

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Russel E. Handy, :
 :
 Complainant :
 :
 v. : PHRC Case No. 200401428
 :
 Harsco Corporation d/b/a Taylor Wharton, :
 :
 Respondent :

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof should be required.

1. The Complainant herein is Russel E. Handy (hereinafter "Complainant"), who is an adult individual residing in Harrisburg, Pennsylvania.
2. The Respondent herein is Harsco Corporation d/b/a Taylor Wharton (hereinafter "Respondent") with a mailing address of 1001 Herr Street, Harrisburg, Pennsylvania 17105.
3. The Complainant is African American.
4. The Respondent, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
5. On or about September 1, 2004, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against the Respondent at Commission Case No. 200401428. A copy of the complaint will be included as a docket entry in this case at time of hearing.
6. The employment actions challenged in the complaint allegedly occurred in Dauphin County.

7. On or about October 25, 2004, Respondent filed a verified answer to the complaint. A copy of the answer will be included as a docket entry in this case at the time of hearing.

8. In correspondence dated February 8, 2006, Commission staff notified the Complainant and Respondent that probable cause existed to credit the allegations found in the complaint.

9. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

10. In correspondence dated January 5, 2007, Commission Permanent Hearing Examiner Carl H. Summerson notified the Complainant and Respondent that a public hearing had been approved.

11. All jurisdictional prerequisites for a public hearing have been satisfied.

Ronald W. Chadwell
Ronald W. Chadwell, Esquire
Assistant Chief Counsel
(Counsel for the Commission
in support of the complaint)

2/5/07
Date

Andrew L. Levy
Andrew L. Levy, Esquire
Attorney for Respondent

2/5/07
Date

suspending or discharging any bargaining unit member, including but not limited to Complainant.

17. At all times relevant hereto, Respondent has had Plant Rules and Regulations that apply to its employees.

18. Respondent's Plant Rules and Regulations are divided into three Classes: Classes A, B, and C.

19. For violations of Class A rules, Respondent's Plant Rules and Regulations set forth the following progression of discipline: a written reprimand for a first offense, a three-day suspension for a second offense within a one-year period, and a five-day suspension with notice of discharge for a third offense within a one-year period.

20. For violations of Class B rules, Respondent's Plant Rules and Regulations set forth the following progression of discipline: a three to five-day suspension for a first offense and a five-day suspension with notice of discharge for a second offense within a five-year period.

21. For violations of Class C rules, Respondent's Plant Rules and Regulations state that a first offense will result in a five-day suspension with notice of discharge.

22. During his employment with Respondent, Complainant received multiple unpaid suspensions for disciplinary reasons.

23. On August 20, 2004, Respondent issued Complainant a five-day suspension with notice of discharge.

24. Respondent's stated reason for the August 20, 2004 suspension with notice of discharge was Complainant's violation of Rules C-9 and B-5, as listed in Respondent's Plant Rules and Regulations.

25. On August 24, 2004, a discharge hearing was held in response to the August 20, 2004 suspension of Complainant.

26. On August 24, 2004, Respondent discharged Complainant.

27. Frank Koller, Respondent's Director of Manufacturing, made the decisions to suspend and discharge Complainant in August 2004.

28. The Union filed a grievance in response to Complainant's August 24, 2004 discharge.

29. On March 15, 2005, a hearing was held before Arbitrator J. Joseph Loewenberg in response to the Union's grievance challenging Complainant's August 24, 2004 discharge.

30. Complainant has made no effort to seek employment at any time from August 20, 2004 to the present.

31. Since 1972, Complainant has owned and operated a fuel oil delivery business.

32. For approximately thirty years prior to his discharge on August 24, 2004, Complainant operated his fuel oil delivery business while working for Respondent.


33. Since his discharge by Respondent on August 24, 2004, Complainant has not increased his involvement with his fuel oil delivery business.

34. Complainant's fuel oil business has remained consistent both before and after his discharge on August 24, 2004.


35. Since approximately 1972, Complainant has owned rental properties.

36. Since his discharge by Respondent on August 24, 2004, Complainant has not increased the amount of time devoted to his rental properties.

37. Since his discharge by Respondent on August 24, 2004, Complainant has not increased his activities related to his rental properties.

 Date: 15 June 2007

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 Date: 6/15/07

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COMMONWEALTH OF PENNSYLVANIA
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PENNSYLVANIA HUMAN RELATIONS COMMISSION

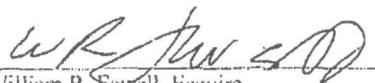
Russel E. Handy, :
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ADDITIONAL STIPULATIONS OF FACT (REMEDIES)

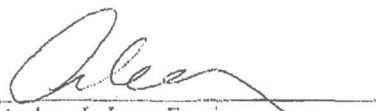
The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required. The following stipulated facts are in addition to the Stipulations of Fact agreed to by the parties on February 5, 2007, and the Additional Stipulations of Fact agreed to by the parties on June 15, 2007.

- 38. Complainant's total gross wages for his last 26 pay periods (comprising one year) was \$57,348.95.
- 39. As of November 4, 2004, the applicable Collective Bargaining Agreement established a 3% wage increase for Respondent's union workers.
- 40. As of January 2, 2006, the applicable Collective Bargaining Agreement established a 2% wage increase for Respondent's union workers.
- 41. As of January 2, 2007, the applicable Collective Bargaining Agreement established a 3% wage increase for Respondent's union workers.

- 42. Attached hereto as Exhibit "A" is a true and correct copy of Respondent's payroll printout reflecting hours worked, hourly rates and gross pay for Complainant, a member of Respondent's "press crew," for 2001, 2002, 2003, and 2004
- 43. Attached hereto as Exhibit "B" is a true and correct copy of Respondent's payroll printout reflecting hours worked, hourly rates and gross pay for each individual member of Respondent's "press crew" for pay period "January 11, 2004" through "July 8, 2007."
- 44. Complainant's date of birth is November 15, 1944.


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August 23, 2007
 Date


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8/23/07
 Date

FINDINGS OF FACT *

1. The Complainant, Russel E. Handy, (hereinafter "Handy") is an African American who was born November 15, 1944. (N.T. 23; S.F. 3).
2. The Respondent, Harsco Corporation d/b/a Taylor Wharton (hereinafter "Taylor-Wharton"), manufactures high pressure gas cylinders. (N.T. 219; S.F. 2).
3. Taylor-Wharton production workers are members of the United Steelworker's Union and are covered by a collective bargaining agreement. (N.T. 222; R.E. 2, 3, 4).
4. In 2004, Taylor-Wharton had 105 employees, approximately 30% of the production workers were African American, and 6 or 7 were Hispanic. (N.T. 303).
5. Handy began working for Taylor-Wharton on January 13, 1966. (N.T. 23).
6. With the exception of two to three years between 1991 and 1993, when Handy was made a foreman, Handy was in the Union and was covered by a collective bargaining agreement. ("CBA"). (N.T. 63, 64, 65, 73, 92).

* The foregoing "Stipulations of Facts", "Additional Stipulation of Fact", and Additional Stipulations of Fact (Remedies) are hereby incorporated herein as if fully set forth. To the extent that the Opinion which 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. Stipulations of Fact. -Additional
Stipulations of Fact. - and Additional
Stipulations of Fact (Remedies)

7. Whenever an employee challenged discipline, the CBA required Taylor-Wharton to prove it had "just cause" to discipline or discharge an employee. (N.T. 226, 227; R.E. 2, 3, 4).
8. At all relevant times, Taylor-Wharton had Plant Rules and Regulations. (S.F. 17; R.E. 5, 6).
9. Taylor-Wharton's Plant Rules and Regulations are divided into classes: A; B; and C. (S.F. 18).
10. Class A violations follow a progressive discipline scheme: written reprimand for a first offense; 3 day suspension for a second offense within 1 year; and 5 day suspension with notice of discharge for a third offense within 1 year. (S.F. 19).
11. Class B violations also follow a progressive discipline scheme: 3 to 5 day suspension for a first offense; and 5 day suspension with notice of discharge for a second offense within 5 years. (S.F. 20).
12. Class C violations are the most serious and subject an employee to a 5 day suspension with notice of discharge for a first offense. (N.T. 229; S.F. 21).
13. Uniquely, during his employment with Taylor-Wharton, Handy was suspended multiple times and discharged more than 5 times. (N.T. 101, 105, 232, 233; S.F. 22).
14. On February 1998, Taylor-Wharton hired Frank Koller, (hereinafter "Koller"), as its Human Resources Manager. (N.T. 48, 219).
15. On 2001 Koller became Taylor-Wharton's Director of Manufacturing. (N.T. 219).
16. At all times, Koller had the responsibility for all hiring, firing, discipline, and interaction with the Union. (N.T. 220).

17. On August 24, 1999, instead of 5 day suspension with notice of discharge, Koller merely gave Handy a verbal warning after Handy attempted to receive unwarranted pay by listing on his time sheet, higher paying work than he had performed. (N.T. 233, 235, 236, 353, 383-384; R.E. 7).
18. Handy's August 1999 time sheet falsification amounted to Class C violations: C-5 falsification of company records; and C-8 falsification of production records. (N.T. 239, 241; R.E. 5).
19. Approximately 6 months later, Handy committed the same violation. (N.T. 239).
20. Once again, Handy falsified his time sheet by indicating he had performed a higher paying job when, in fact, Handy had selected to perform a lower paying task. (N.T. 239; R.E. 8).
21. Since Handy had been previously warned and his action again constituted C-5 and C-8 falsification violations, Koller initially issued Handy a 5 day suspension with notice of termination. (N.T. 240, 365, 384; R.E. 8).
22. However, prior to a discharge hearing, mandated by the CBA, union officials met with Koller indicating they knew what Handy had done was wrong but still asked if Koller would consider giving Handy one more chance. (N.T. 244, 384).
23. Koller responded by reducing Handy's violation to a Class B level violation *converting the discipline from a discharge to a five-day suspension without pay.* (N.T. 108, 245; R.E. 10).
24. The union agreed with Koller's action: (NT. 245).
25. At Handy's March 1, 2000 discharge hearing, Handy was informed of the reduced disciplinary action and warned that the next Class B rule violation would result in a five day suspension with a notice of termination. (N.T. 108-109; R.E. 10).

26. On March 13, 2002, Handy received a written reprimand for two Class A violations. (N.T. 247; R.E. 12).
27. Handy's discipline was for: leaving his assigned work area without permission, loafing, and overstaying breaks and lunch periods. (N.T. 247; R.E. 12).
28. On April 12, 2002, Koller gave Handy a verbal warning for failing to properly punch his time card. (N.T. 250; R.E. 12).
29. Koller had spoken to Handy numerous times about his failure to properly punch his time card. (N.T. 251-252).
30. On June 6, 2002 a note went into Handy's file indicating that a supervisor spoke with Handy about Handy's May 31, 2002 action of writing on his time card that he began work at 3:00a.m. when Handy had not arrived until around 3:30a.m. (N.T. 252-254; R.E. 14).
31. On June 26, 2002, less than a month later, Koller issued Handy a written reprimand with a three day suspension because Handy had failed to properly punch his time card on multiple occasions. (N.T. 254, 259; R.E. 15).
32. On July 1, 2002, Handy punched out and left the facility for at least one hour on personal business. (N.T. 113, 261; R.E. 16).
33. Upon retiring, Handy did not punch back in but, instead reported that he had worked the entire day. (N.T. 113, 261; R.E. 16).
34. Handy's action again constituted C-5 and C-8 violations. (N.T. 262; R.E. 5, 17).
35. Koller issued Handy a five-day suspension with a notice of termination. (N.T. 261, 359-360; R.E. 17).

36. The Union grieved Handy's discharge which was denied and the matter went to an arbitration hearing held on January 9, 2003 and February 20, 2003. (N.T. 266-267; R.E. 19, 20).
37. Due solely to Handy's years of service, Arbitrator Joel Weisblatt ordered Handy reinstated without back pay, converting Handy's discharge into a nine-month suspension. (N.T. 272, 365; R.E. 20).
38. Arbitrator Weisblatt's decision expressly states that Handy "shall be on notice that his disciplinary record is at the end of the road. Further, significant rule violations could clearly warrant a penalty of termination and such penalty would be progressive in nature". (R.E. 20).
39. Koller also warned Handy that further rule violations would result in discharge. (N.T. 272).
40. On August 20, 2004, Handy's actions resulted in his termination. (N.T. 273).
41. At Taylor-Wharton, blocks of steel weighing up to 150 pounds are gradually heated in a large furnace until they are soft enough to be pierced to make seamless cylinders. (N.T. 30, 32, 279, 467).
42. Employees who work on this process are paid according to the number of pieces produced. (N.T. 35).
43. The process at the furnace involves a four person operation: a charge heater person who shoves the raw steel pieces into the back of the furnace; a puller who pulls the heated steel out of the furnace; a press person; and a running transfer person who transfers the cylinder from the press to a bench. (N.T. 32, 34, 180).
44. The area around the furnace is loud and employees are required to wear earplugs. (N.T. 203).

45. The puller also wears protective clothing when pulling the steel out of the furnace as the furnace temperature is between 1900° F. and 2480° F. (N.T. 30, 32, 279).
46. In addition to pushing steel into the furnace, the charge heater also has the responsibility to make control setting adjustments to the furnace so the operation runs at an appropriate temperature. (N.T. 467).
47. The charge heater is at one end of the approximately 40 foot long furnace and the puller, press person, and running transfer person are stationed at the other end. (N.T. 32, 34, 278, 467, 574).
48. The outside of the furnace is hot and the temperature adjustments, rods and controls are on the side. (N.T. 279).
49. Approximately once or twice a week the furnace runs too hot requiring corrective adjustments. (N.T. 33, 82).
50. On the morning of August 20, 2004, Handy, Elmer Keiter (race, white) and Eugene Keath (race, white) rotated every 20 minutes on the puller, press, and transfer positions. (N.T. 32)
51. Barry Straw (hereinafter "Straw") was the charges heater. (N.T. 467).
52. On August 20, 2004, Sam Johnson, an Inspector Foreman, was filling in for the regular forge supervisor, Frank Dietrick, who was on vacation. (N.T. 29, 510, 511, 552, 567).
53. As Handy, Keiter, and Keath rotated, when Handy was the puller, he made adjustments to the furnace because he felt the furnace was too hot. N.T. 33-34, 187).
54. When Keath became the puller, he informed Handy that the furnace was getting to hot and unless something was done, he would stop. (N.T. 34-35, 513).

55. From Straw's location, he could not see the front of the furnace where the others were assigned to work. (N.T. 278).
56. Handy called Johnson over to the forge area and told him to "wake Barry Straw up", that he had not responded when Handy tried to buzz him. (N.T. 29, 35, 36, 273-274, 512).
57. Handy also took the unusual step of stopping the production line, which action entailed varied problems. (N.T. 35, 470, 571).
58. Johnson walked around the furnace to speak with Straw, telling him it had been reported that there was a problem with the furnace and would he check it. (N.T. 36-37, 468).
59. As Straw and Johnson walked around from the back of the furnace, Handy, Keath and Keiter were there in Straw's area. (N.T. 36, 468, 513, 575).
60. Straw was upset that the production line had been stopped and that Handy, Keath and Keiter were in his area saying in effect that now he had three guys doing his job. (N.T. 273-274, 468, 469, 513, 575).
61. Straw went up to Handy and asked him why he had stopped the mill. (N.T. 469, 497).
62. With Johnson, Keath and Keiter looking on, Straw and Handy began hollering at each other, at a volume more than was necessary in the loud environment where hollering to be heard was normal. (N.T. 495, 513, 527, 529, 560).
63. Straw and Handy exchanged profanities, and approximately 10 to 15 seconds into the argument, Handy told Straw to get out of his face and shoved Straw backwards causing Straw to stagger back two, or three steps and to lose his hat. (N.T. 37, 405-406, 469, 482, 483, 495, 514, 515, 518, 533, 534, 535, 536, 548).

64. In conversation with each other, employees commonly used profanity. (N.T. 498, 581).
65. When Handy shoved Straw, Straw was standing stationary approximately two feet in front of Handy. (N.T. 480).
66. Straw's back was to the furnace approximately 3 to 5 feet from the side of the furnace. (N.T. 472, 515).
67. Johnson, Keath and Keiter all personally observed Handy shove Straw. (N.T. 473, 515; R.E. 22, 23).
68. Following the shove, Straw sat down to catch his breath and collect himself. (N.T. 469, 515).
69. After collecting himself, Straw returned to work. (N.T. 474, 516).
70. Johnson went to the forge office and called Koller on his cell phone to apprise him of what had occurred. (N.T. 274, 307, 385, 516).
71. Koller was on his way to work. (N.T. 274).
72. When Koller arrived he met with Johnson in the forge office where Johnson related that he had been called to the furnace area, that he spoke with Straw, that Straw came around to the side of the furnace saying "now I have three guys doing my job, that Straw and Handy began talking loud to each other, that Handy shoved Straw two times causing Straw to fall back and caused him to fall off. (N.T. 274, 307, 308-309, 324, 386, 578).
73. Koller separately asked Keath and Keiter for their versions of what happened. (N.T. 274, 313).
74. Both, Keath and Keiter in effect stated that Handy had shoved Straw. (N.T. 275, 317, 318; R.E. 23).

75. Koller called Bill Banget, the then Union President, to the forge office. (N.T. 275).
76. Koller also spoke with Straw who confirmed there had been a verbal confrontation that ended when Handy shoved him. (N.T. 276)
77. Straw indicated to Koller that he had known Handy for almost 40 years and did not want to see him fired, but would prefer that the matter was simply dropped. (N.T. 276, 318, 473, 474).
78. Finally, Koller called Handy to the office and asked him what happened. (N.T. 50).
79. In response, Handy initially asked if Straw had filed a complaint, to which Koller said no, but that someone said he had pushed Straw. (N.T. 50, 51, 131, 134).
80. Handy indicated he had not pushed Straw and basically that nothing happened and he never touched Straw. (N.T. 51, 321, 275; R.E. 21).
81. Koller formed the belief that Handy had pushed Straw, that given the proximity to the furnace, debris on the floor and controls on the side of the furnace, the incident posed a potential danger to Straw. (N.T. 279, 337, 339, 341).
82. Koller concluded that Handy had assaulted Straw and sent Handy home. (N.T. 47, 345).
83. Koller issued Handy a five-day suspension with notice of discharge for violation of Rules C-9 (fighting) and B-5 (threatening). (N.T. 285, 286; R.E. 24).
84. On behalf of Handy, the union filed a grievance claiming Handy's suspension with notice of discharge was without just or proper cause. (N.T. 287-288; S.F. 28; R.E. 25).
85. On August 24, 2004, a discharge hearing was held at which time Handy offered that all he did was put up his hands while he and Straw were involved in a verbal confrontation and that he did not recall shoving Straw. (N.T. 291; R.E. 26).