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## Articles

### An Examination of Discrimination Under The Pennsylvania Civil Service Act

*Debra Punsky Rand\**

In 1963, the General Assembly amended the Civil Service Act<sup>1</sup> by adding section 905.1.<sup>2</sup> This section reads as follows:

No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

The purpose of this article is to examine this amendment, and specifically the criteria required to fall within its ambit, to analyze the restrictions implicit in this amendment, to evaluate the wisdom of

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1. Act of August 5, 1941, P.L. 752, *as amended*, PA. STAT. ANN. tit. 71, § 741.1 *et seq.* (Purdon 1962 and Supp. 1986) [hereinafter cited as the Civil Service Act].

2. PA. STAT. ANN. tit. 71, § 741.905(a) (Purdon Supp. 1986). Section 905.1 was added to the Civil Service Act by section 25 of the Act of August 27, 1963, P.L. 1257.

using this amendment as a catch-all provision for correcting "injustices" and to consider some of the major legal questions, both constitutional and statutory, that it has generated.

## I. HISTORY AND BACKGROUND

Prior to the enactment of section 905.1, the Civil Service Act granted only a limited right of appeal on the basis of discrimination. Discrimination actions brought by disgruntled employees against employers (appointing authorities) under the Act were limited to instances involving complaints of a regular status employee's improper removal pursuant to section 807,<sup>3</sup> and improper demotion pursuant to section 706.<sup>4</sup> Interestingly, the statutes pertaining to furlough, section 802,<sup>5</sup> and suspension, section 803,<sup>6</sup> did not specifically prohibit discrimination. In addition, the State Civil

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3. The removal of a regular status employee can be effected only for just cause. See Section 807 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 747.807 (Purdon 1962)(amended 1963).

4. PA. STAT. ANN. tit. 71, § 741.706 (Purdon 1962) (amended 1963). There is no statutory standard for an involuntary demotion but because a demotion has the effect of removing the employee from the higher level position it is suggested that the demotion of a regular status employee should be subject to the just cause standard.

5. PA. STAT. ANN. tit. 71, § 741.802 (Purdon 1962) (amended 1963). A furlough may be implemented by an "appointing authority" only because of a lack of work or a lack of funds pursuant to section 3(s) of the Civil Service Act. PA. STAT. ANN. tit. 71, § 741.3(s) (Purdon Supp. 1986). In addition, in determining which employees are to be furloughed, a 1963 amendment to section 802 dictates the order of furlough, absent a collective bargaining agreement containing provisions that it, and not section 802, applies.

The term "appointing authority" is the statutory term for "officers, board, commission, person or group of persons having power by law to make appointments in the classified service." Section 741.3(e) (Purdon Supp. 1986). It is generally understood that personnel actions may be validly implemented only by the appointing authority. See, e.g., Moore v. Commonwealth, 1 Pa. Commw. 73, 272 A.2d 283 (1970).

6. PA. STAT. ANN. tit. 71, § 741.803 (Purdon 1962) (amended 1963). The suspension of a regular status employee can be effected only for good cause. State Civil Service Commission regulation 101.21, 4 PA. CODE § 101.21 (Shepard's 1986), sets forth the types of actions which, if proven, can establish good cause. The list does not purport to be exhaustive and it is generally understood that actions constituting good cause for suspension may also be sufficient to rise to the level of just cause for removal. For example, habitual lateness may merit either suspension or removal depending upon facts unique to a particular case such as the number of times the employee was late, the employee's duties, and the presence or absence of prior warnings. It is, however, the appointing authority which elects the personnel action. Moreover, case law is clear that the State Civil Service Commission has no power to substitute a different personnel action or second guess the appointing authority. See *Omelchenko v. Hous. Auth.*, 58 Pa. Commw. 94, 428 A.2d 274 (1981).

For newcomers to civil service law it should be pointed out that regulation 101.21 formerly read "good cause for suspension shall be a just cause. . . ." The mention of the statutory standard for removal in the context of a regulation dealing with suspension was misleading and the language has been altered to clarify the matter.

Service Commission (hereinafter referred to as the Commission) had and still has the power to institute show cause or investigatory proceedings.<sup>7</sup>

Thus, under the pre-1963 scenario most personnel actions were not appealable. No probationary employee<sup>8</sup> or provisional employee<sup>9</sup> had any right of appeal whatsoever. In addition, many personnel actions involving regular status employees were not appealable to the Commission. Included among these were transfer or reassignment,<sup>10</sup> leave of absence, unfavorable performance evaluation report (PER),<sup>11</sup> reclassification<sup>12</sup> and non-selection for

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7. The authority to conduct hearings in all of the aforementioned actions appears in section 203 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.203 (Purdon 1962) (amended 1963) and in section 951(a), PA. STAT. ANN. tit. 71, § 741.951(d) (Purdon Supp. 1986). "Show cause" hearings usually pertain to issues such as whether an employee violated section 904 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.904 (Purdon Supp. 1986) (pertaining to the prohibition of certain political activities) and whether an employee violated section 902 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.902 (Purdon 1962) (relating to falsification of a civil service application). In addition, the Commission can hold investigatory hearings on issues such as misapplication of eligibility lists by an appointing authority.

8. A probationary employee is one undergoing a probationary period which is defined as "a preliminary period of employment prior to permanent appointment of an employe for the purpose of determining his fitness for permanent employment." Section 3(t) of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.3(t) (Purdon Supp. 1986).

9. Provisional employee is not defined in the Civil Service Act but provisional appointments are permitted only when there is an urgent need to fill a vacancy and the director of the State Civil Service Commission is unable to certify an eligible list and no regular civil service examination is immediately available. See section 604 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.604 (Purdon Supp. 1986). The Civil Service Act also provides for temporary appointments to extra positions, see section 605, PA. STAT. ANN. tit. 71, § 741.605 (Purdon 1962) and emergency appointments, see section 606 PA. STAT. ANN. tit. 71, § 741.606 (Purdon 1962). The distinctions are unimportant for purposes of this article. The point is that none of these employees has regular status, which is granted only after completion of the probationary period. See section 3(k) of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.3(k) (Purdon Supp. 1986).

10. Transfer and reassignment are implemented pursuant to section 705 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.705 (Purdon Supp. 1986). Whether the action is a transfer or a reassignment depends upon whether the employee is moved from one position to another within the same appointing authority (reassignment) or another appointing authority (transfer). See Commission regulation 99.21, 4 PA. CODE § 99.21 (Shepard's 1986).

11. Performance evaluation reports (PERs) are issued pursuant to section 704 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.704 (Purdon 1962) and Commission regulations 99.11 - 99.15, 4 PA. CODE §§ 99.11 - 99.15 (Shepard's 1986). The reports are issued during the month of the anniversary date, see *Sebastiani v. Dep't of Transp.*, 75 Pa. Commw. 602, 462 A.2d 942 (1983), of the regular status employee and prior to the expiration of the probationary period for probationers. The importance of these reports *cannot* be underestimated because they can be utilized to determine promotion and order of furlough. As with any other personnel action they must be appealed to the Commission within twenty days of their issuance to the employee. This is a critical point because frequently the significance of a "bad" PER will not be evident until a promotion or a furlough is implemented.

promotion.

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This may be long after the twenty day appeal period and at that point attack upon the PER will not be permitted. *Interim* PERs are *not* appealable. They are in the nature of progress reports indicating improvement or decline in work and are not utilized for determining furlough order or promotion.

12. Reclassification downward, which is implemented under authority of Commission regulation 99.42, 4 PA. CODE § 99.42 (Shepard's 1986), is a troublesome problem. It involves altering the status of an employee from one position to a lower position because over a period of time the employee's work duties have changed. It is frequently confused with involuntary demotion. An involuntary demotion, however, involves (1) a "change to a position in a class carrying a lower maximum salary," section 3(r) of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.3(r) (Purdon Supp. 1986), and (2) unsatisfactory performance, section 706 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.706 (Purdon Supp. 1986). In reclassification downward, salary is not taken away, but future increments may be lost.

A recent decision has cast doubt upon whether reclassification downward continues to exist as a valid personnel action. In *McHale v. Dep't of Transp.*, \_\_\_ Pa. Commw. \_\_\_, 514 A.2d 290 (1986), the court held that where an employee is reclassified downward before he has reached the top salary range in the pre-reclassification stage, the personnel action taken is, definitionally, a demotion. In other words, the denial of future merit increments to which the employee might have become entitled had he not been reclassified downward renders the action an involuntary demotion. While the Civil Service Act does not specifically require that a demotion be "for cause," the better view is that such cause is required. See note 4. In cases of reclassification downward, fault-based conduct is not at issue and hence if reclassification downward is indeed an involuntary demotion it is probably an invalid demotion because it is implemented without "cause."

The dissent in *McHale* astutely recognizes that:

[T]he majority opinion, in deciding whether a change to a position in a class carrying a lower maximum salary has occurred, compares only the maximum salaries of the two pay ranges in question. This cannot be the correct comparison because every time an employee is reclassified downward, the maximum salary in the reclassified position will *always* be less than the maximum salary in the pre-reclassified position.

Yet, reclassification downward is specifically authorized in Commission Regulation 99.42. . . .

*Id.* at \_\_\_, 514 A.2d at 293. (Emphasis in original). The dissent, in addition, points to case law sustaining reclassification downward as a valid personnel action.

The impact of *McHale* has not yet been felt, but if the case can be taken at its literal word, once an employee is classified and his duties are later changed because of reasons such as computerization or a reduction in the workload the employee must continue to be paid the higher level salary for duties no longer being done by him. The real loser in such cases is the taxpayer.

The other major difficulty in the current case law with respect to reclassification downward is a jurisdictional problem. Initially, the Commission had jurisdiction over classification issues. See section 203(2) of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.203(2) (Purdon 1962). But section 203 was amended and classification as well as compensation issues were transferred to the Executive Board. Compare former section 203(2) with section 203, PA. STAT. ANN. tit. 71, § 741.203 (Purdon Supp. 1986). See also section 707 of the Civil Service Act, PA. STAT. ANN. tit. 71, § 741.707 (Purdon Supp. 1986).

The Commonwealth Court recognized this legislative change in *Gorton v. State Civil Serv. Comm'n*, 35 Pa. Commw. 319, 385 A.2d 1026 (1978). *Gorton* was clearly the state of the law until the Commonwealth Court issued *Ermel v. Dep't of Transp.*, 79 Pa. Commw. 431, 470 A.2d 1061 (1984). The *Ermel* court, without reference to *Gorton* or its progeny, remanded a case to the State Civil Service Commission to determine whether an employee had ever occupied a particular position. Subsequent to *Ermel* the Commonwealth Court filed *Behm*

The 1963 amendment thus created a right of appeal for all non-regular status employees and significantly extended the right of appeal previously held by regular status employees.

## II. HEARINGS AUTHORIZED UNDER THE CIVIL SERVICE ACT

Pursuant to section 951(a) of the Civil Service Act<sup>13</sup> any regular status employee may appeal any permanent separation, suspension, furlough or demotion on the grounds that the appealed action was taken in violation of the Civil Service Act. Section 951(a) grants the employee the right to a public hearing, and a report (adjudication) containing findings of fact and legal conclusions.

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v. State Civil Serv. Comm'n, 90 Pa. Commw. 207, 494 A.2d 1166 (1985), which again reiterated the *Gorton* position. A few days later the Commonwealth Court filed *Benzo v. Office of Employment Sec.* (No. 451 C.D. 1982 filed June 24, 1985), an unpublished case which relied upon *Ermel*. Pursuant to Commonwealth Court's internal operating rules an unpublished opinion may not be cited as precedent. See 210 PA. CODE § 67.55 (Shepard's 1986). Thus, *Behm* would appear to represent the current state of the law. It is submitted that the *Gorton/Behm* position is correct because there has been no further legislation altering the jurisdiction of the State Civil Service Commission on classification matters since *Gorton* was decided. The *Behm* court clearly stated that even where a personnel action exists, it must be one over which the Commission had jurisdiction in order to fall within the ambit of section 905.1. For other cases considering this jurisdictional problem, see *Wetzel v. State Civil Serv. Comm'n*, 77 Pa. Commw. 47, 465 A.2d 69 (1983) (Commission lacks jurisdiction over classification issues); *Carr v. Dep't of Pub. Welfare*, 72 Pa. Commw. 78, 456 A.2d 240 (1983) (jurisdiction over classification issues rests with the Executive Board); *O'Peil v. State Civil Serv. Comm'n*, 16 Pa. Commw. 467, 332 A.2d 879 (1975) (adoption of uniform compensation plan which does not provide merit increment is not a personnel action and the Commission was without jurisdiction to consider the employee's appeal); but see *Dep't of Transp. v. Civil Serv. Comm'n*, 9 Pa. Commw 341, 306 A.2d 428 (1973) (an Executive Board resolution which established maximum *non-uniform* salaries and operated to deny merit increments to some employees was a personnel action). *Department of Transportation*, it should be noted, pre-dates *Gorton*.

The case law instructs that an employee appealing reclassification downward may do so before the State Civil Service Commission, but only upon a discrimination theory. Thus, employees challenging the correctness of the reclassification should direct complaints to the Executive Board, which until recently was required to grant the aggrieved employee a due process hearing. See *Orage v. Office of Admin.*, 85 Pa. Commw. 497, 482 A.2d 1174 (1984), *rev'd*, \_\_\_ Pa. \_\_\_, 515 A.2d 852 (1986).

13. PA. STAT. ANN. tit. 71, § 741.951(a) (Purdon Supp. 1986). This section provides:

(a) Any regular employe in the classified service may, within twenty calender days of receipt of notice from the appointing authority, appeal in writing to the commission. Any permanent separation, suspension for cause, furlough or demotion on the grounds that such action had been taken in his case in violation of the provisions of this act, upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing. As soon as practicable after the conclusion of the hearing the commission shall report its findings and conclusions to the appointing authority and the employe. If such final decision is in favor of the employe, the appointing authority shall reinstate him with the payment of so much of the salary or wages lost by him as the commission may in its discretion order.

Under this section, the State Civil Service Commission is empowered, upon finding in favor of the employee, to reinstate the employee "with the payment of so much of the salary or wages lost by him as the commission may in its discretion order."<sup>14</sup> Pursuant to Commission regulation 105.15<sup>15</sup> the burden of establishing a prima facie case in a section 951(a) appeal rests on the appointing authority.

The section 951(a) right of appeal must be contrasted with that established under section 951(b).<sup>16</sup> The latter permits "any person" who is aggrieved by section 905.1 to appeal. While it also provides for a public hearing and the issuance of an adjudication, it is distinguishable from section 951(a) for several reasons. First, the language does not limit the right of appeal to regular status employees, nor does it contain a restricted list of appealable actions. Second, it grants the State Civil Service Commission, upon finding in favor of the aggrieved person, authority to "make such order as it deems appropriate to assure the person such rights as are accorded him by this act."<sup>17</sup> Third, Commission regulation 105.16<sup>18</sup> places on the employee asserting a section 951(b) claim the burden to establish a prima facie case of discrimination.

The last type of appeal, which is under section 951(d),<sup>19</sup> pertains to the Commission's investigatory hearings. Such hearings may be held *sua sponte* or by motion "to assure observance of the provisions of this act and the rules and regulations thereunder."<sup>20</sup>

### III. THE STATUTORY ELEMENTS OF SECTION 905.1

Section 905.1 contains three separate elements, all of which must be met for a claim to fall within its provisions.

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14. *Id.* For an interesting case construing "salary or wages" under section 951(a), see *Elias v. Dep't of Pub. Welfare*, \_\_\_ Pa. Commw. \_\_\_, 511 A.2d 887 (1986).

15. 4 PA. CODE § 105.15 (Shepard's 1986).

16. PA. STAT. ANN. tit. 71, § 741.951(b) (Purdon Supp. 1986). This Section provides: (b) Any person who is aggrieved by an alleged violation of section 905.1 of this act may appeal in writing to the commission within twenty calendar days of the alleged violation. Upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing. As soon as practicable after the conclusion of the hearing, the commission shall report its findings and conclusions to the aggrieved person and other interested parties. If such final decision is in favor of the aggrieved person, the commission shall make such order as it deems appropriate to assure the person such rights as are accorded him by this act.

17. *Id.*

18. 4 PA. CODE § 105.16 (Shepard's 1986).

19. PA. STAT. ANN. tit. 71, § 741.951(d) (Purdon Supp. 1986).

20. *Id.* See also note 7.

First, the statute provides that “[n]o officer or employe . . . shall discriminate. . . .” The question of what constitutes discrimination under the Act will be considered in detail later in this article.

The second element is that the discrimination must be in the form of a personnel action. This requirement occasionally causes difficulties and contradictory case law exists. Commission regulation 105.2<sup>21</sup> contains a list of personnel actions for which written notice is required. This regulation is, however, silent on whether it is an exhaustive list of *all* personnel actions or merely a list of all personnel actions requiring written notice. The case law serves only to confuse this question. The first case to consider this regulation was *Ellis v. Department of Transportation*.<sup>22</sup> In *Ellis*, the employee appealed his furlough and in so doing sought to challenge the PERs upon which his status for furlough purposes was properly premised. The Commission held the challenge to the PER untimely. It maintained that the report had to be appealed within 20 days of its issuance pursuant to the statute of limitations appearing in section 951(b) of the Civil Service Act. *Ellis* maintained that there was no provision in the Civil Service Act governing the appeal of a PER and hence that he should be able to challenge the report in the context of the civil service furlough proceeding. Commonwealth Court recognized that regulation 105.2(a)(14) specifi-

21. 4 PA. CODE § 105.2 (Shepard's 1986). This regulation reads as follows:

(a) Written notice shall be required for:

- (1) Appointment.
- (2) Promotion.
- (3) Removal.
- (4) Suspension.
- (5) Demotion.
- (6) Furlough.
- (7) Retirement.
- (8) Resignation.
- (9) Transfer.
- (10) Reassignment.
- (11) Leave of absence.
- (12) Extension or reduction of probationary period.
- (13) Compensation changes, except salary increments, general pay increases, or special pay for such things as overtime or out-of-class work.
- (14) Performance evaluation.

(b) The signature of the employe on the performance evaluation shall be evidence of written notice of performance evaluation.

The language in regulation 105.2(a)(13) was amended effective March 30, 1985, *see* 15 Pa. Admin. Bull. 1151, 1162, to include the words “general pay increases, or special pay for such things as overtime or out-of-class work.”

22. 33 Pa. Commw. 354, 381 A.2d 1325 (1978).



cally included PERs among personnel actions subject to appeal before the Commission and held that the Commission's resolution of the timeliness issue was correct.<sup>23</sup>

This regulation was next considered in *Tempero v. Department of Environmental Resources*.<sup>24</sup> In *Tempero*, two employees filed appeals from reassignments under section 951(b). The appeals were consolidated. *Tempero* maintained that she was discriminated against on the basis of her sex because she was deprived of supervisory responsibilities. On this point, the Commonwealth Court wrote:

While the responsibilities of her position did not include supervision over other people, she was responsible for the supervision of a program. We cannot say that *Tempero* was in fact deprived of a supervisory position. *In any event, loss of supervisory authority, without more, is not a personnel action under the Act. See 4 Pa. Code § 105.2.* As a result of the reassignment,

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23. This case is an example of the importance of timely appeal of a PER as explained in note 11.

An interesting extension of the right of appeal recognized in *Ellis, Lehotzky v. State Civil Serv. Comm'n*, 82 Pa. Commw. 612, 477 A.2d 13 (1984), held that where an unfavorable PER is withdrawn the Commission nonetheless remains empowered to grant ancillary relief in the form of an order directing the appointing authority to rescind a letter of reprimand which had been attached to the withdrawn PER.

The *Lehotzky* court stated:

With respect to the issue of whether there should be a rescission of the reprimanding memorandum, however, we believe that the Commission's holding, that the question, of whether there should be a rescission, does not constitute an appealable personnel action, implicitly mischaracterizes the precise issue before it. Petitioner does not present any assertion of a new subject of appeal. Instead, she has preserved a request for ancillary relief stemming from the personnel action originally appealed, *i.e.*, the performance evaluation report. The real issue confronting this Court is whether the Commission was obligated to proceed with a hearing for consideration of that ancillary relief request where the employer agency has reversed the challenged personnel action prior to the hearing on the merits, *i.e.*, whether the agency, by unilaterally mooting the central challenge, can be assured of avoiding any further action of the Commission.

Initially, Section 951(b) of the Civil Service Act, . . . vests with the Commission the authority to "make such order as it deems appropriate to assure . . . [a state employee] such rights as are accorded him" by the Civil Service Act. This clearly permits the ordering of the rescission where the facts of the particular matter justify such.

*Id.* at 615-16, 477 A.2d at 15 (brackets in original).

It was never asserted in *Lehotzky* that the letter was itself a personnel action. Thus, the result in *Lehotzky* was to permit the Commission to exercise its remedial power under section 951(b) where the personnel action which is a requirement for a valid cause of action under section 905.1 had been withdrawn. It is suggested that *Lehotzky* does not really do away with the requirement of a personnel action. Instead, it can be limited to its facts, including the allegation that the memorandum had been circulated among *Lehotzky's* colleagues and the fact that there was initially an appeal of a recognized personnel action.

24. 44 Pa. Commw. 235, 403 A.2d 226 (1979).

Tempero did not lose her continued employment, her classification, any part of her salary, any right to salary increases, or any right to promotions as provided by the Act. We conclude, therefore, that Tempero has failed to meet her burden of proving that the reassignment was based on sex.<sup>25</sup>

Thus, *Tempero* appears to construe Commission regulation 105.2 as an exhaustive list of *all* personnel action. Only six weeks later, however, the Commonwealth Court issued *Department of General Services v. Johnson*.<sup>26</sup> In factual terms, *Johnson* is a fascinating case. In *Johnson*, the employee, an equal opportunities development specialist V, had all of his duties assigned to a non-civil service employee. Johnson was given no assignments for eleven months and eventually his entire office was moved to another floor leaving Johnson behind with only a desk and chair. Johnson was also the victim of an unsatisfactory PER (later withdrawn pending re-evaluation) and a suspension. With respect to the loss of his duties, Johnson filed an appeal which the Commission dismissed after determining in an investigatory hearing that no personnel action had occurred. Subsequently it held, *inter alia*, that the withdrawal of Johnson's work assignments was discriminatory and hence ordered reinstatement of the duties. The issue before Commonwealth Court was "whether the Commission had the power to investigate and determine issues regarding the removal of duties once assigned to Johnson and to order reinstatement of said duties."<sup>27</sup> The appointing authority maintained that its action constituted only managerial supervision and thus was not a personnel action within the meaning of section 905.1. In disagreeing with this argument, the court cited regulation 105.2 (which clearly does not specify that loss of duties is a personnel action) and wrote that "[t]he regulation does not purport to provide an exclusive listing [of personnel actions]."<sup>28</sup> The court then rationalized that such a drastic change in duties was "analogous to a demotion or reassignment"<sup>29</sup> and thus constituted a personnel action. Additionally, the court indicated that the failure or refusal to give an employee *any* work assignments whatsoever is not a usual managerial act.<sup>30</sup> The result in *Johnson* appears correct and its recognition that regulation 105.2 is not a complete list of all personnel actions is astute

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25. *Id.* at 237 n.2, 403 A.2d at 228 n.2 (emphasis added).

26. 45 Pa. Commw. 245, 405 A.2d 596 (1979).

27. *Id.* at 248, 405 A.2d at 597.

28. *Id.* at 249, 405 A.2d at 597.

29. *Id.*

30. *Id.* at 249-50, 405 A.2d at 597-98.

because this reading of the regulation allows for flexibility when unforeseen actions are taken against employees. But *Johnson* seems to be contradictory to *Tempero's* narrow reading of the regulation.

The Court adhered to the *Johnson* view in *Taylor v. State Civil Service Commission*,<sup>31</sup> a non-selection for promotion case. In *Taylor*, the court, although it noted that non-selection for promotion is not a personnel action listed in regulation 105.2, indicated that such an action is nonetheless appealable under section 905.1. *Taylor* is a timeliness case and because the appeal was held untimely the merits were never reached. However, in *Butler v. State Civil Service Commission*,<sup>32</sup> another non-selection case, the court reversed the Commission's determination that the appeals of non-selectees were untimely and remanded "for disposition on the merits."<sup>33</sup> Thus, the court has recognized the appealability of non-selection under section 951(b) although it is not a personnel action listed under regulation 105.2. *Taylor* and *Butler* appear to stand for the proposition that regulation 105.2 is not a complete list of appealable actions.

More recently, in *Coventry v. Pennsylvania Liquor Control Board*,<sup>34</sup> two employees attempted to appeal wage deductions. Each employee was a manager of a liquor store where cash shortages in handling deposits had occurred. The Pennsylvania Liquor Control Board conducted internal investigations, determined that the managers were responsible for the losses, and thus deducted sums from their regular paychecks. The Commission held that the pay reductions were not appealable personnel actions under the Civil Service Act and rules. Commonwealth Court, apparently relying on regulation 105.2, indicated its agreement with this holding.<sup>35</sup> Thus, *Coventry* appears to follow the *Tempero* rationale that regulation 105.2 constitutes an exhaustive list of all personnel actions, but ignores the dictum in *Tempero* as well as regulation 105.2(13) both of which suggest that partial loss of salary is a personnel action.<sup>36</sup>

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31. 67 Pa. Commw. 594, 447 A.2d 1098 (1982).

32. 57 Pa. Commw. 406, 426 A.2d 239 (1981).

33. *Id.* at 409, 426 A.2d at 241.

34. 81 Pa. Commw. 232, 473 A.2d 249 (1984).

35. Although *Coventry* quotes regulation 105.2 and states that the State Civil Service Commission correctly determined that the pay reduction was not a personnel action, the case does not directly state that personnel actions are restricted only to those listed in the regulation.

36. Another example of a personnel action which is, in fact, appealable under section

In assessing whether regulation 105.2 is or ought to be viewed as the complete list of personnel actions as that term is used in section 905.1 the better rationale would appear to be that it ought not. First, as *Johnson* notes, the regulation itself never purports to be a complete listing of *all* actions, but only of all actions *requiring written notice*. Second, Commonwealth Court has already, by precedent, permitted hearings on non-listed actions.<sup>37</sup> Third, allowing actions not listed to be appealable permits the Commission to adapt to meet new situations (such as the *Johnson* scenario) when implemented.

Even under the broad view espoused in *Johnson*, however, not every activity would constitute a personnel action. Consider a hypothetical situation where a supervisor has two subordinates, one a Republican, the other a Democrat. The Democrat is senior to the Republican, but the supervisor is also a Republican. An office with a window view becomes available. The supervisor assigns the Republican to that office although the Democrat, the more senior employee, requests it. Even if the supervisor admitted that his choice had been based upon his political bias, is the denial of a more desirable office a personnel action? Should such decisions be appealable? Section 2 of the Civil Service Act,<sup>38</sup> sets forth the Act's purpose:

Greater efficiency and economy in the administration of the government of this Commonwealth is the primary purpose of this act. The establishment of conditions of service which will attract to the service of the Commonwealth qualified persons of character and ability and their appointment and promotion on the basis of merit and fitness are means to this end.

Certainly, persons will be more attracted to government service if they believe they are treated fairly, but greater efficiency of administration will not be achieved if appointing authorities are required to defend, against a charge of discrimination at a full blown due process hearing, every minor decision. To construe "personnel action" too broadly is to usurp routine management decisions and *Johnson* certainly did not suggest that managerial prerogative is to be lightly disregarded. Thus, the considerations of fair treatment of the employee and decision-making rights of management must be balanced cautiously.

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951(b), although not specified in regulation 105.2, is reclassification downward. *See, e.g., Johnson v. Dep't of Gen. Servs.*, 91 Pa. Commw. 96, 496 A.2d 1268 (1985) [hereinafter cited as *Johnson v. D.G.S.* to avoid confusion with the case cited in note 26]. *See also* note 12.

37. *E.g., Taylor, Butler, Johnson v. D.G.S.*

38. PA. STAT. ANN. tit. 71, § 741.2 (Purdon 1962).

The final element appearing in section 905.1 is that discrimination must take the form of a personnel action *with respect to the classified service*. Thus, if a supervisor does not invite a Jewish employee to his home for a picnic, but all co-employees are invited, it would seem as though this conduct is neither a personnel action, nor is it an activity related to the classified service. While it may be *evidence to show the supervisor's attitude* toward the employee in a recognized personnel action, the conduct itself is most likely not actionable under section 905.1 of the Civil Service Act.

As noted earlier, the burden of proving discrimination under section 905.1 has been assigned to the employee pursuant to the procedures set forth in regulation 105.16. But the elements of a prima facie case under regulation 105.16 are nowhere set forth in statute, regulation or civil service case law. It is suggested that the prima facie elements and presumptions of the Civil Rights Act of 1964 (Title VII)<sup>39</sup> are appropriate for civil service law in many, but not all, instances. In order to understand and evaluate the appropriateness of applying Title VII law to the State Civil Service Act, it is necessary to review this law, to examine Pennsylvania's application of Title VII standards to state law, and to consider particularly the unique development of discrimination law under the Civil Service Act.

#### IV. FEDERAL LAW UNDER TITLE VII

Examination of employment discrimination under Title VII requires an initial determination of whether the alleged activity constitutes disparate treatment, disparate impact and/or present effects of past discrimination. Justice Larsen in his opinion in support of affirmance in *Winn v. Trans World Airlines, Inc.*<sup>40</sup> astutely noted that these different theories must be distinguished. Only the first two theories need be examined for our purposes here.

As explained in *International Brotherhood of Teamsters v. United States*,<sup>41</sup> disparate treatment under Title VII occurs when an employer treats some persons differently because of race, sex, religion or other similar criteria. In such cases proof of discriminatory motive is critical, although it can be inferred in some in-

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39. 42 U.S.C. § 2000e *et. seq.* (1982) [hereinafter Title VII].

40. 506 Pa. 138, 484 A.2d 392 (1984).

41. 431 U.S. 324 (1977).

stances merely from the fact of the disparate treatment.<sup>42</sup>

Disparate impact cases involve employment practices that are facially neutral but in application fall more harshly on one group than another, and cannot be justified by business necessity.<sup>43</sup> Proof of discriminatory motive is not required in disparate impact cases.<sup>44</sup>

The United States Supreme Court enunciated the *prima facie* elements applicable to a disparate treatment case in *McDonnell Douglas Corporation v. Green*<sup>45</sup> as follows:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>46</sup>

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42. *Id.* at 335 n.15.

43. *Id.*

44. *Id.*

45. 411 U.S. 792 (1973). In *McDonnell*, the employee, a black civil rights activist, protested his furlough by participating in a "stall-in" against the employer. This tactic consisted of a plan whereby members of a civil rights group intentionally and illegally stalled their cars on the main roads leading to the employer's plant. Subsequent to this incident a lock-in occurred. The lock-in, which involved chaining the doors of employer's plant to prevent ingress and egress, was conducted by members of a civil rights group of which Green was chairman. The trial court found that Green actively participated in the lock-in activity as well as the stall-in, but the court of appeals held that the evidence did not support the finding with respect to the lock-in. The Supreme Court found it unnecessary to resolve the factual issue pertaining to participation in the lock-in because Green had admitted participating directly in the stall-in incident.

Approximately three weeks after the lock-in, the employer publicly advertised for qualified mechanics, Green's trade. Green reapplied for a job and was rejected, according to the employer, because of his participation in the above noted illegal activities. Green lost at the district court level. The court of appeals agreed with the district court that the activities Green participated in were illegal and were not protected civil rights activities under 42 U.S.C. § 2000e-3(a). But the circuit court also determined that Green's claim under 42 U.S.C. § 2000e-2(a)(1), which pertains generally to employment discrimination based upon, *inter alia*, race, should not have been dismissed. The circuit court suggested that the employer's refusal to rehire was based upon subjective criteria and that Green should have been given the opportunity to show that its reasons for refusing to hire him were a pretext.

46. *Id.* at 802. The *McDonnell* Court held that Green had established these elements. In addition, the *McDonnell* Court noted that the facts will vary in a Title VII case and thus "the *prima facie* proof required . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

The High Court recently held that the *McDonnell* test is inapplicable where the plaintiff presents direct evidence of discrimination. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In *Trans World* the direct evidence was that the company's method of transfer available to a captain depended upon the captain's age.

According to the *McDonnell* Court, if the employee establishes these elements, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>47</sup>

What *McDonnell* did not make clear was first, whether the burden of *persuasion* ever shifted to the employer and second, how the employee could rebut the employer's reasons for its personnel decision. These questions were subsequently answered in *Texas Department of Community Affairs v. Burdine*.<sup>48</sup>

After reviewing the prima facie burden previously enunciated in *McDonnell*, the *Burdine* Court stated that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."<sup>49</sup> According to the *Burdine* Court, the employer need only rebut the presumption of discrimination established by the prima facie case.<sup>50</sup> "[It] need not persuade the court that it was actually motivated by the proffered reasons."<sup>51</sup> If the employer rebuts the prima facie presumption by producing evidence that rejection was for a legitimate and non-discriminatory reason, the presumption drops from the case.<sup>52</sup> The plaintiff, who retains the burden of persuasion, must then demonstrate that the proffered reason is a pretext.<sup>53</sup> This can be done "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."<sup>54</sup> It must be emphasized that under *Burdine* the employer need only produce evidence that legitimate non-dis-

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47. 411 U.S. at 802. The Court determined that the employer had articulated a legitimate non-discriminatory reason for the rejection and went on to explain that the circuit court had "seriously underestimated the rebuttal weight" to be given this evidence. *Id.* at 803. On remand, according to the Court, Green was to be given a chance to show that the employer's reasons for refusing to rehire him were a pretext.

48. 450 U.S. 248 (1981). Briefly, *Burdine* involved the firing of an employee who was later rehired in another department. Prior to her firing, she had applied for a supervisory position which she was denied. She filed a Title VII action alleging that the refusal to promote her and her subsequent firing were based on gender discrimination.

49. *Id.* at 253.

50. *Id.* at 254.

51. *Id.*

52. *Id.* at 255.

53. *Id.* at 255-56.

54. *Id.* at 256. For an interesting article on the burdens under *Burdine* and their possible application to disparate impact cases see Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of the Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine*, 55 TEMP. L.Q. 372 (1982).

criminary reasons existed for its action.<sup>55</sup> It is not, in the context of a non-selection for promotion case, required to persuade the court that it had convincing objective reasons for preferring another job candidate.<sup>56</sup> Finally, according to *Burdine*, the employer need not prove that the selectee was more qualified than the non-selectee because Title VII permits the employer discretion in choosing from a pool of equally qualified candidates.<sup>57</sup>

The third case developing the Title VII burden in a disparate treatment context is *United States Postal Service Board of Governors v. Aikens*.<sup>58</sup> *Aikens* adds little to *Burdine* except a clear re-statement that the employee is not required to submit direct evidence of discriminatory intent.<sup>59</sup>

Summarizing the salient principles, in disparate treatment cases arising under Title VII, the prima facie case, if established, creates a presumption of discrimination which if rebutted drops from the case. The burden of persuasion remains at all times with the employee and discriminatory motive must be established.

The seminal case on disparate impact under Title VII is *Griggs v. Duke Power Company*.<sup>60</sup> The issue in *Griggs* was whether the employer was prohibited under Title VII "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites."<sup>61</sup> The lower courts had ruled that a showing of discriminatory intent was necessary. The High Court rejected this idea indicating that under Title VII "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>62</sup> Title VII prohibits not only overt

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55. 450 U.S. at 254.

56. *Id.* at 256-57.

57. *Id.* at 259.

58. 460 U.S. 711 (1983). *Aikens* involved the employer's refusal to promote a black employee. The reason given by the employer for its action was that Aikens had turned down several lateral transfers which would have broadened his experience.

59. *Id.* at 717.

60. 401 U.S. 424 (1971).

61. *Id.* at 425-26.

62. *Id.* at 430.



discrimination, but "practices that are fair in form, but discriminatory in operation."<sup>63</sup> But, the Court further explained, "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."<sup>64</sup>

Title VII, according to the *Griggs* Court, is directed not only to the motivation of employment practices, but also their consequences.<sup>65</sup> Thus, under disparate impact cases, the relevant inquiry becomes, does the practice exclude a protected group without the justification of business necessity? Unlike the disparate treatment case, intent to discriminate is not an element necessary to the plaintiff's proof.

### V. TITLE VII AND PENNSYLVANIA LAW

The Pennsylvania Supreme Court in *General Electric Corporation v. Pennsylvania Human Relations Commission*,<sup>66</sup> a disparate impact case, specifically adopted the *Griggs* disparate impact rationale. The *General Electric* court read the "best able and most competent to perform" clause in section 5 of the Human Relations Act<sup>67</sup> as analogous to the business necessity doctrine judicially en-

63. *Id.* at 431.

64. *Id.*

65. *Id.* at 432.

66. 469 Pa. 292, 365 A.2d 649 (1976).

67. PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1986). This provision reads in pertinent part:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required. The provision of this paragraph shall not apply, to (1) termination of employment because of the terms or conditions of any bona fide retirement or pension plan, (2) operation of the terms or conditions of any bona fide retirement or pension plan which have the effect of a minimum service requirement, (3) operation of the terms or conditions of any bona fide group or employe insurance plan, (4) age limitations placed upon entry into bona fide apprenticeship programs of two years or more approved by the State Apprenticeship and Training Council of the Department of Labor and Industry . . . . Notwithstanding any provision of this clause, it shall not be an unlawful employment practice for a religious corporation or association to hire or employ on the basis of sex in those certain instances where sex is a bona fide occupational qualification because of the

grafted onto Title VII disparate impact cases in *Griggs*. In addition, in *General Electric* the court recited the prima facie elements set forth in *McDonnell* and, in *Winn v. Trans World Airlines*, Chief Justice Nix, in his opinion in support of affirmance, reiterated that the four prong *McDonnell* test applies in "employment discrimination cases" (as opposed to merely Pennsylvania Human Relations Act cases).<sup>68</sup> Furthermore, the Commonwealth Court, appellate court for civil service appeals,<sup>69</sup> has applied Title VII law in two State Civil Service cases.<sup>70</sup> Prior to examining the application of Title VII law to the Civil Service Act, it is helpful to understand the holding of the seminal State Civil Service discrimination case heard by the Supreme Court of Pennsylvania.

*Hunter v. Jones*<sup>71</sup> was decided only two years after section 905.1 was enacted. It concerned a most basic question—whether sections 905.1 and 951(b) afforded probationary employees a right of appeal from an adverse personnel action on the basis of discrimination. It was clearly a question of first impression and permitting the cause of action would allow probationary employees a right of appeal where they formerly had had none.<sup>72</sup> The *Hunter* court noted, in particular, that sections 905.1 and 951(b) contained broad language by the use of the words "any person" (as opposed to "any regular employe" which appears in section 951(a)).<sup>73</sup> Accordingly, it recognized a right of appeal. It is of great importance that the *Hunter* court's focus was on whether the right of appeal existed at all—not on the technicalities of how the case should be tried. Nonetheless, the end of the opinion contains a statement that an employee alleging discrimination must specifically recite the bases underlying his claim and factually substantiate his claim at hearing.<sup>74</sup> Al-

religious beliefs, practices, or observances of that corporation, or association.

68. 506 Pa. at 141, 484 A.2d at 393-94. While *General Electric* involved the application of Title VII to the Pennsylvania Human Relations Commission, *Winn* was a Pittsburgh Human Relations Commission case.

69. See 42 PA. CONS. STAT. ANN. § 763(a) (Purdon 1981).

70. State Correctional Inst. at Graterford v. Goodridge, 87 Pa. Commw. 527, 487 A.2d 1036 (1985); Lynch v. Dep't of Pub. Welfare, 30 Pa. Commw. 235, 373 A.2d 469 (1977).

71. 417 Pa. 372, 207 A.2d 784 (1965), *aff'd sub nom. after hearing*, *Hunter v. Pa. State Civil Serv. Comm'n*, 422 Pa. 158, 220 A.2d 879 (1966).

72. Interestingly, legislative debate is silent on section 905.1. There was, however, lively debate as to whether long time state employees who were, pursuant to the 1963 amendments, being brought into the civil service system should, although they would be probationers, have a right of appeal under section 951(a). The votes answered this question in the negative. See *Senate Legislative Journal* 1028-31 (1963).

73. 417 Pa. at 375-76, 207 A.2d at 787.

74. *Id.* at 379, 207 A.2d at 788.

though the Pennsylvania Supreme Court has not addressed the question of whether the *McDonnell* and *Griggs* tests are the way in which one factually substantiates a claim under section 951(b) of the Civil Service Act, it is suggested that these principles should be generally applicable, subject to a recognition of certain limitations within the Civil Service Act.

It is evident that disparate treatment is an activity prohibited by section 905.1. The question of whether disparate impact also falls within the ambit of that section has not been decided. At least one case has disparate impact overtones, but does not directly fall under the definition of disparate impact.<sup>75</sup>

There is, in addition, another category of cases not recognized in Title VII. These cases rest upon a theory of procedural or factual discrimination and have evolved because of the restricted right of appeal under the Civil Service Act.

#### VI. DISPARATE TREATMENT UNDER THE CIVIL SERVICE ACT

As was stated earlier, disparate treatment cases under Title VII require proof of discriminatory motive. The first State Civil Service case to specifically mention motive is *Department of Revenue v. State Civil Service Commission*.<sup>76</sup> In *Department of Revenue*, a regular status employee appealed his removal under both sections 951(a) and 951(b) alleging that it had been effected for political reasons, and not for just cause as the appointing authority asserted. The court indicated with respect to the discrimination issue that the question was whether the employee "had carried his burden of proving that his removal was politically motivated."<sup>77</sup> The motive requirement was also enunciated in *Snipas v. Department of Public Welfare*.<sup>78</sup> In *Snipas*, an employee appealed his furlough under both sections 951 (a) and 951 (b) of the Civil Service Act. His section 951 (b) claim was premised upon the fact that the appointing authority furloughed him, but retained several less senior employees in violation of section 802 of the Civil Service Act. His evidence on this point was rebutted by the acting administrator of the appointing authority who testified that non-merit factors had nothing to do with Snipas' furlough. The court, in rejecting the

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75. Analysis of this case will be presented later in the article along with an explanation as to why it is not a "true" disparate impact case.

76. 12 Pa. Commw. 400, 316 A.2d 676 (1974).

77. *Id.* at 401, 316 A.2d at 677 (emphasis added).

78. 46 Pa. Commw. 196, 405 A.2d 1366 (1979).

discrimination claim, wrote that “[a]n individual alleging discrimination bears the burden of proving that non-merit factors motivated the personnel action.”<sup>79</sup> The different results in *Snipas* and *Department of Revenue* appear to be attributable to the difference in detail offered by each employee to support his claim.

The motive factor also appears in *Lynch v. Department of Public Welfare*.<sup>80</sup> In *Lynch*, the employee appealed her non-selection for promotion alleging gender discrimination. The issue before the court was whether the Commission committed legal error by its refusal to hear testimony on the relative qualifications of Lynch and the selectee. The court agreed that “a sex discrimination charge can be sustained by proof of the subjective intent of the alleged discriminator, and that one way to prove intent to discriminate . . . is to show that the appointing authority promoted the less qualified applicant.”<sup>81</sup> Additionally, the court recognized that discrimination cases “more often than not rest on inferences drawn from acts and the credibility of the explanations assertedly justifying them.”<sup>82</sup> The court also wrote that in matters of promotion the issue of discrimination is tied to the question of qualifications and that when an employer chooses someone other than the *most* qualified candidate there is a strong inference that the selection was motivated by a non-merit factor.<sup>83</sup> While this statement is probably true in general, its strict application to the Civil Service Act must be a cautious one because the Act does not specifically *require* that the most qualified candidate be appointed or promoted. Reference to section 501,<sup>84</sup> dealing with promotion, and section 602,<sup>85</sup> dealing with the selection and appointment of eligibles, indicates that while the criteria for selection must be merit related there is no requirement under section 602 that the individual with the highest test scores be appointed, nor is there any requirement under section 501 that the individual with the highest PER and most seniority be promoted. In fact, the practice is to group all

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79. *Id.* at 201, 405 A.2d at 1369. For this proposition the *Snipas* court cited *Cunningham v. State Civil Serv. Comm'n*, 17 Pa. Commw. 375, 332 A.2d 839 (1975). Reference to *Cunningham* discloses that no such statement was made therein.

80. 30 Pa. Commw. 235, 373 A.2d 469 (1977).

81. *Id.* at 239-40, 373 A.2d at 471.

82. *Id.* at 240, 373 A.2d at 471 (quoting *Mawn v. State Civil Serv. Comm'n*, 17 Pa. Commw. 9, 14, 330 A.2d 271, 274 (1975)), *appealed again after remand sub. nom. Dep't of Pub. Welfare v. Mawn*, 28 Pa. Commw. 377, 368 A.2d 1316 (1977).

83. 30 Pa. Commw. at 240, 373 A.2d at 472.

84. PA. STAT. ANN. tit. 71, § 741.501 (Purdon Supp. 1986).

85. PA. STAT. ANN. tit. 71, § 741.602 (Purdon Supp. 1986).

employees with PERs of "very good" or above together as tied and, in addition, group them in five year blocks of seniority. Therefore, the interviewing process can be used even when the employee has the highest PER and the most seniority. Thus, *to the extent that "most qualified" is quantified only in terms of examinations or PERs*, the most qualified individual need not be appointed or promoted in order to comply with the substantive provisions of the Civil Service Act dealing with appointment and promotion.

The *Lynch* court found support for its "most qualified" rationale by relying upon *General Electric*, a disparate impact Pennsylvania Human Relations Commission case. As explained earlier, in *General Electric* the court reasoned that the "best able and most competent to perform" clause of section 5 of the Human Relations Act was analogous to the business necessity doctrine recognized by the Supreme Court in *Griggs*, a disparate impact case. Application of the *General Electric* best able doctrine to *Lynch* may be faulty because, as previously noted, section 501 of the Civil Service Act does not require that the most qualified candidate be selected for promotion—only that a qualified candidate be promoted. In fact, section 501 of the Civil Service Act is actually more akin to Title VII as construed in *Burdine*<sup>86</sup> than to section 5(a) of the Human Relations Act. *Burdine*, a disparate treatment case, and hence comparable to *Lynch*, held that under Title VII an employer need not show that the selectee was *more* qualified than the non-selectee because Title VII permits an employer to choose from among equally qualified candidates.<sup>87</sup> It is suggested that in civil service cases where the most qualified candidate (in quantitative terms) is not chosen a presumption of discrimination should arise. To this extent, *Lynch* is correct. However, a demonstration that the most qualified candidate was not selected or promoted should not give rise to a *per se* finding of discrimination under the Civil Service Act and *Lynch* should not be read as requiring this. Strict application of the best able standard found in *Lynch* can, in addition, be detrimental to the appealing non-selectee who bears the burden under section 951(b) because it suggests that to sustain his burden under section 951(b) that individual is *required* to show that he or she was the most qualified candidate.<sup>88</sup>

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86. 450 U.S. 248 (1981).

87. *Id.* at 259.

88. For other cases reciting the *Lynch* "most qualified" standard see *Dep't of Transp. v. Wible*, 74 Pa. Commw. 620, 460 A.2d 903 (1983); *Butler v. State Civil Serv. Comm'n*, 57 Pa. Commw. 406, 426 A.2d 239 (1981).

Subsequent to *Lynch*, in *Quarles v. Department of Transportation*,<sup>89</sup> a provisional status employee appealed his removal. The personnel action was premised upon Quarles having been charged with and arrested for misdemeanor offenses of misappropriating funds of an agency and violating the firearms laws.<sup>90</sup> These facts were printed in a newspaper article which mentioned that the employee was employed by the appointing authority.<sup>91</sup> The employee, maintaining that the charges did not reflect adversely on state government and were not related to his ability to do his job, contended that his removal was discriminatory. The court cited *Snipas* for the proposition that the employee must show that a non-merit factor motivated the action.<sup>92</sup> The court wrote:

[K]eeping in mind that the [employee's] duties entailed extensive efforts to try to bring minority contractors and employers into state highway construction projects, it is not inconceivable nor the result of strained logic *imbued with discriminatory intent*, to conclude that the charges lodged against him, especially the one alleging misappropriation of public funds for personal use, might suggest a breach of the public trust which would seriously reduce his job effectiveness while simultaneously diminishing public respect and confidence in [the appointing authority] and in state government.<sup>93</sup>

Thus *Quarles* reiterates, in language stronger than *Snipas*, the intent requirement.

Despite the appellate court's repeated indications that discriminatory intent or motive must be established in cases which, although not specifically so called, are in fact disparate treatment situations, one case, *Snyder v. Department of Transportation*,<sup>94</sup> has taken a different approach. The employee in *Snyder* appealed the failure of his appointing authority to promote him to a vacancy in a higher job classification. The position was instead filled by allowing a higher level employee to take a voluntary demotion. It is clear that the appeal was under section 951(b). With respect to the employee's burden, the court wrote, "[A]n employee alleging that he was the victim of unlawful discrimination in a personnel action has the burden of establishing . . . discriminatory conduct."<sup>95</sup> The

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89. 61 Pa. Commw. 572, 434 A.2d 864 (1981).

90. *Id.* at 573, 434 A.2d at 864.

91. *Id.*

92. *Quarles*, 61 Pa. Commw. at 575, 434 A.2d at 865.

93. *Id.* at 575-76, 434 A.2d at 865 (emphasis added).

94. 64 Pa. Commw. 599, 441 A.2d 494 (1982).

95. *Id.* at 602, 441 A.2d at 495 (emphasis added).

court cited *O'Peil v. State Civil Service Commission*<sup>96</sup> in support of this proposition. *O'Peil*, however, involved a challenge to a uniformly applied compensation plan which did not provide for a salary increment.<sup>97</sup> Because *O'Peil* involved a neutral policy, it is perhaps closer to a disparate impact than a disparate treatment case. It therefore appears that the *Snyder* court's reliance upon *O'Peil* may be inappropriate.

Finally, there is one case which deals, by implication only, with the question of motive and is difficult to classify. In *Dadey v. Bureau of Employment Security*,<sup>98</sup> the employee brought an action alleging that the appointing authority's promotion of another and its failure to appoint him violated section 501 of the Civil Service Act. Dadey's theory was that section 501 had been violated because the selectee had not, prior to her promotion, occupied the next lower position to her promoted position and hence did not meet the criteria of section 501.<sup>99</sup> Although Dadey failed to meet his burden, the nuance is that had he shown that the selectee had not occupied the next lower position he would have sustained his burden. Significantly, nothing in *Dadey* suggests that intent to discriminate need be shown or that part of Dadey's failure was his inability to prove intent. Thus, it is possible to read *Dadey* as suggesting that where a technical violation of the Civil Service Act is proved by the employee, the employee need not demonstrate that the violation was intentional to sustain his burden.<sup>100</sup> This position, it is submitted, is desirable because it allows aggrieved employees to aid in enforcing compliance with the technical provisions of the Civil Service Act. To deny recovery *in the face of a clear statutory violation* because such violation does not itself in-

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96. 16 Pa. Commw. 467, 332 A.2d 879 (1975). *O'Peil* in turn cited *Hunter v. Jones*, 417 Pa. 372, 207 A.2d 784 (1965), *aff'd after hearing sub. nom. Hunter v. Pa. State Civil Serv. Comm'n*, 422 Pa. 158, 220 A.2d 879 (1966). Reference to *Hunter* discloses that no such statement was made therein.

97. 16 Pa. Commw. at 471, 332 A.2d at 881-82. This compensation plan was held in *O'Peil* not to constitute a personnel action under section 905.1.

98. 70 Pa. Commw. 513, 453 A.2d 702 (1982).

99. *Id.* at 516, 453 A.2d 704. Section 501 permits promotion without examination if the person has completed a probationary period in the next lower position, meets the minimum requirements for the higher position and receives the unqualified recommendation of his or her supervisor. It is the first criterion which Dadey maintained that the selectee had not met.

100. *Dadey* is a case which is perhaps properly considered under the section of this article entitled "The Procedural Discrimination Problem." *But see* note 108.

It should be noted that the cases cited in the text are merely selected *examples* of where the question of motive has been considered. Cases mentioning the motive requirement are legion.

dicating an intent to discriminate against the appealing employee is to exalt form over substance and ignore the fundamental principle of civil service law that merit should prevail.

## VII. DISPARATE IMPACT UNDER THE CIVIL SERVICE ACT

There has been no specific recognition of disparate impact as a discriminatory theory embodied within section 905.1. The opportunity for case law to develop in this area is scant because neutral policies which are adopted by the Commonwealth agencies or by the Civil Service Commission can be challenged via the Human Relations Act and Title VII and because the Civil Service Act does not specifically recognize class actions. Thus if, for example, potential employees viewed standardized civil service tests as having a discriminatory impact, the action could be appropriately filed with the Pennsylvania Human Relations Commission or the Equal Employment Opportunity Commission. There is, however, one case which contains what was arguably a neutral policy affecting a group of persons<sup>101</sup> and is somewhat akin to disparate impact cases.

In *Board of Probation and Parole v. Baker*<sup>102</sup> (*Baker I*), the appointing authority conducted unauthorized testing in violation of

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101. The writer has used the term "arguably neutral" because, while the policy may have been applied uniformly to all employees, the policy itself constituted a violation of the Civil Service Act.

102. 51 Pa. Commw. 501, 414 A.2d 1117 (1980) (*Baker I*), *appealed again sub. nom. Alterman v. Baker*, 71 Pa. Commw. 124, 454 A.2d 1154 (1983) (*Baker II*), *appealed again sub. nom. Pa. Board of Probation and Parole v. Baker*, 82 Pa. Commw. 86, 474 A.2d 415 (1984) (*Baker III*).

*Baker I* involved a promotion without examination process. Such procedure has strict guidelines. See note 99. Nonetheless, the appointing authority administered to all the candidates its own written examination. Each Board member graded each applicant; there was no consultation among Board members with respect to the grading and no standard against which to measure the answers. The only consideration in making the selection was the score on this written examination.

*Baker II* is procedurally complex, but in essence involved the Board's attempt to transfer its original selectee (who had never been validly promoted). The Commonwealth Court indicated that because the promotion was improper the selectee could not remain in the transferred position. The case also includes a demotion and immediate repromotion process which both the Civil Service Commission and the Commonwealth Court found improper.

*Baker III* involved the question of whether the Civil Service Commission was empowered to award attorneys fees under section 951(b). Although the Commonwealth Court determined it was not, the court acknowledged that after the Civil Service Commission had entered its award the General Assembly changed the law to allow Commonwealth agencies to award counsel fees in certain situations. See PA. STAT. ANN. tit. 71, §§ 2031 - 2035 (Purdon Supp. 1986). The applicability of this new law to the Civil Service Commission has yet to be determined.



section 501 of the Act. *Baker I* was a non-selection case and hence was heard under section 951(b). In *Baker I*, the appointing authority argued that since it applied improper procedures to all candidates it could not be said to have discriminated against Baker.<sup>103</sup> The court rejected this argument.<sup>104</sup> *Baker I* seems to suggest that a clear violation of the Civil Service Act is discriminatory per se. The implied holding in *Baker I* becomes clearer in *Baker II*,<sup>105</sup> wherein the court referred to the "discrimination we previously found present in the board's promotion process."<sup>106</sup> The argument in *Baker I* that the procedure was uniformly applied is suggestive of a disparate impact situation, but the fact that this policy was, on its face, violative of section 501 indicates that it was not "neutral" in all respects and thus that *Baker I* was not a true disparate impact case.

### VIII. THE PROCEDURAL DISCRIMINATION PROBLEM

This is an area of civil service law which has evolved because of the fact that many personnel actions can be appealed only under section 951(b). It apparently has its beginnings in the Commission's older version of its Appeal Request Form.<sup>107</sup> Both the prior forms and the current form provide numerous boxes which an employee claiming discrimination can check off in order to assert the type of discrimination that he or she is alleging. Most of the selections are typical choices such as race, religion, sex and union affiliation. But included among the choices in the prior forms was "illegal procedure." This term is nowhere defined. An employee could check this category in addition to alleging more traditional forms of discrimination, but often the reason for the employee's appeal was *not* his belief that he was a victim of one of the traditional forms of discrimination, but rather that he was a victim of the incorrect application of a technical process utilized to implement the

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103. 51 Pa. Commw. at 503, 414 A.2d at 1118.

104. *Id.*

105. *See* note 102.

106. 71 Pa. Commw. at 131, 454 A.2d at 1158.

107. *See* Appendix A. This form, it should be noted, provides for appeals under section 951(b) on the basis of "illegal procedure by agency." The form pre-dating it did so as well. Although the current form, *see* Appendix B, does not provide a block to be checked for this type of discrimination, the Chief Counsel for the State Civil Service Commission has stated that the specific absence of procedural discrimination from the new form is not an indication that the Commission has retracted its position that procedural discrimination is actionable under section 905.1. Interview with Barbara G. Raup, Esquire, July 8, 1986.

personnel action.<sup>108</sup>

One simple example of how procedural discrimination can occur is the totalling of PERs. Order of furlough and selection for promotion are often dictated at least in part by an employee's past performance on the job.<sup>109</sup> Performance is calculated by totalling the individual grades on an employee's PER(s) and comparing his or her score with that of other similarly situated<sup>110</sup> employees. In carrying out this procedure, an appointing authority may add the numbers incorrectly or mistakenly use the wrong employee's PER or the report from the wrong year. Clearly an inequity has occurred. The inequity, however, is not based on race, union affiliation or other similar factors. It is based on a technical mistake. But in many instances the aggrieved employee can, because of his status or because of the type of personnel action, appeal only on the basis of discrimination; hence, procedural discrimination is his theory.

The major problems with procedural discrimination are first, that it is not "discrimination" in a commonly accepted form,<sup>111</sup> and second, that because what happened is only a mistake, intent cannot be shown. Case law in this area is chaotic because of the appellate court's failure to recognize the genesis of this theory of "discrimination." Examination of two procedural discrimination cases will serve to demonstrate the confusion. In *Insurance Department v. Tracz*,<sup>112</sup> the employee appealed his furlough under section 951(a), maintaining that section 802 of the Act was violated because two other employees who, like Tracz, held Administrative Officer I positions, were not included in Tracz's class for furlough purposes. The employee appealed also under section 951(b), maintaining that the procedure of not grouping the three employees together was discriminatory. The Commission sustained Tracz's appeal on both bases. On appeal, the Commonwealth Court affirmed

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108. Both the *Dadey* case and *Baker II* are examples of cases where the allegations pertained to the misapplication of the technical requirements in section 501. They have not been grouped with cases dealing with procedural discrimination for the purposes of this article because the Commonwealth Court did not specifically view them as such. In *Dadey*, no technical error was proven, but in *Baker I* the procedural violation was admitted.

109. See section 802 and section 501 of the Civil Service Act. See also note 11.

110. What constitutes "similarly situated" will be dictated by the particular personnel action. For example, under section 802, to determine order of furlough, comparison of PERs would properly be limited to comparison within a furlough unit.

111. Procedural discrimination does not fit within the province of disparate treatment cases since there is no intent to discriminate. It is not an example of disparate impact because it does not involve application of a neutral policy.

112. 77 Pa. Commw. 502, 466 A.2d 269 (1983).

the Commission order "but only insofar as the order is based on section 802 of the Civil Service Act."<sup>113</sup> With respect to the discrimination issue the court wrote that "there is insubstantial evidence on the record to support the Commission's conclusion that the Department [of Insurance] discriminated against Tracz. Although the Department committed a procedural error with regard to Tracz, such an error is not necessarily the equivalent of discrimination."<sup>114</sup>

The statement in *Tracz* that an improper procedure is not the equivalent of discrimination suggests that something more need be shown. The question which remains unanswered is, what if *Tracz* had been a probationary employee who had a right of appeal *only* under section 951(b)? Would the demonstration of procedural impropriety have sustained his burden?<sup>115</sup> If not, then the aggrieved employee has no remedy whatsoever.<sup>116</sup> The unfortunate aspect of *Tracz* is that it could have been decided by the Commission solely on the section 951 (a) claim.<sup>117</sup>

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113. *Id.* at 509, 466 A.2d at 273. It is interesting to note that while the Commission sustained Tracz's appeal under both section 802 and section 905.1, the Civil Service Commission's adjudication contains no discussion whatsoever of the section 905.1 violation.

114. *Id.* at 508-09, 466 A.2d at 273 (citing *Silverman v. Dep't of Educ.*, 70 Pa. Commw. 444, 454 A.2d 185 (1982)). The alleged procedural error in *Silverman* was the appointing authority's delay in exposing Silverman to furlough. The Commonwealth Court indicated that to sustain his burden under section 951(b) Silverman would have had to have shown that the appointing authority was "improperly motivated in its personnel action. . . ." *Id.* at 455, 454 A.2d at 190. The court rejected the Commission's approach which had been that because the appointing authority had followed improper procedures it was automatically guilty of discrimination. *Id.* at 455, 454 A.2d at 190. *Silverman* cannot be reconciled with the *Baker* cases which indicated that improper procedure constituted discrimination *per se*.

The *Silverman* case is viewed by many civil service practitioners as the worst case ever decided under the Civil Service Act. Not only did it fail to grasp the concept of procedural discrimination, it also established new and incomprehensible law in the area of lack of work furlough, and rejected the Commission's application of the admittedly equitable concept of *de facto* demotion.

115. *Tracz* is an interesting case because, although the discrimination claim was not upheld on appeal, Tracz retained his full remedy because of the court's affirmance of the finding of a violation of section 802. Tracz's remedy before the Commission consisted of an order requiring the appointing authority to recompute the furlough rankings of all employees in Tracz's class. If after doing so it was determined that Tracz should not have been furloughed he was to be reinstated with full back pay.

116. Indeed, *Silverman* appears to stand as evidence of this harsh consequence. See note 114.

117. It must be understood that Tracz was a regular status employee challenging a furlough. The appointing authority bore the burden of establishing a lack of work or a lack of funds justifying the furlough under the section 951(a) claim. It was also responsible for demonstrating that it furloughed employees in the proper order considering their seniority and PERs. If it failed in this burden, and the Commission found that it did, then section 802 of the Act was violated. Consequently, it was unnecessary for the Commission to even

*Williams v. Department of Transportation*<sup>118</sup> (*Williams II*), which was decided shortly after *Tracz*, suggests that merely demonstrating a procedural impropriety *does* establish discrimination. In a prior appeal of the same case, *Williams v. Department of Transportation (Williams I)*,<sup>119</sup> the Commonwealth Court held that the use of non-uniform PERs for purposes of determining which employees within a class were to be furloughed was discriminatory. The *Williams I* court remanded the case to the Commission for further hearing because the Commission had improperly precluded the employee from presenting evidence that the PERs used in his furlough were defective. The Commission on remand heard the case under both section 951(a) and section 951(b). It determined that non-uniform factors *had* been considered, but nonetheless upheld the furlough action after determining that Williams still would have been furloughed even if only uniform factors had been considered. Commonwealth Court, in *Williams II*, reversed stating that there is no requirement that the employee show that the improper computation was actually prejudicial.<sup>120</sup>

*Williams II* and *Tracz* upon close analysis appear irreconcilable. The *Tracz* court affirmed the section 802 claim only, and on the discrimination issue, determined that a procedural error alone is not necessarily discrimination. *Williams II*, if read as a discrimination case,<sup>121</sup> says that where a procedural error is shown discrimination exists *per se*.

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reach the discrimination issue.

118. 79 Pa. Commw. 113, 468 A.2d 547 (1983).

119. 64 Pa. Commw. 153, 439 A.2d 233 (1982).

120. 79 Pa. Commw. at 116, 468 A.2d at 548. The *Williams II* case approved the Commission adjudication in the Appeal of Weikel (No. 2786, filed April 13, 1980). In *Weikel* the Commission indicated in its discussion that the practice of comparing PERs with the non-uniform factors was discriminatory but it did not conclude as a matter of law that section 905.1 had been violated. Instead, its conclusion of law was limited only to a finding of a violation of section 802. Additionally, the Commission did not specifically find that Weikel was prejudiced by the practice of comparing non-uniform PERs. In its *Williams II* adjudication, in distinguishing *Weikel*, the Commission wrote, "In *Weikel*, this Commission had no evidence that Weikel would have been designated for . . . furlough had the calculation been redone properly." (Appeal of Williams, No. 2787 filed April 9, 1984). By relying upon the reasoning in *Weikel*, the *Williams II* court seems to be saying that the comparison of non-uniform factors is discriminatory, but it does not clearly hold that its determination is based on a section 951(b) claim. Because *Williams II*, like *Tracz*, involved a case brought under both section 951(a) and section 951(b) the case can be read to mean merely that the procedures followed were in violation of section 802 and hence that the appointing authority failed in its burden. Under this reading, *Williams II* is not a discrimination case. This writer believes, however, that the case is a section 951(b) case.

121. See *supra* note 120.

The difficulty with the *Tracz* rationale is that, practically speaking, one can never establish intent to discriminate in cases when what is at issue is a technical error. *Williams II*, in rejecting the notion that intent need be shown, appears to be the better analysis but it goes to the extreme by implying that there is no such thing as harmless error. It is suggested that the better reasoning would be that because intent is not an element in many of these procedural discrimination cases, a miscalculation which is harmless in effect should not be considered discriminatory as a matter of law. Nothing is gained by so holding. Accordingly, it is submitted that the following three prong approach would establish an effective guideline for the appellate courts to use in evaluating cases alleging procedural discrimination:

1. Is the action truly appealable only under section 951(b)?
2. Is the allegation in the nature of procedural discrimination?
3. Has actual harm been shown?

The first prong would allow cases in which the allegation relates to improper procedures being followed under section 802 to be treated as section 951 (a) claims in the case of regular status employees. If the appointing authority cannot show that it properly computed the order of furlough then the furlough action is invalid under section 802 and the discrimination issue need not even be reached.<sup>122</sup> While this would not work in cases where probationary employees appeal, such instances are rare.

The second question to be considered is actually an extension of the first, but it also forces the segregation of true disparate treatment cases from procedural discrimination cases.

The last question avoids the *Williams II* result by adopting a "no-harm no-foul" approach. To direct the appointing authority to reinstate, award back pay and refurlough because of a harmless miscalculation is nothing more than bureaucratic wastefulness at the taxpayer's expense.<sup>123</sup>

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122. This approach would avoid the situation which occurred in *Tracz* and may have occurred in *Williams II*.

123. One other case demonstrating the problems related to the restricted right of appeal of probationary employees alleging procedural discrimination deserves mention. In *County of Beaver v. Funk*, 89 Pa. Commw. 226, 492 A.2d 118 (1985), an interesting case involving a violation of the Civil Service Act which was not technically a misapplied procedure, the Commonwealth Court suggested that where the appointing authority was unable to demonstrate lack of funds such as to justify a furlough under section 3(s), the furlough was improper and therefore discriminatory. Although subtly done, this case, which involved the appeal of a *probationary* employee, places the burden of proof on the appointing authority.

## IX. THE "MISTAKE OF FACT" DISCRIMINATION PROBLEM

Akin to procedural discrimination is discrimination based upon mistake of fact. It evolved for the same reason as did procedural discrimination. A recent Commonwealth Court case dealing with this issue is *State Correctional Institution at Graterford v. Goodridge*.<sup>124</sup> *Goodridge* simply does away with the motive requirement.

*Goodridge* was employed as a corrections officer trainee, probationary status. Graterford State Correctional Institution dismissed him on the grounds that he had falsified his employment application, a violation of section 902 of the Act.<sup>125</sup> The Commission determined that no falsification had occurred. On appeal to Commonwealth Court, Graterford did not question the Commission's findings. Instead, it argued that "because its functionaries sincerely believed, based on the information they had received, that [Goodridge] had lied on his application, their action dismissing him was not a personnel action based on non-merit factors because it was taken for reasons related to merit."<sup>126</sup> The Commonwealth Court agreed that the charge of falsification was job-related,<sup>127</sup> but wrote, "[W]e are concerned not with the charges. We are concerned with their basis in fact, which [Goodridge] has been given the right to test by appeal to the State Civil Service Commission."<sup>128</sup> The *Goodridge* court further stated that because the Commission properly found that there was no factual basis to sup-

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This misapplied burden occurred because in *County of Beaver* the Commission consolidated the appeals of two furlougees, one a regular status employee, the other a probationer. The appointing authority had the burden to establish a lack of funds only with respect to the regular status employee. It failed to meet its burden. The probationary employee, who bore the burden of establishing that the furlough action was discriminatory, presented testimony that the furlough was in retaliation for her bargaining unit's refusal to accept a wage freeze. But the finding of discrimination was not based upon this testimony. Instead, the court permitted the Commission to bootstrap by relying upon the lack of evidence produced during the portion of the hearing pertaining to the regular status employee, which evidence was insufficient to show a valid lack of funds. Thus *Funk*, in effect, allowed a probationer to prove her discrimination claim by relying upon the appointing authority's failure to meet its burden in the section 951(a) appeal of the regular status employee. While *Funk* did not involve a true "procedural error," it is an example of technical non-compliance which must be deemed discrimination to permit appeal and rectify a "wrong." As the Commission stated in Appeal of Graeser, the companion case to *Funk*, "Actions taken by an appointing authority in a manner contrary to the requirements of the Civil Service Act are, per se, violations of the Act's prohibition against discrimination." Appeal of Graeser (No. 4384, filed Sept. 16, 1983).

124. 87 Pa. Commw. 527, 487 A.2d 1036 (1985).

125. PA. STAT. ANN. tit. 71, § 741.902 (Purdon 1962).

126. 87 Pa. Commw. at 530-31, 487 A.2d at 1038.

127. *Id.* at 531, 487 A.2d at 1038.

128. *Id.*

port the charge, the removal was for non-merit reasons.<sup>129</sup> The court reasoned that to hold that charges which were found to be untrue must be upheld would render the right of appeal a nullity.<sup>130</sup> Most significantly, the *Goodridge* court stated that Graterford's thesis "rests on the proposition that in order to establish an act of discrimination the victim must show that the [appointing authority] intended to discriminate. The law is clearly to the contrary."<sup>131</sup> As support for this proposition the court cited *Canon-McMillan School District v. Pennsylvania Human Relations Commission ex rel Davis*.<sup>132</sup> *Canon-McMillan* is a Pennsylvania Human Relations Act case which relied upon *General Electric* and hence a Title VII analysis. More importantly, *Canon* clearly involved a facially neutral policy applied by the employer to all employees and hence was a disparate impact case. *Goodridge*, however, did not involve such a policy, but rather rested upon the action taken by Graterford based upon allegations peculiar only to *Goodridge*. Thus, reliance upon disparate impact case law is incorrect. However, because, as is often the case in procedural discrimination cases, intent in mistake of fact discrimination cases is also frequently nonexistent, the result in *Goodridge* appears correct. It is the *analysis* that presents the problem. It is suggested that had the court understood the genesis of mistake of fact discrimination and the lack of intent which normally occurs in such cases, it could have reached the right result but without resort to a disparate impact theory.<sup>133</sup>

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129. *Id.*

130. *Id.*

131. *Id.* at 531-32, 487 A.2d at 1038-39.

132. 30 Pa. Commw. 1, 372 A.2d 498 (1977).

133. The holding in *Goodridge* and this writer's suggestion that intent should not be a requirement in procedural and mistake of fact cases presents interesting problems. For example, if intent need not be shown then the appointing authority will *never* have a good faith defense. This result is not without its problems as the following hypothetical illustrates. The appointing authority has a progressive disciplinary scheme for chronic lateness which calls for an oral warning on the first offense, followed by, for each successive offense, a written warning, a one day suspension, a three day suspension and removal. Suppose the probationary employee is late for the fourth time; discipline should be the three day suspension. But because of a clerical mistake the appointing authority believes this is the fifth infraction and removes her. She appeals. At the hearing it is discovered that this was her fourth infraction, and she should have received only a three day suspension. Yet, it is not disputed that the error was clerical in nature and that the highest level supervisor who actually implemented the personnel action (for example the Administrator of a state hospital) had no idea what her disciplinary record was but was merely presuming that the recommendation for removal sent up the chain of command was factually accurate.

Since under *Goodridge* no intent to discriminate need be shown, and since the effect was

## X. THE PROBLEM OF INFERENCE

Although under Title VII and *Burdine* an employee can establish intent indirectly by showing that an employer's explanation is incredible, State Civil Service case law is somewhat misleading on the question of whether intent can be inferred. Clearly *Lynch* permits such inference, but other cases restrict it.

In *Skowronski v. Governor's Council on Drug and Alcohol Abuse*,<sup>134</sup> a provisional employee appealed her demotion. The employee maintained that the Commission should have inferred discrimination based upon the fact that she had received a "very good" PER approximately six weeks prior to her demotion.<sup>135</sup> The court held that the Commission had not erred in failing to infer discrimination. In addition, the PER itself supported testimony that the employee had difficulty communicating with people.<sup>136</sup> In such an instance, the refusal to allow the inference appears correct.

In a later case, *Tempero v. Department of Environmental Resources*,<sup>137</sup> employees appealed their reassignments, alleging that they were discriminated against. Unfortunately the facts are not elaborated upon in the opinion. But the employees apparently argued that because they had good performance ratings their reassignments must have been discriminatory. The *Tempero* court maintained that "[d]iscrimination cannot be inferred merely because of the existence of good performance ratings."<sup>138</sup> What distinguishes *Tempero* from *Skowronski* is that the former deals with the employee's prima facie burden, whereas the latter pertains to the appointing authority's rebuttal evidence.

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to discriminate against the employee by not properly following the progressive disciplinary route, it would appear that discrimination has been established. The Commission orders reinstatement with full back pay. On the average, the order will appear about six to eight months after the removal and the Commonwealth and the taxpaying public must pay six to eight months wages for no work. There are other concerns. The highest level supervisor can combat this result only by personally checking every fact since he or she has no good faith defense. Most significantly, however, the payment of wages by the appointing authority will not serve to deter future discriminatory acts when there was no intent to discriminate in the first place.

Despite these problems, to argue that intent must be shown in cases involving procedural or factual discrimination is also fraught with difficulties. In the hypothetical, while the agency was at most negligent, the employee was completely blameless for the error. To deny her reinstatement and back pay appears inequitable. In addition, to require a showing of intent is an impossible burden since there was never intent—only mistake.

134. 28 Pa. Commw. 236, 368 A.2d 852 (1977).

135. *Id.* at 239, 368 A.2d at 854.

136. *Id.*

137. 44 Pa. Commw. 235, 403 A.2d 226 (1979).

138. *Id.* at 238, 403 A.2d at 229.



The Commonwealth Court has also rejected the notion that a significant difference between earlier ratings given by one supervisor and a later less favorable rating given by a new supervisor justifies an inference of discrimination.<sup>139</sup> Similarly, where a furloughed employee asserted that PERs were artificially inflated as a result of a supervisor's desire to retain certain employees, the court disallowed an inference of discrimination.<sup>140</sup> In general, it appears as though the Commonwealth Court is unwilling to permit an inference of discrimination when there is an absence of any negative evidence implicating the appointing authority. Thus an employee's theory, such as that PERs are artificially inflated, will not operate to shift the burden unless that theory is accompanied by some solid evidence.

## XI. WHAT CONSTITUTES DISCRIMINATION UNDER THE CIVIL SERVICE ACT?

In disparate treatment cases, the employee's general theory of the case frequently takes one of two forms. In what can be called the "comparison approach," an employee presents evidence to compare his situation and treatment with that of other employees. In so doing, certain evidence is critical. The employee must establish his status (probationary, provisional, regular), his job title and his job duties. He must then present evidence wherein his treatment is compared with others similarly situated. Thus, the testimony should include the status, job title and duties of the other employees. This comparison approach has been approved by the Commonwealth Court.<sup>141</sup>

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139. *Sauers v. Dep't of Pub. Welfare*, 76 Pa. Commw. 504, 464 A.2d 635 (1983).

140. *Sebastiani v. Dep't of Transp.*, 75 Pa. Commw. 602, 462 A.2d 942 (1983). "[D]iscrimination by the appointing authority against the employee cannot be inferred by the Commission since there must be some affirmative support adduced to sustain the allegations of discrimination." *Id.* at 605, 462 A.2d at 944 (citing *Delaware County Bd. of Assistance v. Balanow*, 63 Pa. Commw. 388, 437 A.2d 1312 (1981)). In *Balanow*, the court stated generally that discrimination cannot be inferred, but also noted that no evidence of discrimination whatsoever had been produced. *See also Wagner v. Dep't of Transp.*, 76 Pa. Commw. 78, 83, 463 A.2d 492, 495 (1983) (held that "discrimination . . . cannot be inferred . . . since there must be some affirmative support presented to sustain the allegations of discrimination.")

141. In *Scasserra v. Civil Serv. Comm'n*, 4 Pa. Commw. 283, 287 A.2d 158 (1972), *cert. denied*, 410 U.S. 968 (1973), the employee, a caseworker trainee, probationary status, alleged that his removal was based upon his prior criminal record, reports in local newspapers concerning his employment by the appointing authority and concurrent receipt of welfare payments, and failure to supply a doctor's excuse for an authorized absence which he asserted he supplied. The State Civil Service Commission, in dismissing the appeal, wrote, "[We

The other method sometimes employed in asserting a discrimination claim can be termed the "retaliatory approach." In these cases, the employee is not *directly* concerned with comparing his situation to that of others, but instead asserts that the personnel action was taken to retaliate against the employee for some action he has taken. Often such cases involve union activities by the employees.<sup>142</sup> Another pattern in retaliatory approach cases occurs where a subordinate employee disagrees with a supervisor over work related matters.<sup>143</sup>

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find] that the appointing authority treated appellant in the same manner as they would have treated any other employee in similar circumstances. . . ." *Id.* at 287, 287 A.2d at 161. The *Scasserra* court quoted this language and apparently approved it. Similarly, in *Philadelphia County Bd. of Assistance v. Cahan*, 24 Pa. Commw. 543, 358 A.2d 440 (1976), where an income maintenance worker trainee, probationary status, appealed her demotion to clerk II, the court specifically cited with approval to evidence of Cahan's supervisor being asked if she had treated Cahan differently from any other income maintenance worker trainee. 24 Pa. Commw. at 548, 358 A.2d at 442. And in *Snyder v. Dep't of Transp.*, 64 Pa. Commw. 599, 441 A.2d 494 (1982), where the employee appealed his denial of promotion and sought to prove his case "through the introduction of circumstantial evidence aimed at demonstrating that other, less qualified employees . . . received promotions at the time his requested promotion was denied," the court agreed with the Commission that "[t]he circumstances surrounding the promotions of the other employees differed from those present in . . . [Snyder's] situation." *Id.* at 602, 441 A.2d at 495. Finally, in *Norristown State Hosp. v. Bruce*, 69 Pa. Commw. 298, 450 A.2d 1093 (1982), where a psychiatric aide I, probationary status, appealed his removal, which had been based on a charge of failing to disclose fully his criminal conviction record on his employment application, the court, in considering whether Bruce met his burden, explained, "At no point in the proceedings before the Commission, however, was there any evidence submitted indicating that Mr. Bruce had been treated any differently than other employees with similar criminal records." *Id.* at 302, 450 A.2d at 1095.

142. In *Mawn v. State Civil Serv. Comm'n*, 17 Pa. Commw. 9, 330 A.2d 271 (1975), the employee unsuccessfully attempted to show that his union activities were the basis of his being denied a promotion. An example of a slightly different factual situation is *Wagner v. Dep't of Transp.*, 76 Pa. Commw. 78, 463 A.2d 492 (1983), which involved the employee's allegation that he was suspended as a result of union complaints because of his having previously disciplined union members.

143. In *Sauers v. Dep't of Pub. Welfare*, 76 Pa. Commw. 504, 464 A.2d 635 (1983), where the employee wrote a memorandum which was critical of his supervisor's management decisions, and also exhibited his low regard for the supervisor's abilities by "inveighing against, complaining of, and failing to support" the superior's decisions, the Commission found no discrimination in the issuance by the superior of a somewhat critical PER. *Id.* at 507, 464 A.2d at 637.

Other factors which the court has also cited as evidence not tending to establish discrimination or as rebutting a charge of discrimination include: a supervisor being the same race as the employee alleging racial discrimination as in *Smith v. Pennsylvania Liquor Control Bd.*, 28 Pa. Commw. 336, 368 A.2d 923 (1977); performance evaluation reports which are remote in time as in *Boris v. Dep't of Envtl. Resources*, 81 Pa. Commw. 547, 474 A.2d 722 (1984); *Gibson v. Dep't of Pub. Welfare*, 35 Pa. Commw. 27, 384 A.2d 1030 (1978); performance evaluation reports with high marks in the pre-printed categories, but negative comments as in *Dep't of Health v. Graham*, 58 Pa. Commw. 409, 427 A.2d 1279 (1981); a decrease in performance evaluation report ratings under a new supervisor as in *Sauers v. Dep't*

Assuming that a prima facie case of disparate treatment is established, under a Title VII analysis, the burden would then shift to the appointing authority to articulate a legitimate non-discriminatory reason for its action. It is submitted that in a civil service case, as in any employment discrimination case, the best way to rebut the prima facie case is to show that the action was taken for job related reasons. Although in *Cunningham v. State Civil Service Commission*,<sup>144</sup> the Commonwealth Court wrote that “[i]f the probationary status employee fails to sustain his charge of discrimination, his dismissal stands without consideration of the validity of the determination of unsatisfactory work performance”<sup>145</sup> it would appear that “sustain his charge” should be read to mean establish a prima facie case because once the prima facie case is made out, establishing a legitimate reason for the action necessarily involves examining its propriety.<sup>146</sup>

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of Pub. Welfare, 76 Pa. Commw. 504, 464 A.2d 635 (1983); and the presence of a recent favorable PER followed six weeks later by a costly funding error and then a demotion as in *Skowronski v. Governor's Council on Drug and Alcohol Abuse*, 28 Pa. Commw. 236, 368 A.2d 852 (1977). In addition, a policy of mandatory retirement at age 65 is not discriminatory. *Delaware County Child Care Services v. Goodley*, 53 Pa. Commw. 333, 417 A.2d 868 (1980). For further discussion of *Goodley* see note 171.

144. 17 Pa. Commw. 375, 332 A.2d 839 (1975).

145. *Id.* at 378, 332 A.2d at 840-41.

146. Cases containing factual examples of effective rebuttal are legion. In *Bureau of Corrections v. Yancey*, 85 Pa. Commw. 143, 481 A.2d 702 (1984), a case involving a corrections officer trainee, probationary status, the Commonwealth Court held that a removal was based on merit factors, where the employee, because of his prior criminal record, was unable to carry a gun even though the carrying of a gun would be required in only limited instances. Effective rebuttal was also present in *Smith v. Pennsylvania Liquor Control Bd.*, 28 Pa. Commw. 336, 368 A.2d 923 (1977), where a liquor store clerk, probationary status, failed to sustain his burden in light of the appointing authority's testimony that Smith, *inter alia*, disrupted training sessions, objected to regulations prohibiting outside employment, and was prone to outbursts and exhibitions of anger in a position involving daily dealings with the general public. Another case demonstrating effective rebuttal is *Litner v. Office of Budget and Admin.*, 79 Pa. Commw. 176, 468 A.2d 903 (1983). In *Litner*, the employee, who alleged discrimination based upon a work related respiratory problem, had her case rebutted by evidence of her use of a WATS line in violation of office policy, her need for a greater amount of supervision than was customary to one in her position, and her failure to complete assignments on time. And, in *Philadelphia County Bd. of Assistance v. Vinson*, 75 Pa. Commw. 518, 463 A.2d 73 (1983), the appointing authority, after having its request to remove Vinson's name from the eligibility list because of convictions for robbery and conspiracy rejected, hired him as an income maintenance worker I. Upon receiving further legal advice, it determined it could remove him and did so. Vinson alleged discrimination based on a non-merit factor, his criminal record; the Commission agreed. Commonwealth Court reversed noting that the job involved determining financial eligibility for welfare, visits to current or potential recipients' homes, and access to negotiable instruments. Further testimony established that fifteen income maintenance workers had been convicted of defrauding the Commonwealth. In *Meiler v. Dep't of Banking*, 58 Pa. Commw. 346, 427 A.2d

In some instances, a general denial of discriminatory intent may be sufficient rebuttal, but such tactic is risky and may invite a later action for malpractice. Because the entire civil service system is premised upon the merit concept, effective rebuttal should include an explanation of how the personnel action related to the job.

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783 (1981), the employee, a bank examiner II, sought promotion to bank examiner III. He alleged that he had greater seniority than the two selectees, had completed a training program not completed by one of the two selectees, had investigated a number of banks, and was actually doing the work of a bank examiner III. Rebuttal evidence accepted as sufficient included the fact that the training program as well as the actual experience heading investigations were only guidelines, the fact that one selectee who lacked this training had, instead, an area of specialization in trust departments, the fact that Meiler had examined only a few large banks, and the fact that he had extensively used leave time. One interesting point is that while Meiler did not sustain his burden, he did present sufficient evidence of not having been assigned to investigate larger banks so as to cause the Commission to direct the appointing authority to provide Meiler and the Commission with an explanatory statement in the event he was passed over for future promotions.

It has also been established that allegations of discrimination based on age can be rebutted in a furlough case by showing that the appointing authority had in its employ older workers. *Angel v. State Civil Serv. Comm'n*, 9 Pa. Commw. 582, 309 A.2d 69 (1973). And, in *Lusane v. Pennsylvania Civil Serv. Comm'n*, 5 Pa. Commw. 642, 291 A.2d 808 (1972), a child care aide who had been arrested on charges of assault and battery, wantonly pointing a deadly weapon, and assault with intent to maim in an accident occurring outside the scope of his employment was removed. Both the Commission and the Commonwealth Court rejected the notion that such factors were non-merit. The court noted that the job involved care of mentally ill children and indicated that the activities (some of which the employee had admitted to his supervisor) had led the appointing authority to conclude that Lusane's temperment clouded his competency. Thus, a showing of off-the-job conduct, when linked with the job itself, can rebut allegations of discrimination. Another case which submitted effective rebuttal is *Quarles v. Dep't of Transp.*, 61 Pa. Commw. 572, 434 A.2d 864 (1981). In *Quarles*, an equal opportunities development specialist II was removed after being charged with misdemeanor offenses of misappropriating public agency funds and violating firearms laws. His discrimination claim was rebutted by testimony that the adverse publicity hampered his effectiveness on the job. And in *Laws v. Philadelphia County Bd. of Assistance*, 50 Pa. Commw. 340, 412 A.2d 1377 (1980), an employee suspended and then removed because arthritis made her unable to perform "field work," such as visiting homes of welfare recipients to verify eligibility, appealed alleging discrimination based upon physical disability. She argued that field work was only a minor part of her duties and hence her condition did not substantially preclude her from doing her job. She also argued that reasonable accommodation should be made pursuant to 16 PA. CODE § 44.4 (*Shepard's* 1986). The Commission rejected Law's assertions finding that field work was a requirement of the position (the appointing authority had offered her a demotion to a job not involving field work, and she had been offered disability retirement). Determining that inability to exert a job duty is a merit criterion, the court upheld the removal. One final example of effective rebuttal appears in *Lowe v. State Civil Serv. Comm'n*, 76 Pa. Commw. 267, 463 A.2d 1229 (1983), wherein the employee, a clothing room attendant, appealed his removal which had been premised upon his falsifying his civil service application by failing to reveal four of his five criminal convictions. Relation to the job of the convictions (which included disorderly conduct, resisting arrest, shoplifting, assault and battery on a police officer, and robbery) was established by testimony that the position involved patient contact and access to patient property as well as to hospital equipment and supplies.

## XII. CONCURRENT JURISDICTION AND RELATED MATTERS

Section 12(b) of the Pennsylvania Human Relations Act provides in pertinent part:

(b) Except as provided in subsection (c), nothing contained in this act shall be deemed to repeal or supersede any of the provisions of any existing . . . law of this Commonwealth relating to discrimination because of race, color, religious creed, ancestry, age, sex, national origin or handicap or disability, but as to acts declared unlawful by section five of this act the procedure herein provided shall when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complaint concerned. If such complaint institutes any action based on such grievance without resorting to the procedure provided in this act, he may not subsequently resort to the procedure herein.<sup>147</sup>

Thus, an aggrieved civil servant has a choice of the forum in which he or she chooses to litigate. The State Civil Service Commission currently has a practice of proceeding with a case appealed to it even if the same case has been appealed to the Human Relations Commission. As a practical matter, the Civil Service Commission issues decisions more quickly than the Human Relations Commission which must, pursuant to the procedure set forth in section 9 of the Pennsylvania Human Relations Act, conduct an investigation to determine if probable cause exists.<sup>148</sup> Accordingly, there has not been as of yet a case in which the Human Relations Commission has issued a final adjudication prior to one being issued by the Civil Service Commission. It is suggested, however, that once one of the agencies issues a final decision which is not appealed the principle of collateral estoppel would preclude the other agency from finding facts to the contrary.<sup>149</sup>

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147. PA. STAT. ANN. tit. 43, § 962(b) (Purdon Supp. 1986).

148. PA. STAT. ANN. tit. 43, § 959(b) and (c) (Purdon Supp. 1986).

149. The doctrine of collateral estoppel provides that "[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." *McCarthy v. Township of McCandless*, 7 Pa. Commw. 611, 619, 300 A.2d 815, 820 (1973) (quoting section 68(1) of Restatement of Judgments). The prior action operates only as an estoppel to those matters in issue which are identical, were actually litigated, were essential to the judgment and were material to the adjudication. *Id.* at 619, 300 A.2d at 820-21.

One case which does consider the applicability of facts found by another agency, although not in the context of collateral estoppel, is *Allegheny County Children and Youth Services v. Williams*, 87 Pa. Commw. 77, 487 A.2d 47 (1985). In *Allegheny County* the appointing authority removed a houseparent, regular status, from his position at a youth shelter on the basis of a Child Line and Abuse Registry report which evidenced "indicated abuse." This finding of indicated abuse had not been appealed by Williams. The appointing authority argued that Williams' failure to appeal the abuse report precluded him from appealing his

A decision as to where to litigate a claim is a matter of legal judgment. It is submitted, however, that where the allegation is one involving procedural discrimination and hence the technical complexities of the Civil Service Act the State Civil Service Commission is the forum with greater expertise in the area. Wise counsel should, however, take note of the more liberal statute of limitations applicable to the Human Relations Act. In cases where the alleged discrimination can be pinpointed to a particular date, the complainant before the Human Relations Commission has ninety days within which to file a complaint.<sup>150</sup> Section 951(b) of the Civil Service Act, however, provides for only a twenty day period<sup>151</sup> measured from the date of the alleged violation (or its reasonable discovery).<sup>152</sup> In addition, the Human Relations Commission, pur-

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removal to the State Civil Service Commission. The Commonwealth Court correctly noted that both the issues and the remedies were different in the two proceedings. An appeal to the Department of Public Welfare from the indicated report, which is established without a due process hearing and thus composed of "unlitigated" findings, could result in expungement of the report. See section 15(d) of the Child Protective Services Law, PA. STAT. ANN. tit. 11, § 2215(d) (Purdon Supp. 1986). In contrast, an appeal to the State Civil Service Commission would focus upon the existence of just cause for removal and possible reinstatement and back pay. See also *Spinola v. Dep't of Pub. Welfare* (No. 205 C.D. 1985, filed August 15, 1985) (unreported Commonwealth Court case holding that the Commission need not consider the hearing transcript of a prior informal non-adversarial hearing conducted by the appointing authority and that a finding of no willful misconduct by the Unemployment Compensation Board of Review does not collaterally estop the State Civil Service Commission from finding just cause for removal).

150. 16 PA. CODE § 42.11(a) (Shepard's 1986).

151. See also 4 PA. CODE § 105.12 (Shepard's 1986).

152. Case law recognizes that one is unable to appeal an alleged discriminatory act until one becomes aware of the discrimination. Thus, in *Butler v. State Civil Serv. Comm'n*, 57 Pa. Commw. 406, 426 A.2d 239 (1981), where female nurses alleging gender discrimination appealed their non-selections more than twenty days after the tentative selectee was announced, the appeal was timely because the announcement letter did not indicate that the selectee was male. The women did appeal within twenty days of learning the identity of the candidate. Once the date of the incident is pinpointed, however, the time period for appeal, whether under section 951(a) or section 951(b), is mandatory. See, e.g., *Taylor v. State Civil Serv. Comm'n*, 67 Pa. Commw. 594, 447 A.2d 1098 (1982); *Marks v. Civil Serv. Comm'n*, 7 Pa. Commw. 414, 299 A.2d 691 (1973). See also *Schnieder v. State Civil Serv. Comm'n*, 77 Pa. Commw. 623, 466 A.2d 300 (1983) (employer's notice of removal is not required to set forth twenty day appeal period); *Edmonds v. Dep't of Pub. Welfare*, 71 Pa. Commw. 160, 454 A.2d 221 (1983) (appeal inadvertently addressed to Federal Civil Service Commission and which was forwarded to State Civil Service Commission but arrived after twenty day period was untimely); *Pettit v. Civil Serv. Comm'n*, 4 Pa. Commw. 124, 285 A.2d 223 (1971) (appeal denied when attempted delivery of removal letter sent by certified mail was unsuccessful and employee was notified of attempted delivery but letter went unclaimed); but see *Roderick v. State Civil Serv. Comm'n*, 76 Pa. Commw. 329, 463 A.2d 1261 (1983) (where employee alleges misdirection by appointing authority wherein it knew employee was pursuing wrong avenue of appeal but chose not to inform her of this after several contacts by her attorney, a remand for findings on whether appeal nunc pro tunc should be

suant to section 9(f) of its Act, has broad discretion in fashioning a remedy including an order pertaining to reinstatement, back pay, hiring and "upgrading."<sup>153</sup> The Civil Service Commission is empowered pursuant to section 951 (b) to "make such order as it deems appropriate to assure the person such rights as are accorded him by [the] Act." Thus, in discrimination cases including those involving removal, suspension, non-selection for promotion or demotion, an adequate remedy is available from either forum. Another factor to consider is that a complainant under the Human Relations Act is provided with an attorney; this is not the case for persons appealing to the Civil Service Commission.

Other distinctions to be aware of with respect to the two forums include the method of pleading, discovery and post-hearing rights. The Pennsylvania Human Relations Commission complaint must set forth the names of the complainant and the respondent and "[s]uch other information as may be required by the Commission."<sup>154</sup> Answers may be filed,<sup>155</sup> any allegation of new matter is deemed denied without the necessity of a reply<sup>156</sup> and respondents have the right to file a formal position statement.<sup>157</sup> Additionally, complaints or answers may be amended at any time prior to the approval of a hearing and thereafter by leave of the commissioners, hearing commissioners or permanent hearing examiner.<sup>158</sup> In instances where no probable cause is found, the complainant retains the right to bring an action in the court of common pleas of the jurisdiction where the alleged discrimination occurred.<sup>159</sup> The Human Relations Commission also has regulations establishing a broad range of discovery procedures, which are available to it dur-

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allowed is appropriate).

153. PA. STAT. ANN. tit. 43, § 959(f) (Purdon Supp. 1986).

154. 16 PA. CODE § 42.32(a) (Shepard's 1986).

155. 16 PA. CODE § 42.32(b) (Shepard's 1986).

156. 16 PA. CODE § 42.33(a) (Shepard's 1986).

157. 16 PA. CODE § 42.33(c) (Shepard's 1986).

158. 16 PA. CODE § 42.35(a) (Shepard's 1986). If the unlawful discriminatory practice complained of is not eliminated before a hearing on the merits is approved, the complaint may be amended to include additional material allegations disclosed by the investigation. 16 PA. CODE § 42.35(b) (Shepard's 1986).

159. 16 PA. CODE § 42.61(c) (Shepard's 1986). If probable cause is found the Commission "will endeavor to eliminate the unlawful discriminatory practice by conference, conciliation and persuasion." 16 PA. CODE § 42.71(b) (Shepard's 1986). The Human Relations Commission regulations provide for pre-hearing discovery including protective orders, 16 PA. CODE § 42.82 (Shepard's 1986), discovery of Commission records, 16 PA. CODE §§ 42.83-.84 (Shepard's 1986), interrogatories, 16 PA. CODE § 42.86 (Shepard's 1986), depositions, 16 PA. CODE § 42.88 (Shepard's 1986), production of documents and materials, 16 PA. CODE § 42.91 (Shepard's 1986) and requests for admission, 16 PA. CODE § 42.94 (Shepard's 1986).

ing the probable cause investigation stage.<sup>160</sup> Finally, the complainant may seek reconsideration of a case closing within ten days of the receipt of notice of the closing of the complaint.<sup>161</sup>

With respect to cases brought before the Civil Service Commission, case law has repeatedly established that under section 951(b) of the Civil Service Act the employee must allege with specificity the underlying basis for his claim of discrimination.<sup>162</sup> The Commission incorporates this requirement into its regulation and reserves the right to dismiss a case which does not specify facts alleging discrimination.<sup>163</sup> It routinely does so *sua sponte*. No answer is required, nor specifically provided for in the Civil Service regulations<sup>164</sup> and an appeal form can be amended only at the discretion of the Commission.<sup>165</sup> Recently, the Commission adopted regulations expanding discovery to include depositions and pre-hearing discovery of documents.<sup>166</sup> Prior to the implementation of

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160. 16 PA. CODE § 42.42 (Shepard's 1986). The investigatory discovery proceedings available to the Human Relations Commission at this stage include oral interviews and production of documents, 16 PA. CODE § 42.43 (Shepard's 1986), interrogatories and answers to interrogatories, 16 PA. CODE §§ 42.44-45 (Shepard's 1986), subpoenas, 16 PA. CODE § 42.48 (Shepard's 1986), depositions, 16 PA. CODE § 42.51 (Shepard's 1986), and production of documents, information or material for inspection, copying or photographing, 16 PA. CODE § 42.54 (Shepard's 1986).

161. 16 PA. CODE § 42.62(d) (Shepard's 1986).

162. *Hunter v. Jones*, 417 Pa. 372, 207 A.2d 784 (1965), *aff'd sub. nom. Hunter v. State Civil Serv. Comm'n*, 422 Pa. 158, 220 A.2d 879 (1966); *Vovakes v. Dep't of Transp.*, 71 Pa. Commw. 3, 453 A.2d 1072 (1982); *Sienkiewicz v. Dep't of Pub. Welfare*, 53 Pa. Commw. 445, 417 A.2d 874 (1980); *Cunningham v. State Civil Serv. Comm'n*, 17 Pa. Commw. 375, 332 A.2d 839 (1975). *See also Somersset Mental Retardation Unit v. Sanders*, 85 Pa. Commw. 549, 483 A.2d 1018 (1984) (Commission's post-hearing raising of procedural issue which was not raised by either party prior to or at the hearing constituted a denial of due process).

163. 4 PA. CODE § 105.12(c) (Shepard's 1986).

164. In most instances, the aggrieved employee will receive a letter explaining the adverse personnel action. This will usually establish the appointing authority's position so that a formal answer is not required. This letter is admitted into evidence at the hearing as a Commission exhibit. It should be noted that while written *notice* is required for the most common personnel actions, *see* 4 PA. CODE § 105.1-2 (Shepard's 1986), a statement of *reasons* for the action is required only in the cases of removal, resignation by abandonment, involuntary retirement, involuntary demotion or suspension of a *regular* status employee. *See* 4 PA. CODE § 105.3 (Shepard's 1986).

165. 4 PA. CODE § 105.12(d) (Shepard's 1986). *See also O'Byrne v. Dep't of Transp.*, 92 Pa. Commw. 286, 498 A.2d 1385 (1985), a case examining amendment of an appeal form pursuant to the General Rules of Administrative Practice and Procedure, 1 PA. CODE §§ 31.1-35.251 (Shepard's 1986) (mistakenly designated in the opinion as Commission regulations). *O'Byrne* suggests that in a section 951(a) case an amendment to include a section 951(b) claim beyond the twenty day appeal period may be the injection of a new cause of action beyond the appeal period.

166. 4 PA. CODE § 105.14(a) and § 105.14(b) (Shepard's 1986). Regulation 105.14(a) replaces the Commission's prior rule relating to subpoenas. Regulation 105.14(b), which gov-



these regulations, discovery was limited to subpoenas for documents which were exchanged at the beginning of or during the hearing, unless counsel agreed to an earlier exchange, and subpoenas ad testificandum.<sup>167</sup> Thus, where extensive pre-trial discovery is needed, the Pennsylvania Human Relations Commission may be the more effective forum because of its broad discovery provisions and its practice in actually implementing them. As with the Human Relations Commission, the State Civil Service Commission does permit petitions for reconsideration.<sup>168</sup> The petitions must be filed within ten calendar days of the issuance of the adjudication.<sup>169</sup>

### XIII. CONSTITUTIONAL ISSUES

The Civil Service Act has been the subject of a number of constitutional challenges on grounds such as veterans preference,<sup>170</sup> mandatory retirement,<sup>171</sup> free speech and association<sup>172</sup> and equal

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erns depositions and discovery of documents, has been effective only since March 30, 1985. See 15 Pa. Admin. Bull. 1151.

167. The Commission's expansion of discovery to the prehearing phase was, in the author's view, long overdue, especially in section 951(b) cases where the employee has the burden. The inaccessibility to documents was especially detrimental in the procedural discrimination cases and in cases involving a comparison theory. Additionally, at least one judge of the Commonwealth Court believes that the denial of pre-hearing discovery violates due process. See *Turzai v. Pa. Liquor Control Bd.*, 90 Pa. Commw. 374, 495 A.2d 639 (1985) (Kalish, J., dissenting). But see *E. Pa. Psychiatric Inst. v. Russell*, 77 Pa. Commw. 390, 401, 465 A.2d 1313, 1319 (1983), where the court in the context of a furlough case wrote:

The employees also assert that they were denied due process by the lack of pre-trial discovery. A review of the record, however, indicates counsel for the employees was allowed to review documents in an adequate manner prior to the hearing. Employees' contention that they were entitled to a broader form of discovery has not been substantiated by any case law suggesting that such a right exists in administrative hearings. In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process right occurred.

168. 4 PA. CODE § 105.17 (Shepard's 1986).

169. 4 PA. CODE § 105.17(c) (Shepard's 1986).

170. *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973).

171. *Delaware County Child Care Services v. Goodley*, 53 Pa. Commw. 333, 417 A.2d 868 (1980) (where contract between State Civil Service Commission and local agency provided that local agency's practice of mandatory retirement shall continue, contract provision was controlling under Commission regulation 93.8, 4 PA. CODE § 93.8 (Shepard's 1986)). This regulation provides that services of the Commission are available to other agencies via contractual agreement. The *Goodley* court also indicated that a mandatory retirement policy is not discriminatory *per se* under Pennsylvania law.

172. *Farview State Hosp. v. Urda*, 23 Pa. Commw. 607, 353 A.2d 61 (1976), *cert. denied*, 429 U.S. 1093 (1977) (prohibition in section 904 of Civil Service Act against taking an active part in political management or political campaigns does not violate state or federal constitutional rights to free speech and free association); *Sauers v. Dep't of Pub. Welfare*, 76 Pa. Commw. 504, 464 A.2d 635 (1983) (employee's critical remarks of superior, which re-

protection.<sup>173</sup> There have also been challenges to extrajudicial inquiry,<sup>174</sup> proper separation of functions,<sup>175</sup> bias<sup>176</sup> and the absence of one or more members of the Commission from the hearing.<sup>177</sup> These cases, however, do not emanate from an attack upon section 905.1 of the Act. Thus, detailed discussion of them is not appropriate for the focus of this paper.

There are, however, two due process issues which are repeatedly raised in both section 951(a) and section 951(b) claims, and which merit closer attention. The first concerns notice of charges. Both section 950 of the Civil Service Act<sup>178</sup> and Commission regulation 105.2<sup>179</sup> specify personnel actions requiring notice. Although under this regulation most personnel actions directly affecting pay and present benefits require notice, indirect actions such as non-selection or non-promotion do not. In addition, although under section 950 probationary employees are entitled to *notice* of personnel actions taken with respect to them, they are not entitled to a *statement of reasons* for the actions.<sup>180</sup> Accordingly, the suspension, demotion or removal notice of a probationary employee will often be

marks were not related to matters of political or social concern, could serve as a basis for discipline without first amendment violation occurring).

173. *Haines v. State Civil Serv. Comm'n*, 58 Pa. Commw. 640, 428 A.2d 759 (1981) (Civil Service Act did not violate equal protection by establishing distinctions between regular and probationary employees).

174. *Freedman v. Dep't of Gen. Services*, 38 Pa. Commw. 229, 392 A.2d 352 (1978) (dismissal of appeal based upon extrajudicial inquiry is prohibited where statute requires a public hearing).

175. *Wasniewski v. State Civil Serv. Comm'n*, 7 Pa. Commw. 166, 299 A.2d 676 (1973).

176. *Silvia v. Pennhurst Center Dep't of Pub. Welfare*, 63 Pa. Commw. 75, 437 A.2d 535 (1981); *Tempero v. Dep't of Env'tl. Resources*, 44 Pa. Commw. 235, 239 n.3, 403 A.2d 226, 229 n.3 (1979).

177. *Turzai v. Pa. Liquor Control Bd.*, 90 Pa. Commw. 374, 380 n.6, 495 A.2d 639, 642 n.6 (1985); *Caldwell v. Clearfield County Children and Youth Services*, 83 Pa. Commw. 49, 476 A.2d 996 (1984); *Kakas v. Dep't of Pub. Welfare*, 65 Pa. Commw. 550, 442 A.2d 1243 (1982); *Fleming v. State Civil Serv. Comm'n*, 13 Pa. Commw. 421, 319 A.2d 185 (1974); *Siegel v. State Civil Serv. Comm'n*, 9 Pa. Commw. 256, 305 A.2d 736 (1973).

178. PA. STAT. ANN. tit. 71, § 741.950 (Purdon Supp. 1986).

179. 4 PA. CODE. § 105.2 (Shepard's 1986).

180. Commission regulation 105.3, 4 PA. CODE § 105.3 (Shepard's 1986), which governs statement of reasons, refers only to regular status employees. See note 164. This position is in conformity with *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), wherein the United States Supreme Court held that a non-tenured college professor who had no right to continued employment and was not rehired, was not constitutionally entitled to a statement of reasons for the state action or to a hearing. The *Roth* Court did note, however, that had the state made charges which would have damaged Roth's "standing and associations in his community," or imposed a stigma on him which would have "foreclosed his freedom to take advantage of other employment opportunities," the result may well have been different. *Id.* at 573.

a statement only that the employee is being disciplined for "unsatisfactory performance." The multitude of cases holding that an employee must receive notice which enables him to discern the charges and adequately prepare a defense, are cases involving *regular* status employees.<sup>181</sup> There is no requirement that a probationary employee be given a statement of reasons for an adverse personnel action, because his appeal is limited to issues of discrimination where he bears the burden of proof.

A related issue is the question of whether one is entitled to a pre-termination hearing. The United States Supreme Court in *Cleveland Board of Education v. Loudermill*,<sup>182</sup> recently decided that with respect to a *regular status* civil servant, a pre-termination hearing is required to satisfy due process, but that such hearing need be only an initial check. Thus, as long as the employee is given notice of the charges, explanation of the employer's evidence and an opportunity to respond in an informal pre-termination hearing, due process is satisfied. There is nothing to suggest that *Loudermill* was meant to apply to probationary employees.<sup>183</sup>

#### XIV. REMEDIES

Under section 951(b) of the Civil Service Act, the Commission's power to make an appropriate order is limited to assuring that the employee receives the rights given him by the statute.<sup>184</sup> The Commission routinely orders reinstatement. It has on one occasion, where an employee was not removed but his duties were taken

181. See, e.g., *Chavis v. Philadelphia County Bd. of Assistance, Dep't of Pub. Welfare*, 29 Pa. Commw. 205, 370 A.2d 445 (1977); *Benjamin v. State Civil Serv. Comm'n*, 17 Pa. Commw. 427, 332 A.2d 585 (1975); *Wood v. Dep't of Pub. Welfare*, 49 Pa. Commw. 383, 411 A.2d 281 (1980). It is clear that a statement of reasons which is insufficient can be amended. *Rizzo v. Civil Serv. Comm'n*, 17 Pa. Commw. 474, 333 A.2d 212 (1975). See also *Lylo v. Dep't of Env'tl. Resources*, 83 Pa. Commw. 101, 477 A.2d 897 (1984).

182. \_\_\_ U.S. \_\_\_, 105 S. Ct. 1487 (1985).

183. The Commonwealth Court has specifically applied *Loudermill* to the State Civil Service Act. See *Adamovich v. Dep't of Pub. Welfare*, \_\_\_ Pa. Commw. \_\_\_, 504 A.2d 952 (1986). But *Adamovich*, like *Loudermill*, involved a regular status employee. Older cases hold that there is no right to a pre-termination hearing (presumably a full-blown hearing). See, e.g., *Gorby v. Dep't of Pub. Welfare*, 57 Pa. Commw. 312, 426 A.2d 223 (1981); *Beville v. State Civil Serv. Comm'n*, 15 Pa. Commw. 341, 327 A.2d 196 (1974); *Williams v. Civil Serv. Comm'n*, 9 Pa. Commw. 437, 306 A.2d 419 (1973), *aff'd*, 457 Pa. 470, 327 A.2d 70 (1974); *Grausam v. Murphey*, 448 F.2d 197 (3d Cir. 1971), *cert. dismissed*, 405 U.S. 981 (1972). These cases all involve regular status employees. The issue of whether *Adamovich* applies to probationary employees remains undecided.

184. See also *Pennsylvania Bd. of Probation and Parole v. Baker*, 82 Pa. Commw. 86, 474 A.2d 415 (1984).

from him, ordered reinstatement of the duties.<sup>185</sup> In cases involving non-selection, the Commission, upon a finding of discrimination, usually directs that the employee be offered the next available position. On occasion, where the appointing authority has repeatedly followed procedures which the Commission has rejected, it will order that the position be vacated and direct that the aggrieved employee be placed in the position. With respect to the grant or denial of back pay, the Commission has wide discretion in such matters,<sup>186</sup> but the denial of back pay must be based upon job related factors which touch upon competency and ability to do the job.<sup>187</sup> Thus, if the Commission finds a removal or suspension to have been discriminatory, a denial of back pay would probably constitute an abuse of discretion.

#### XV. SUMMARY

Under the Pennsylvania Civil Service Act, section 905.1 has been frequently used not only to remedy the traditional forms of discrimination, but also to provide redress for mistakes. This broad reading of section 905.1 provides aggrieved employees with standing to enforce the procedural requirements of the Act. This in turn operates to allow employees to participate personally in insuring the fairness in employment that the Act seeks to achieve, and to assist the State Civil Service Commission in policing the Act. When the reasons for this broad reading of discrimination are understood by the litigants and the courts, the result will be a more effective application of the law, which will better implement the Act's goal of greater efficiency in government through the application of the merit concept.

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185. *Dep't of Gen. Services v. Johnson*, 45 Pa. Commw. 245, 405 A.2d 596 (1979).

186. *Fiegenberg v. Dep't of Labor and Indust.*, 33 Pa. Commw. 570, 382 A.2d 498 (1978).

187. *See, e.g., Justice v. Youth Dev. Center*, 74 Pa. Commw. 531, 460 A.2d 876 (1983). It is well settled that denial of back pay is a penalty. *See, e.g., Baron v. Civil Serv. Comm'n*, 8 Pa. Commw. 6, 301 A.2d 427 (1973).

Appendix A

**DISCRIMINATION 951 (b)**

L. PROBATIONARY EMPLOYEES MAY ONLY APPEAL UNDER THIS SECTION. REGULAR STATUS EMPLOYEES WHO ARE ALLEGING DISCRIMINATION MAY ALSO APPEAL UNDER THIS SECTION. THE BURDEN OF PROOF IS ON APPELLANT WHEN FILING UNDER 951-B. INDICATE THE TYPE(S) OF ACTION(S) BEING APPEALED.

<input type="checkbox"/> REMOVAL	<input type="checkbox"/> TRANSFER	<input type="checkbox"/> DENIAL OF LEAVE OF ABSENCE	<input type="checkbox"/> NON-PROMOTION (TO WHAT CLASSIFICATION?)
<input type="checkbox"/> DEMOTION	<input type="checkbox"/> REASSIGNMENT	<input type="checkbox"/> PERFORMANCE EVALUATION REPORT	<input type="checkbox"/> NON-APPOINTMENT (TO WHAT CLASSIFICATION?)
<input type="checkbox"/> SUSPENSION	<input type="checkbox"/> INVOLUNTARY RETIREMENT	<input type="checkbox"/> EXTENSION OF PROBATIONARY PERIOD	<input type="checkbox"/> OTHER (SPECIFY)
<input type="checkbox"/> FURLOUGH	<input type="checkbox"/> INVOLUNTARY RESIGNATION	<input type="checkbox"/> COMPENSATION CHANGES EXCEPT MERIT INCREMENTS	

M. CHECK THE BOX/BOXES BELOW AND STATE ALL OF THE SPECIFIC REASONS FOR YOUR APPEAL IN THE SPACE PROVIDED. TO THE BEST OF YOUR KNOWLEDGE, STATE WHO DISCRIMINATED AGAINST YOU, WHEN THE DISCRIMINATION OCCURED AND WHAT THE DISCRIMINATORY ACTIONS WERE. (YOUR APPEAL MAY BE DENIED IF YOU ARE NOT SPECIFIC.)

<input type="checkbox"/> POLITICAL OPINIONS/AFFILIATIONS	<input type="checkbox"/> RACE	<input type="checkbox"/> AGE	<input type="checkbox"/> ILLEGAL PROCEDURE BY AGENCY
<input type="checkbox"/> RELIGIOUS OPINIONS/AFFILIATIONS	<input type="checkbox"/> NATIONAL ORIGIN	<input type="checkbox"/> HANDICAP	<input type="checkbox"/> OTHER NON-MERIT FACTORS (EXPLAIN)
<input type="checkbox"/> LABOR UNION AFFILIATIONS	<input type="checkbox"/> SEX	<input type="checkbox"/> MISTAKE OF FACT BY AGENCY	

REASONS: (Failure to give specific reasons may cause your appeal to be denied) ATTACH ADDITIONAL SHEETS IF NECESSARY.

DISCRIMINATION 951-B ACTION ONLY

N. HAVE YOU TAKEN THIS APPEAL BEFORE ANY OTHER FORUM?

YES      NO     IF SO, WHAT FORUM? \_\_\_\_\_

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O. WHAT REMEDY ARE YOU SEEKING:

---

<p>F. DO YOU AGREE TO APPEAR PERSONALLY IF YOUR REQUEST FOR A HEARING IS GRANTED?</p> <p><input type="checkbox"/> NO     <input type="checkbox"/> YES</p>	<p>G. WILL YOU BE REPRESENTED BY AN ATTORNEY?</p> <p><input type="checkbox"/> NO     (IF YOU RETAIN AN ATTORNEY LATER, PLEASE INFORM THE APPEALS DIVISION, STATE CIVIL SERVICE COMMISSION.)</p> <p><input type="checkbox"/> YES     (ENTER ATTORNEY'S NAME, IF AVAILABLE. NOTE: YOUR ATTORNEY IS REQUIRED TO FILE AN ENTRANCE OF APPEARANCE WITH THE STATE CIVIL SERVICE COMMISSION IN ORDER TO RECEIVE OFFICIAL CORRESPONDENCE.)</p>
<p>R. SIGNATURE [APPELLANT MUST SIGN IN INK.]</p>	<p>S. DATE SIGNED</p>

Appendix B

\* PART III - 951(b) ALL EMPLOYEES/PERSONS ALLEGING DISCRIMINATION

SECTION 905.1. Prohibition of Discrimination. -- No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention, or any other personnel action with respect to the classified service because of political or religious opinions or affiliations, because of labor union affiliations, or because of race, national origin, or other non-merit factors

SECTION 951. Hearings.

(b) Any person who is aggrieved by an alleged violation of Section 905.1 of this act may appeal in writing to the commission within twenty calendar days of the alleged violation. Upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing. As soon as practicable after the conclusion of the hearing, the commission shall report its findings and conclusions to the aggrieved person and other interested parties. If such final decision is in favor of the aggrieved person, the commission shall make such order as it deems appropriate to assure the person such rights as are accorded him by this act.

K1. EMPLOYEES WHO DO NOT HAVE REGULAR STATUS AND NON-EMPLOYEES WHO ARE ALLEGING DISCRIMINATION MAY ONLY APPEAL UNDER THIS PART. REGULAR STATUS EMPLOYEES ALLEGING DISCRIMINATION ALSO MAY APPEAL UNDER THIS PART. THE BURDEN OF PROOF IS ON THE APPELLANT. INDICATE THE TYPE(S) OF ACTION(S) BEING APPEALED.

- REMOVAL, SUSPENSION, FURLOUGH, EXTENSION OF PROBATIONARY PERIOD, OTHER (SPECIFY), DEMOTION, REASSIGNMENT, PERFORMANCE EVALUATION REPORT, NON-APPOINTMENT (TO WHAT CLASSIFICATION?)

K2. CHECK THE APPLICABLE BOX(ES) BELOW AND STATE WHO DISCRIMINATED AGAINST YOU, WHEN THE DISCRIMINATION OCCURRED, AND WHAT THE DISCRIMINATORY ACTIONS WERE. FAILURE TO DO SO WILL RESULT IN DENIAL OF YOUR APPEAL. BE PREPARED TO GO FORWARD AT HEARING AND PROVE YOUR ALLEGATIONS.

- POLITICAL OPINIONS/AFFILIATIONS, LABOR UNION AFFILIATIONS, RACE, SEX, OTHER NON-MERIT FACTORS (EXPLAIN), RELIGIOUS OPINIONS/AFFILIATIONS, NATIONAL ORIGIN, AGE, HANDICAP

REASONS: [SUPPORT YOUR REASONS] WITH REQUIRED SPECIFICITY AS TO WHY YOU FEEL YOU HAVE BEEN DISCRIMINATED AGAINST. Attach additional sheets if necessary.

SECTIONS 905.1/951(b)

K3. DATE YOU BECAME AWARE OF THE ALLEGED DISCRIMINATION YOU ARE APPEALING

\* PART IV - HEARING DATA (To be completed by ALL Appellants.)

Form with sections L, M, N, O. L: DO YOU AGREE TO APPEAR PERSONALLY IF YOUR REQUEST FOR A HEARING IS GRANTED? M: WILL YOU BE REPRESENTED BY AN ATTORNEY? N: SIGNATURE (APPELLANT MUST SIGN IN INK) O: DATE SIGNED

