COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Sor Angel Fontanez-Rucker Complainant	:	
	:	PHRC Case No. 200904447
v.	:	EEOC Charge No. 17F201060740
Reading School District Respondent	:	

FINDINGS OF FACT

OPINION

RECOMMENDATION OF PRELIMINARY HEARING OFFICER

ORDER

FINDINGS OF FACT*

1. The Complainant in this matter is Sor Angel Fontanez-Rucker (hereinafter the "Complainant"). (N.T. 11; C.C. attachments).
2. The Respondent in this matter is the Reading School District (hereinafter the "Respondent"). (C.C. attachments).
3. The Complainant worked for the Respondent for 28 and one half years in several capacities including: educational assistant for 16 years; English language acquisition (ELA) teacher for 10 years; and a few months as a substitute vice principal and as a vice principal for 2 and one half years. (R.E. 2 Pl 4).
4. On December 8, 2009, the Complainant was informed by telephone that she was being suspended with pay. (N.T. 19, 122).
5. On December 11, 2009, the Complainant was informed by Frank Vecchio, the Respondent's Assistant Superintendent of Schools (hereinafter "Vecchio") that she was suspended without pay and that Vecchio would recommend that the Complainant be terminated. (N.T. 13, 20, 35, 37, 54, 76, 133; R.E. 1 p. 8).
6. Shortly after the December 11, 2009 meeting, the Complainant retained Attorney Kevin Lovetts. (N.T. 20, 38, 65, 117).
7. By letter dated December 14, 2009, Vecchio confirmed the Complainant's suspension without pay and his intent to recommend that the Complainant be terminated. (N.T. 48, 54; C.E. 5).

*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
C.C.	-	PHRC Chief Counsel letter of October 27, 2010

8. By letter dated December 17, 2009, the Complainant received a revised letter from Vecchio informing the Complainant that he would not be recommending the Complainant's termination but would instead recommend that the Complainant be demoted to teacher. (N.T. 21; C.E. 6).

9. By letter dated December 23, 2009, from the Respondent's Board of Directors and President, the Complainant received a Notice of Demotion and Right to a Hearing. (N.T. 37; R.E. 1 p. 2-3).

10. On December 28, 2009, the Complainant requested a hearing. (N.T. 37, 117; R.E. 1 p. 4).

11. A hearing was scheduled for January 26, 2010, however, before the hearing, the Complainant's attorney, Lovetts, and the Respondent's Assistant Solicitor/ Labor Attorney, John Stott agreed to continue the hearing as they were attempting to come to an agreement. (N.T. 29-30, 50, 126; N.T. R.E. 1 p. 6).

12. Lovetts had called Stott advising him that the Complainant was interested in resigning versus being demoted. (N.T. 118).

13. Stott then prepared a draft of a Severance and Release Agreement. (N.T. 119).

14. During the negotiations, the Complainant was unhappy with the content of a proposed recommendation letter and the fact that the agreement did not provide for payment of accumulated sick days. (N.T. 41, 44).

15. On February 1, 2010, the Complainant signed a Severance and Release Agreement wherein the Complainant agreed to resign from the Respondent effective February 1, 2010 and to withdraw a PHRC complaint she had filed against the Respondent at PHRC Case No. 200904447. (N.T. 41, 78; R.E. 1 p. 10-16).

16. The items listed as consideration for the Complainant's resignation and withdrawal of her PHRC case are as follows:

    a. Payment for 6 unused vacation days - $1,706.52.

    b. Payment for 4 personal days - $1,137.68.

    c. The amount of $700.36 to be deducted from the vacation day reimbursement.

    d. The Respondent would not contest a claim for unemployment compensation and would indicate to the Unemployment Compensation Center that the Complainant had been terminated for performance.

    e. The Respondent would provide prospective employers with a letter of reference that would include the Complainant's date of employment, positions held and the last day of employment. (R.E. 1 p. 11).

17. On February 16, 2010, Respondent's President of the Board of Directors signed the Severance and Release Agreement. (R.E. 1 p.16).

18. By letters dated April 15, 2010, the Complainant and Respondent were notified that the PHRC had closed Case No. 200904447 (C.C. attachments)

19. By letter dated May 26, 2010, written to the PHRC Executive Director, the Complainant requested that Case No. 200904447 be reopened. (C.C. attachment).

20. In effect, the Complainant's May 26, 2010 request asserts that the Complainant was coerced to sign the Severance and Release Agreement and the Respondent had not complied with the terms of the agreement. (C.C. attachment).

21. By letter dated August 3, 2010, the Complainant was notified that the PHRC had determined that a Preliminary Hearing should be held to assess whether to reopen the Complainant's case.

22. By letter dated October 21, 2010, the Preliminary Hearing Officer notified the parties that a Preliminary Hearing would be held to address:

    a. Whether, under the totality of the circumstances, the agreement executed by the Complainant was knowing and voluntary;

    b. Whether the agreement between the parties is supported by adequate consideration; and

    c. Whether the Respondent complied with the terms of the agreement.

OPINION

This case originally arose on a complaint filed by Sor Angel Fontanez-Rucker (hereinafter "Complainant") against the Reading School District (hereinafter "Respondent"). In her PHRC complaint, the Complainant generally alleged that, on or about December 2009, she was demoted from the position of vice principal to teacher because of her ancestry, Hispanic and in retaliation for the Complainant's expression of opposition to alleged discriminatory actions by the Respondent.

Subsequent to filing her PHRC allegations, on February 1, 2010, the Complainant executed a Severance and Release Agreement that purportedly settled her claims against the Respondent. Letters dated April 15, 2010, addressed to the parties advised them that the PHRC had closed the Complainant's PHRC case as settled. Subsequently, by letter dated May 26, 2010, the Complainant requested that her case be reopened.

By letter dated August 3, 2010, the Complainant was notified that the PHRC had determined that a Preliminary Hearing should be conducted. By letter dated October 21, 2010, the parties were notified that a Preliminary Hearing was scheduled for November 5, 2010.

The Preliminary Hearing began on November 5, 2010 and continued on December 7, 2010 to afford the Complainant an opportunity to call her doctor as a witness.

Subsequent to the Preliminary Hearing, the Respondent submitted a post-hearing position letter received on January 11, 2011. The Complainant also submitted a post hearing statement received on January 14, 2011.

The first question addressed at the Preliminary Hearing was whether the Severance and Release Agreement had been signed by the Complainant knowingly and voluntarily. On this issue, a totality of the circumstances approach was used. To aid in such an inquiry, a non-exclusive set of six factors is frequently used. See *Smart v Gillett Co. Long-term Disability Plan* 70 F.3d 173, 181 n.3 (1st Cir. 1995). The six factors are: (1) Complainant's education and experience; (2) respective roles of the Complainant and Respondent in creating the provisions of

an agreement; (3) clarity of the agreement; (4) time the Complainant had to evaluate the proposed provisions of an agreement; (5) whether a Complainant had the advice of an attorney; and, (6) consideration exchanged by the parties.

The first five factors were evaluated on the question of "knowing and voluntary," however; in this case, the issue of whether there had been sufficient consideration was separately evaluated.

The Complainant submits that numerous circumstances compel a finding that her execution of the Severance and Release Agreement was not knowing and voluntary. The Complainant offered a variety of circumstances that she argues contributed to her being neither physically nor mentally able to competently sign the agreement.

Before the December 8, 2009 suspension, situations in the Complainant's life were extremely stressful. For instance, the Complainant's husband, Anthony Rucker, had been hospitalized from September 25, 2009, until November 25, 2009 with a life threatening condition, (N.T. 107, 110), and the Complainant was personally suffering with fibromyalgia. On top of these significant life circumstances, the Complainant contends that from the moment she received the December 8, 2009 telephone call notifying her that she had been suspended, she believed she was being treated unfairly and denied due process.

Based on numerous factors, the Complainant related her general belief that she was being treated in a disparate manner. Upon being suspended, the Complainant offered that she was immediately told to leave the building and not permitted to return. (N.T. 12, 20). Further, the Complainant believed that she was being denied the opportunity to attempt to resolve any outstanding issues informally at the lowest level by having a meeting with her supervisor and her accusers. (N.T. 12, 13). Instead, the Complainant viewed the process as immediately going to the highest level. (N.T. 13). Indeed, by December 11, 2009, the Assistant Superintendent of Schools, Frank Vecchio, met with the Complainant and informed her that her suspension would continue without pay and he would recommend her for termination. (N.T. 13, 20, 37, 54).

The Complainant's testimony about the December 11, 2009 meeting with Vecchio suggests that although, as an administrator, she had a right to representation, her representative, the President of the Principal's Association, Dr. Norman, was not permitted to represent her in any way. (N.T. 36, 76).

Along with believing she had been denied an opportunity to informally meet with her accusers, and Dr. Norman not being allowed to represent her, fundamentally, the Complainant believed that Vecchio had made up his mind without even hearing from her and had blatantly skipped over an established progressive discipline policy. The Complainant indicated that she believed the Respondent's progressive discipline policy included first receiving an oral warning, then a written reprimand, a suspension, a demotion and only then dismissal. (N.T. 13-14). In the Complainant's eyes, the Respondent immediately suspended her then told her she would be terminated. Additionally, the Complainant offered that when paid on December 11, 2009, shortly thereafter, the Respondent took back the pay she had received. (N.T. 31).

From the moment she was informed she was being suspended, the Complainant suggests that she was no longer herself emotionally and that as time went on she progressively got worse. On this point, the Complainant presented the testimony of two individuals with whom the Complainant had contact and the Complainant's doctor. First, Dora Perez, a parent, who had worked with the Complainant, testified that after December 11, 2009, she observed that the Complainant was both tearful and extremely stressed. (N.T. 90). Zylkia Rivera, an individual, who had worked with the Complainant for four years observed that the Complainant was "sad." (N.T. 104). The record also confirms that on December 11, 2009, the Complainant called her family doctor complaining of anxiety. (N.T. 168). Her doctor prescribed medication for her anxiety and on December 14, 2009, when the Complainant called again, the doctor changed the medication. (N.T. 168-169). Three days later, the Complainant again called her doctor saying neither medication was effective. (N.T. 169). This time, her doctor prescribed a stronger medication, however, it would be 6 to 8 weeks before it would be effective. (N.T. 169). On

January 4, 2010, the Complainant then asked for an appointment and on January 5, 2010, she was seen by her doctor. At that time, the Complainant reported being very nervous, experiencing palpitations, headaches, difficulty sleeping, crying spells, and chest tightness. The doctor formed the opinion that the Complainant was very anxious and referred the Complainant to a counselor. (N.T. 169-170).

Importantly, when asked directly, the Complainant's doctor testified that the medications the Complainant had been given would not impair her decision making ability and that, in her opinion, the Complainant had the knowing and voluntary capacity to waive rights, (N.T. 175) and that the Complainant was competent to sign a contract. (N.T. 174).

In effect, the Complainant challenges her capacity to sign the Severance and Release Agreement, however, to support a finding that she did not have the capacity to sign the agreement; the Complainant needed competent medical evidence. See *Melanson v Browning Ferris Industries, Inc.,* 86 FEP Cases 1119, 1120 (D.C. Mar. 2001) *aff'd* 88 FEP Cases 286, 289 (1st Cir. 2002). Of course, here, the Complainant's evidence falls short of the requisite showing to set aside the agreement for this reason. Incapacity, without more, will not be inferred from merely the emotional and financial stress associated with the loss of a job. The Complainant is a sophisticated, intelligent, and literate adult who along with the assistance of an attorney, had abundant time to both negotiate and consider the terms of the agreement she signed. In summary, the record lacks sufficient evidence that the Complainant did not have the capacity to knowingly and voluntarily execute the Separation and Release Agreement.

Next, we turn to the Complainant's contention that the Respondent failed to comply with the terms of the agreement. On this point, it appears that the Complainant believes that the agreement would have required the Respondent to provide a "positive" reference to prospective employers. A review of the terms of the agreement reveals that the letter of reference the Respondent was required to provide was not a "positive" reference but only a reference that generally included the Complainant's "date of employment, positions held with the Respondent

and the last day of employment." The record establishes that the Respondent complied with this provision. Further, the Complainant received the payments as provided in the agreement.

Accordingly, we next turn to the question of whether there was sufficient consideration for the agreement. On the point, we do find a reason to set aside the Severance and Release Agreement for want of sufficient consideration.

The agreement outlines the purported consideration the Complainant was given for her agreement to resign and withdraw her PHRC allegation as:

(1) payment for unused vacation and personal days;

(2) the Respondent would not contest the Complainant's claim for unemployment compensation; and

(3) the Respondent would provide a letter of reference.

First, as generally recognized by the Respondent in its post-hearing letter, the money the Complainant received was for unused vacation and personal days to which she was already entitled. When a Complainant only receives something in exchange for an agreement to which she was already entitled, the agreement fails for want of consideration. See *i.e. Fleming v U.S. Postal Service,* 66 FEP Cases 627, 629 (7th Cir. 1994). Accordingly, the money the Complainant received is not consideration.

The Respondent urges a finding that, in this case, the Respondent agreed not to contest the Complainant's claim for unemployment and that this is adequate consideration. Clearly, an employee is not automatically entitled to unemployment benefits. Further, it is normally a reasonable argument to say that an employer who agrees to forego contesting an application for unemployment benefits has stated adequate consideration. However, the facts present in this case are unique.

Here, the Complainant executed the Severance and Release Agreement on February 1, 2010 and the Respondent representative signed the agreement on February 16, 2010. Quite critically, it appears that the Complainant filed her claim for unemployment benefits shortly after

Vecchio informed her that he intended to recommend her termination. Subsequently, a Notice of Determination of Benefits was mailed to both the Respondent and Complainant on January 8, 2010. In this Notice of Determination, the Respondent was clearly notified that benefits had been approved and that the Respondent only had until January 25, 2010 to appeal the determination.

Since the Complainant did not execute the agreement until February 1, 2010, the Respondent no longer had the capacity to use "not contesting unemployment" as a basis of consideration. For this reason, the purported "consideration" that the Respondent would not contest the Complainant's claim for unemployment is not consideration at all.

Finally, the Respondent contends that there is consideration in the Respondent's agreement to provide a letter of reference to the Complainant's prospective employers. Here, the only thing the Respondent agreed to do was to tell prospective employers the date of the Complainant's employment, the positions held, and her last day of employment.

It is interesting to observe that several drafts of the final severance and Release Agreement were exchanged. The Complainant testified that a major problem she had with the early drafts was the Respondent's refusal to provide a positive reference acceptable to the Complainant. (N.T. 41, 44, 45). Indeed the final agreement signed by the Complainant contained the same general reference provision that the Complainant was unhappy with from the beginning. (N.T. 45).

Under the circumstances, the provision of a general reference cannot support sufficient consideration. Therefore, since an agreement, like the one in question here, must be supported by adequate consideration, we find that the Separation and Release Agreement is ineffective and may be set aside. As a final matter, we note that the Complainant does not have an obligation to send back the money she received because the amount she received was something to which the Complainant was already entitled. See *Fleming v U.S. Postal Service,* 66 FEP Cases 627, 629 (7th Cir. 1994).

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Sor Angel Fontanez-Rucker **Complainant**	:	
	:	**PHRC Case No. 200904447**
v.	:	**EEOC Charge No. 17F201060740**
Reading School District **Respondent**	:	

RECOMMENDATION OF PRELIMINARY HEARING OFFICER

Upon consideration of the entire record in the above-captioned matter, I find that the Complainant's request to reopen this case should be granted because the Separation and Release Agreement she signed fails for want of sufficient consideration. It is, therefore, my recommendation that the attached Findings of Fact and Opinion be approved and adopted. If so, approved and adopted, I further recommend issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

January 21, 2011
Date

BY: _____
Carl H. Summerson
Preliminary Hearing Officer

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Sor Angel Fontanez-Rucker	:	
Complainant	:	
	:	**PHRC Case No. 200904447**
v.	:	**EEOC Charge No. 17F201060740**
Reading School District	:	
Respondent	:	

ORDER

AND NOW, this 1st day of March, 2011 after a review of the entire record in this matter, pursuant to Section 9 of the Pennsylvania Human Relations Act and 16 PA Code §§42.66(c)(e) and 42-67(c), the Pennsylvania Human Relations Commission hereby approves the foregoing Findings of Fact, and Opinion of the Preliminary Hearing Officer. Further, the Commission adopts said Findings of Fact, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

that the Complainant's request to reopen this case is granted. Further, this Order is entered consistent with Section 962 of the PA Human Relations Act and applicable judicial determinations in Baker v Cmwlth., Human Relations Commission, 507 Pa. 325, 489 A. 2d 1354 (1985) and Graves v Cmwlth., Human Relations Commission, 634 A. 2d 701 (Pa. Cmwlth. Ct. 1993) related to the non-adjudicative nature of determinations made by the Commission during the exercise of its investigative jurisdiction. Accordingly, because investigative determinations do not adjudicate rights of the parties, this Interlocutory Order is non-adjudicative in nature.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Stephen A. Glassman
Chairperson

Attest:

Dr. Daniel D. Yun
Secretary