cut to the bone and there was no where else to cut. (N.T. 218, 219, 255) Standing in stark contrast with this testimony is the simple fact that in the Summer of 2001, only months after Folmer's termination, Kennedy was awarded a \$15,000 per year raise. (N.T. 126, 385) When Board members were asked to explain this anomaly, they simply offered that Kennedy was given a raise just because other managers were given raises. (N.T. 330, 385) It is simply incomprehensible to think that a Board that has severe financial problems would award a large raise to a management employee

with whom they have lost confidence and with whom they are dissatisfied. We must also remember that Kennedy was initially hired as an accountant. Only three months later he became the Hospital's CFO and three more months later, he assumed the duties of both CFO and CEO. Kennedy then proposed that the Board consolidate the CFO and CEO functions and thereafter, he was made the Hospital's CEO. Fundamentally, Kennedy's testimony that he had a good relationship with the Board until October 30, 2003 is far more credible.

When the full Board began to address consolidating the Human Resource Manager position with the Development Fund Coordinator position, Kennedy informed the Board that he was not in favor of consolidating these two positions. (N.T. 246) Rather than fully discussing the proposal to consolidate the positions at a regular Board meeting, the Board met in a late night executive session after a regular Board meeting ended to act on the consolidation and to decide that Folmar should be terminated instead of Dugan. (N.T. 257) Further, as one reviews the Board minutes of March 28, 2001, a glaring discrepancy appears. (R.E. 1) Indeed, although testimonial evidence makes it clear that the decision to consolidate was made at an executive session after the Board meeting concluded, Board minutes suggest that the decision was made at the meeting while Kennedy was present. Clearly, Kennedy had been intentionally left out of the poorly conceived process. While the minutes suggest that he was present at the meeting and directed to appoint Dugan to the consolidated position, what actually occurred was that Wulderk had to call Kennedy after the executive session to tell Kennedy to hire Dugan and dismiss Folmar. No recording was made of the Board's judgments making the process difficult, if not impossible, to validate.

It also appears that Wulderk and Harry spoke about the consolidation of the positions prior to taking the matter before the full Board. (N.T. 254, 256) Wulderk offered that the conversations dealt with management positions generally. However, by the time the full Board discussed the matter at the executive session, it is more than apparent that Harry had prepared himself to poison the minds of other Board members against Folmar. Harry testified that prior to the decision to consolidate, Harry spoke with Dugan and learned of Dugan's negotiation experience while Dugan had been a member of a local school board. (N.T. 221, 240-241, 243) Harry made no such effort to contact Folmar, he only contacted Dugan.

Wulderk testified that it was only after speaking with Harry on the night of March 28, 2001, that he formed his impression of Folmar. (N.T. 273) Wulderk revealed that he hadn't known Folmar personally and only formed an impression that a 1995 negotiation had gone poorly after having had a discussion with Harry. It becomes more than apparent that Harry wanted a man to perform the newly created position. Harry offered that he had always felt that Folmar's performance negotiating the union contract in 1995, six years earlier, still bothered him. (N.T. 222, 223, 231) Certainly, Harry knew that negotiations were a team effort. (N.T. 98, 104, 411) Although Harry suggested that he was unaware whether the negotiation team consisted of more than Folmer and Kennedy, there was an attorney on contract negotiation teams. (N.T. 98, 104) The Human Resource Manager's role was mainly to voice the opinions of the team. (N.T. 411) Further, Kennedy was not even hired until 1997.

While Harry suggests that he was dissatisfied with the 1995 negotiations, it is clear that, in six years, he never expressed concerns to Folmar. This is true despite the fact that Folmar participated in other negotiations after the 1995 contract negotiations. (N.T. 38) Further, Folmar credibly testified that she never received any complaints about her performance regarding negotiating union contracts. (N.T. 38) Also, Folmar's evaluations by the then CEO, a subsequent

CEO, and eventually several years of evaluations by Kennedy make no mention of a Board concern with Folmar's performance. On the contrary, all three CEO's found Folmar to be an excellent Human Resource Manager.

At this executive session, Harry made several other vague references to concerns about Folmar. For instance, Harry testified that he thought Folmar appeared weak because she did not have much to say. (N.T. 222, 229) Again, Harry pointed to the 1995 time frame, suggesting that Folmar appeared quiet at two Board meetings. (N.T. 230) If Folmar did attend two Board meetings in 1995, she would only have done so when invited and then she would only have responded to questions asked. In reality, the Board knew very little of Folmar because she had very limited direct interaction with the Board. (N.T. 37, 66) Harry had called Folmar only twice in six years and those calls concerned the termination of other employees. (N.T. 37) Harry also testified that there was no real reason for Folmar to come to Board meetings because she did not have much to say. (N.T. 217) Actually, most managers did not attend Board meetings. Folmar did not attend because she was not asked to. Harry suggests that Dugan was more outspoken and stronger but appears to have had no real basis for making such a statement. (N.T. 234) About all anyone knew of Dugan is that he was from the area and had been a wrestling referee for approximately 20 to 25 years. (N.T. 234) Vaguely, the Board was made aware that, while a school board member, Dugan had participated in several negotiations with the teacher's union, but the Board knew nothing about the details of such negotiations. (N.T. 234) The Board also had vague information that Dugan had been an aide to a local representative, Camille Bud George. (N.T. 378) Harry also testified that what he was "really" dissatisfied with was a lack of information from the human resource department since 1995. (N.T. 231-232). On this point, clearly, Harry knew that the CEO, not Folmar, would be directly responsible for obtaining any information the Board requested. Harry lacked credibility by testifying that he figured that requested information should come from human resources. (N.T. 218)

Of significant import is the fact that while the Board really had almost nothing to go on as far as comparing the qualifications of either Folmar or Dugan, the Board generally knew that Dugan did not meet the listed qualifications for the job of Human Resource Manager. Moore specifically testified that the Board looked at the position description for the Human Resource Manager component, and knew that Dugan was not qualified. (N.T. 324; C.E. 1) In fact, it appears that the Board totally disregarded this important information and by doing so, more than an irregularity exists. Knowingly disregarding vital information contributes to a showing of pretext. See Predmore v. Allen, 407 F.Supp. 1067, 16 FEP 1175 (D. Md. 1975) Indeed, after he was given the consolidated position, the minimum qualifications listed for the new position was redrafted in such a way as to add a new qualification designed to address Dugan's limited background and create the appearance that Dugan was qualified. (C.E.11) It is simply remarkable that Dugan was selected by a Board that knew he did not meet the minimum qualifications required for as critical position a position as the Human Resource Manager component of the consolidated position.

Just how critical was that function can be seen by comparing the essential responsibilities and duties and knowledge, skills, and ability portions of the job descriptions of the Human Resource Manager position prior to consolidation with the job description of the consolidated position. Under the new job description the following five essential responsibilities and duties were added: Develop and maintain ongoing fund raisers at Philipsburg Area Hospital; promote community support for fund raisers; maintain accurate records/bookkeeping of monies in the Development Fund Account; administer the Development Fund monthly meeting; and advise Administrator of

upcoming fundraisers and events. Added to the Knowledge, Skills and Abilities section was only one additional listing – Knowledge of all licenses needed for Small Games of Chance. Additionally, although a computer was listed as equipment used, Dugan was unable to operate a computer. In fact, he is yet to learn how to operate a computer.

Clearly, Kennedy and two prior CEO's were in the best position to make unfettered evaluations of Folmar's strengths and weaknesses. Equally, Kennedy was in the best position to evaluate Dugan's first several months as a Hospital employee. On this point, in evaluation after evaluation, Kennedy and the two prior CEO's repeatedly praised Folmar's professionalism and commitment to the Hospital. (C.E. 3) These ratings consistently reflected that Folmar was considered an excellent employee. (C.E. 3C-F) Conversely, Kennedy's evaluation of Dugan shows that Dugan only met standards in most factors and in the category of Independence, Dugan was viewed as between meeting standards and needing improvement. (C.E. 12A)

Even after Dugan was hired for the consolidated position, Dugan's evaluations reflected problems. Kennedy testified that in the year after Dugan's hire, he perceived Dugan to be weak in essentially all of the responsibilities that related to the duties of Human Resource Manager. (N.T. 112) Kennedy also testified that after a year, he was not seeing a lot of results from the human resource office, (N.T. 119) and that things were falling behind. (N.T. 120) The fact that Dugan never learned to operate a computer also speaks for his limited abilities. As noted, after Folmar left, the cost of running the human resource department actually increased over what it would have been had the Board selected Folmar. When Folmar ran the human resource department, she had one assistant. After Dugan took over the department, it did not take long until one assistant was not enough. Over time, the need for additional help increased. (N.T. 150) In Kennedy's assessment, the extra person needed in the human resource department resulted in additional cost, not a savings. (N.T. 153)

It was not only Kennedy that found Dugan lacking. Sandra Semple, the Hospital's registration switchboard supervisor testified that in her opinion, Dugan was not as professional as Folmar. (N.T. 195) Indeed, Semple testified that she found Dugan to be unprofessional. (N.T. 200).

The Hospital attempted to support the decision to place Dugan into the consolidated position because of his purported negotiation skills. While Dugan may have been the lead negotiator for a school board, the Board had little to no details about his performance during those negotiations. In fact, it is even unclear whether the Board was aware that Dugan was the lead negotiator. This evidence came from Dugan, not a Board member. (N.T. 406-408) Moore testified that she had no firsthand knowledge of Dugan's negotiations with the school board until she was told about it at the executive session on March 28, 2001. (N.T. 308)

It is worthy of note that after Dugan was selected for the consolidated position, he did participate in the negotiation of at least two new union contracts. (N.T. 169) It is also worthy of note that by the end of 2002, the Board had to ask employees to take another 3% voluntary pay cut. (N.T. 133, 385-386) Wulderk testified that the Board was not happy that this had to happen. (N.T. 261) In fact, Dugan testified that, in hindsight, he felt that, budget-wise, it would have been better to have negotiated multi-year contracts, rather than the approach he took. (N.T. 425)

On another factor, the Hospital offered the testimony of Mark Alan Travis, the union President at the time relevant to the consolidation. Travis offered that Folmar did not have a good relationship with the union. (N.T. 336) Travis testified that Folmar was mean to employees who

asked questions, that she was one-sided, and with her there was no happy medium. (N.T. 336, 345) Travis further offered that once Dugan took over, the relationship between the Hospital and the union improved.

Travis' testimony is suspect for several reasons. First, ultimately, it was revealed that Folmar had been involved in Travis' termination. (N.T. 64, 350) While Travis was eventually returned through the arbitration process, a question of bias naturally arises upon learning that Folmar had involvement with Travis' termination. Second, credible testimony offered by Folmar, Kennedy, and others reveals that Folmar had an effective professional relationship with union members. (N.T. 64) The Board had never complained to Folmar regarding purported complaints by union members. (N.T. 36) Folmar credibly testified that she received praise from Kennedy, administrators, department managers, and union employees. (N.T. 39, 41) Kennedy testified that no one from the Board had ever expressed dissatisfaction with Folmar's interaction with the union. (N.T. 105) Further, Kennedy indicated that no management employee had complained about Folmar either. (N.T. 105)

Considering the evidence in its entirety, it is more likely than not that Folmar's sex was the basis for the Board not selecting her versus Dugan. On this critical finding, Harry is found to have made a calculated effort to insure that Dugan was selected over Folmar. A careful reading of the record reveals that he was a highly influential member of the Board and that he indeed worked to influence other Board members' opinions and their votes regarding who should be selected. It is clear that Board members had no specific guidelines and very little information from which to make a proper evaluation of either Dugan or Folmar. Neither Folmar nor Dugan were interviewed and, despite their existence, neither their personnel files nor their past evaluations were reviewed. Instead, by stealth, Harry made contact with Dugan prior to the Board's consideration and learned of Dugan's negotiations as a school board member. At the later executive session, Harry then went back to 1995 and in vague attitudinal terms distorted the efforts of Folmar during that negotiation process in order to influence others. Harry called Folmar weak when, considered as a whole, the evidence suggests she was anything but weak. Harry then propped Dugan up despite knowing he lacked the essential minimal qualifications to run the consolidated position. Harry was far less than credible when he suggested that he made his decision based on Dugan's performance as a fund-raiser. (N.T. 248) It seems that Harry wanted Dugan to get the consolidated position just because Dugan is a man. While each Board member that testified at the Public Hearing can recall discussions of Dugan's purported attributes, very little was actually known of attributes regarding Folmar's performance for over six years with the Hospital and her relevant experiences prior to that. Indeed, the Board can best be described as uninformed. There was absolutely no evaluative device for the Board to implement. Direction was absent and no fixed content from which a comparative judgment could be made left the process subject to whim or worse, manipulation.

Nothing in Folmar's records indicates there had been prior complaints of the type and nature purported to exist through testimony offered at the Public Hearing. Indeed, Moore testified that the Board had never taken corrective action directed at purported shortcomings because those purported concerns were just "not serious enough." (N.T. 329) When an employer has knowledge of purported performance issues that span many years and does nothing about such issues, but later offers such purported performance issues as a legitimate nondiscriminatory reason for a termination, the simple fact that the employer did nothing may contribute to a finding that the reason offered is pretextual. Here, Dugan's fundamental lack of qualifications was overcome by the persuasive influence of Harry's stress on irrelevant behavior while ignoring

essential behaviors and performance. This remained true even after Kennedy later told Wulderk that when Dugan was told that he had been selected, Dugan responded by saying to Kennedy, in effect, he can not do the job because he knows nothing about human resources. (N.T. 109, 154)

A single person's bias may well influence others, particularly when that person plays a significant role in a selection process and leads the fight pro and con with respect to the candidates. See Lam v. University of Hawaii, 66 FEP 74 (9th Cir. 1994); and Gutzwiller v. Fenik, 860 F.2d 1317, 1327 (6th Cir. 1988). Here, that person was Harry. His single-minded bias clearly drove the vote on March 28, 2001. While the Board may have been unanimous on March 28, 2001 that Dugan was their choice, the process the Board used, or better said, did not use, makes it more likely than not that the basis of Folmar's non-selection and eventual termination was Folmar's sex. The Board is found simply rubberstamping Harry at Folmar's expense. Drawing critical inferences from the circumstantial evidence presented in this case and essentially rejecting most of the Hospital's evidence for lack of credibility, we find that Folmar has met her ultimate burden of persuasion.

For this fundamental reason, we turn to the issue of an appropriate remedy.

The Commission has broad equitable power to fashion relief. Section 9(f)(1) of the PHRA, 43 P.S. § 959(f)(1), generally outlines the remedies the PHRC is authorized to order. This section provides in pertinent part:

If, upon all the evidence at the hearing, the Commission shall find 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 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 employees, 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. . . .

The Pennsylvania Supreme Court has recognized the broad remedial powers granted to the Commission by Section 9(f)(1): "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court." Murphy v. Pa. Human Relations Comm'n, 506 Pa. 549, 486 A.2d 388, 393 (1985), appeal dismissed, 471 U.S. 1132. The Commission's expertise in molding a remedy is not to be lightly regarded. The only limitation is that a Commission award may not seek to achieve ends other than the purposes of the PHRA. Consolidated Rail Corp. v. Pa. Human Relations Comm'n, 582 A.2d 702, 708 (Pa. Commonwealth Ct. 1990).

The purpose of a Commission final order is twofold. First, the remedy fashioned by the Commission must insure the Commonwealth's interest in eradicating the unlawful discriminatory practice found to exist is vindicated. Vindication of this interest is non-discretionary. It necessitates the entry of an order, injunctive in nature, which requires Respondent to cease and desist from engaging in unlawful discriminatory practices.

The second purpose of a Commission final order is to award appropriate individual relief. A Commission final order must not only restore the injured party to her pre-injury status, it must also

discourage future discrimination. Williamsburg Community School Dist. v. Pa. Human Relations Comm'n, 512 A.2d 1339 (Pa. Commonwealth Ct. 1986) A remedy in an employment discrimination case is not to punish a Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Accoc., 306 A.2d 881 (Pa. Supreme Ct. 1973).

The first aspect we must consider regarding making Folmar whole is the issue of the extent of financial loss suffered. Where a complainant demonstrates that economic loss has occurred, back pay should be awarded absent special circumstances. Walker v. Ford Motor Co., 684 F.2d 1355, 29 Fair Empl. Prac. Cas. (BNA) 1259 (11th Cir. 1982). In fact, once liability is established, the burden shifts to the respondent to demonstrate that monetary relief is not proper. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 Fair Empl. Prac. Cas. (BNA) 1514 (1977); Franks v. Bowman Transportation Co., 424 U.S. 474 (1976).

The calculation of the back pay award need not be mathematically precise but must simply be a “reasonable means to determine the amount [the Complainant] would probably have earned...” PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975) Uncertainties in an estimation of damages must be resolved against a discriminating employer, rather than the victim, since the wrongdoer caused the damages. See Green v. USX Corp., 843 F.2d 1511 (3rd Cir 1988); and Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 7 FEP 115 (5th Cir. 1974).

In this case, Folmar submits that she should be completely reimbursed for lost wages and benefits from April 1, 2001 through the present, adjusted by subtracting her interim wages. Additionally Folmar seeks front pay until such time as the Hospital reinstates Folmar into the consolidated position.

The Hospital’s post-hearing brief offers no arguments regarding the issue of appropriate damages. Never-the-less, we review whether Folmar attempted to mitigate her damages. The issue of mitigation of damages is subject to the sound discretion of the Commission. Consolidated Rail Corp., 582 A.2d at 708. The burden is on the employer to establish any alleged failure to mitigate. Also see Carden v. Westinghouse Electric Corp., 850 F.2d 996, 1005 47 FEP 446 (3d Cir. 1988). See generally, State Public School Building Auth. v. M. M. Anderson Co., 410 A.2d 1329 (Pa. Commonwealth Ct. 1980) (party causing loss has burden of proving losses could have been avoided through reasonable efforts of damaged party).

In order to establish a failure on Folmar’s part to mitigate damages, the Hospital had the burden to establish both that Folmar “failed to exercise reasonable diligence to mitigate damages” and “that there was a reasonable likelihood” that Folmar “might have found comparable work if [she] had exercised reasonable diligence.” Wehr v. Burroughs Corp., 619 F.2d 276, 22 FEP 994, 995 n. 3 (3d Cir. 1980). The Hospital produced no evidence that comparable employment had been available to Folmar from the moment she was discharged through the date of the public hearing. Nor did Hospital present evidence that Folmar was less than diligent in her efforts to find comparable employment.

Turning to the question of the amount of Folmar’s financial loss, it is possible to calculate the appropriate remedy owed to Folmar by reasonable methods. First, as the PHRA, 43 P.S. § 959(f)(1), expressly provides, an offer of reinstatement is appropriate. Second, payment of back pay, pay increases and associated benefits are also appropriate. *Id*

The evidence establishes that Folmar is entitled to the following relief: (a) back pay with associated pay increases; (b) medical expense reimbursement; (c) reinstatement and front pay; and (d) appropriate interest.

The appropriate measure of back pay remedy is the salary the Hospital paid to Dugan when he was placed in the consolidated Human Resources Manager/Development Fund Coordinator position after it terminated Folmar's employment. The Hospital paid Dugan an annual salary of \$25,000 commencing on April 1, 2001 (N.T. at 13). From August 1, 2002 through October 31, 2002, Dugan was paid at the rate of \$12.76 per hour (\$510.40 per week/\$26,540 per year). From November 1, 2002, through January 31, 2003, Dugan was paid at the rate of \$13.51 per hour (\$540.40 per week/\$28,100.80 per year). From February 1, 2003, through April 30, 2003, Dugan was paid at the rate of \$14.26 per hour (570.40 per week/\$29,660.80 per year). Finally, on May 1, 2003, the Hospital increased Dugan's rate of pay to \$15.00 per hour (\$600.00 per week/\$31,200.00 per year). Since the Hospital terminated Folmar's employment, she has had interim gross earnings of \$13,529.59.

The evidence presented at public hearing demonstrates that Folmar's entitlement to a back pay award, together with appropriate salary increases, extends from the date of her discharge until such time as the Hospital offers appropriate reinstatement to Folmar and she either returns to work or refuses the offer. The Hospital presented no evidence suggesting a back pay award is inappropriate.

The calculations of Folmar's back pay award are as follows:

April 1, 2001 through July 31, 2002 (1 and 1/3 years)
(25,000.00 per year)(1 and 1/3 years) = \$33,333.33
August 1, 2002 through October 31, 2002 (1/4 year)
(26,540.80 per year)(1/4 year) = \$6,635.20
November 1, 2002 through January 31, 2003 (1/4 year)
(28,100.80 per year)(1/4 year) = \$7,025.20
February 1, 2003 through April 30, 2003 (1/4 year)
(29,660.80 per year)(1/4 year) = \$7,415.20
May 1, 2003 through May 23, 2005 (2 years and 3 weeks)
(31,200 per year)(2 years and 3 weeks) = \$64,200.00
Total Lost Pay
\$33,333.33 + \$6,635.20 + \$7,025.20 + \$7,415.20 + \$64,200.00 = \$111,653.98
Total Back Pay Award
\$111,653.98 (Lost Pay) - \$13,529.59 (interim earnings) = \$98,124.39

The other monetary element to Folmar's remedy is comprised of reimbursement for medical insurance coverage costs. During Folmar's employment with the Hospital, medical insurance coverage was a paid benefit of her employment. After her discharge, Folmar paid for medical insurance coverage from her own pocket. At first, she paid the Hospital for COBRA coverage. Folmar then bought and paid for medical insurance coverage from a variety of sources.

The calculations for Folmar's medical insurance cost remedy are as follows:

April 2001 through February 2002 (COBRA)
\$1,709.26
March 2002 through January 2003 (Classic Motor Lines)
(\$109.00 per month)(11 months) = \$1,199.00
February 2003 through April 2003 (Classic Motor Lines)
(\$120.00 per month)(3 months) = \$360.00

May 2003 through November 2003 (Ward Trucking)
 (\$15.00 per month)(7 months) = \$105.00
December 2003 through February 2004 (Grad-Med)
 \$432.00
March 2004 (Grad-Med)
 \$127.00
April 2004 through May 2005 (Geisinger Health Plan)
 (\$205.80 per month)(11 months) = \$2,263.80
Folmar's Total Subsequent Medical Insurance Costs
 \$1,709.26 + \$1,199.00 + \$360.00 + \$105.00 + \$432.00 +
 \$127.00 + \$2,263.80 = \$6,196.06

Folmar presented evidence that she received unemployment compensation benefits. As a collateral source payment to Mrs. Folmar, the Commission need not offset these payments. Orweco Frocks, Inc. v. Pa. Human Relations Comm'n, 537 A.2d 897, 903 (Pa. Commonwealth Ct. 1988). *See also*, Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 33 Fair Empl. Prac. Cas. (BNA) 187 (3d Cir. 1983).

On the issue of front pay, this monetary award should be made to compensate Folmar for lost employment that extends beyond the date of this Order. To make Folmar whole, front pay shall be paid to Folmar until either Folmar is instated into the position of Human Resource Manager/Development Fund Coordinator or an offer of instatement is made to Folmer that she rejects or Folmar accepts an alternate job that pays more than the amount she would earn if working in the consolidated position. The amount of front pay shall be equal to difference between the present value of earnings she would make if working in the consolidated position and Folmar's salary in any alternate job Folmar may accept.

Finally, the PHRC is authorized to award interest on the back pay award at the rate of six percent per annum. Goetz v. Norristown Area School District, 328 A.2d 579 (Pa. Commonwealth Ct. 1975).

Accordingly, relief is ordered as described with specificity in the Final Order that follows.

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

DORIS FOLMAR, Complainant

v.

**MOSHANNON VALLEY CITIZENS, INC.,
d/b/a PHILIPSBURG AREA HOSPITAL, Respondent**


PHRC CASE NO. 200100574

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Folmar has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

May 11, 2005
Date

By: 
Carl H. Summerson
Permanent Hearing Examiner

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

DORIS FOLMAR, Complainant

v.

**MOSHANNON VALLEY CITIZENS, INC.,
d/b/a PHILIPSBURG AREA HOSPITAL, Respondent**

PHRC CASE NO. 200100574

FINAL ORDER

AND NOW, this 24th day of May, 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 Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Recommendation of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Recommendation of the Permanent Hearing Examiner as its own findings in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and the Recommendation of the Permanent Hearing Examiner into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That the Hospital shall cease and desist from sex-based discrimination with regard to determining which employees to retain after positions are consolidated.
2. That the Hospital shall pay to Folmer, within 30 days of the effective date of this Order, the lump sum of \$98,124.39, which amount represents back pay lost for the period between April 1, 2001 and the date of this Order.
3. That the Hospital shall pay additional interest at the rate of six percent per annum on the back pay award, calculated from April 1, 2001, until payment is made.
4. That the Hospital shall pay to Folmar, within 30 days from the effective date of this Order, the lump sum of \$6,196.06, which amount represents the money Folmar had to pay to maintain medical coverage for the period between April 1, 2001 and the date of this Order.
5. That the Hospital shall pay additional interest at the rate of six percent per annum on the reimbursement for medical coverage payments Folmar made, calculated from April 1, 2001, until payment is made.
6. That, at the earliest opportunity, the Hospital shall offer Folmar instatement into the position of Human Resource Manager/Development Fund Coordinator.

7. That, in the event the position of Human Resource Manager/Development Fund Coordinator is currently being performed by another individual, and the Hospital is therefore unable to make an immediate offer of instatement, the Hospital shall pay Folmar front pay in an amount equal to the current salary of the Human Resource Manager/Development Fund Coordinator, minus amounts earned by Folmar from other employment. Such front pay shall be paid from the date of this Order until such time as either Folmer is offered instatement into the position and rejects such offer or Folmer secures alternate employment at which she earns more than she would earn if working as the Human Resource Manager/Development Fund Coordinator.
8. That the Hospital shall report the means by which it will comply with this Order, in writing to Ronald W. Chadwell, Esquire, PHRC Assistant Chief Counsel, within 30 days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 

Stephen Glassman, Chairperson

ATTEST:
By: 

Daniel D. Yun, Secretary