

Memo

To: Desmon Martin, Chief of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: December 1, 2010

Re: *James A. Bolden v. Combined Health District of Montgomery County*

(DAY) 76 (17572) 01182006 22A-2006-01512C
Complaint No. 06-EMP-[DAY-17572]



**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT**

ALJ RECOMMENDS DISMISSAL ORDER

Report issued: November 24, 2010

Report mailed: November 24, 2010

**** Objections due: December 17, 2010**

DMJ:tg



Ohio Civil Rights Commission

Governor
Ted Strickland

Board of Commissioners

Eddie Harrell, Jr., Chairman
Leonard J. Hubert
Stephanie M. Mercado, Esq.
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

November 24, 2010

James A. Bolden
5853 Hillary Street
Trotwood, OH 45426

Robert J. Surdyk, Esq.
Dawn M. Frick, Esq.
Surdyk, Dowd & Turner
One Prestige Place, Suite 700
Miamisburg, OH 45342-6148

Re: *James A. Bolden v. Combined Health District of Montgomery County*
(DAY) 76 (17572) 01182006 22A-2006-01512C
Complaint No. 06-EMP-[DAY-17572]

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Friday, December 17, 2010**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Chief of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414.** All parties and the Administrative Law Judge should receive copies of your Statement of Objections.

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Chief of Enforcement and Compliance

DM:tg

cc: Lori A. Anthony, Chief – Civil Rights Section
Denise M. Johnson, Chief Administrative Law Judge

Enclosure

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

JAMES A. BOLDEN

Complainant

v.

**COMBINED HEALTH DISTRICT
OF MONTGOMERY COUNTY**

Respondent

Complaint No. 06-EMP-[DAY-17572]
DAY 76 (17572) 01182006
22A-2006-01512C

**CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION**

**RICHARD CORDRAY
ATTORNEY GENERAL**

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ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 - 466 - 6684

James A. Bolden
5853 Hillary Street
Trotwood, OH 45426

Complainant

INTRODUCTION AND PROCEDURAL HISTORY

Clarence L. Johnson and James A. Bolden (Complainants) filed sworn charge affidavits with the Ohio Civil Rights Commission (the Commission) on January 18, 2006.

The Commission investigated the charges and found probable cause that the Combined Health District of Montgomery County (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued Complaints on December 14, 2006.

The Complaints alleged Respondent subjected Complainants to different terms, conditions, and privileges of employment, and paid them less wages due to their race, in violation of R.C. 4112.02(A).

Respondent filed Answers to the Complaints on January 18, 2007. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held March 4, 2008 at the Commission's Dayton Regional Office.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 129 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on November 5, 2008; by Respondent on December 19, 2008; and a reply brief filed by the Commission on January 14, 2009.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainants filed sworn charge affidavits with the Commission on January 18, 2006.

2. The Commission determined on November 16, 2006 it was probable Respondent engaged in unlawful employment practices in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve these matters by informal methods of conciliation. The Commission issued the Complaints after conciliation failed.

4. Respondent is an agency of a political subdivision, doing business in Ohio and an employer.

5. Complainants are African-American.

6. Respondent is Montgomery County's public health department, responsible for a wide variety of services including, but not limited to, food inspection, monitoring and inspection of sewage systems and regional air pollution and control. (Tr. 11)

7. Respondent is governed by the Board of Health which consists of approximately nine (9) members. Directly below the Board of Health is the Health Commissioner. (Tr. 13)

8. The Health Commissioner supervises six (6) divisions: the Division of Community Health, the Division of Environmental Health, the Division of Personal Health, the Division of Special Services, the Division of Programs/Outcomes, and the Division of Administration. (Comm. Ex. 2)

9. Each division is headed by a Division Director.

10. Minority Programs is under the Division of Special Services.

11. Complainants Johnson and Bolden started working for Respondent on April 6, 1987 and September 1992, respectively.

12. Complainant Johnson was a Supervisor of Minority Programs in the Division of Special Services from 1995 to 2005.

Complainant Bolden was a Supervisor of Minority Programs in the Division of Community Health from 2000 to 2007. (Tr. 36, 80)

13. Due to budgetary concerns the Division of Special Services was eliminated and the programs and services contained in the Division of Special Services were transferred into other divisions as of February 1, 2006. (Tr. 51, 70)

14. The Division of Special Services was started by E. Ricky Boyd (Boyd), an African-American. (Tr. 13, 68)

15. Boyd started the Division to specifically provide programs for minorities that have unique health care issues that may not be adequately addressed. (Tr. 11, 116)

16. Boyd was the Division's Director of Special Services.

17. Reporting to Boyd was the Bureau Supervisor of Minority Programs, Jill Vaniman (Vaniman), Caucasian. (Tr. 13, 15)

18. Reporting to Vaniman was the Program Administrator, Marilyn McFadgen (McFadgen), African-American. (Tr. 47)

19. Each of the Supervisors of Minority Programs generally supervised multiple programs. (Comm. Ex. 2)

20. The Supervisor of Minority Programs' duties included coordinating the functions of multiple community-based programs within the area of minority health care, supervision of staff, development and implementation of evaluation assessments, and program outreach. (Comm. Ex. 5)

21. Respondent has three (3) wage scales: A, B, and C. (Tr. 16)

22. The "A" scale is comprised of supervisors and/or management.

23. The "B" and "C" scales are comprised of professional employees, including nurses and registered sanitarians, and clerical positions.

24. Within each wage scale there are “Grades”.

25. The Grades represent, among other things, job knowledge, skill, discretion, scope of supervision, and budgeting.
(Tr. 16)

26. Every three to four years, Respondent performs a Labor Market Survey (LMS) to determine if their wages are competitive with other agencies. If they are not, there is a wage scale adjustment. (Tr. 19-20)

27. During a 2001 LMS Respondent performed an “A” scale survey. (Tr. 22, Resp. Ex. C, D)

28. “A” Wage Scale includes coordinators, supervisors, assistant supervisors, directors, bureau supervisors, and all other supervisory personnel, regardless of whether their title included the word “supervisor”. (Tr. 102, Resp. Ex. D)

29. Complainants did not receive wage scale adjustments in February 2006 pursuant to a Wage Scale Adjustment done in 2005.¹ (Tr. 32)

¹ (B)(1) (...) shall be filed with the commission within six months after the alleged unlawful discriminatory practice was committed. (...)

The charges were filed on January 18, 2006. The allegation that Complainants were not reclassified in 2001 is untimely, and the Commission does not have jurisdiction over employment actions that occurred in 2001. Additionally, the Commission presented evidence at the hearing regarding other allegations of employment discrimination, i.e. having titles with a racial connotation rather than one describing actual job duties, being located in an inferior office location away from the administration, working with a decreased training budget. All of the allegations were not supported by any type of credible evidence regarding when the actions occurred, only by the self-serving statements of Complainants.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.²

1. The Commission alleged in the Complaints Respondent subjected Complainants to different terms, conditions, and privileges of employment and paid them less wages due to their race.

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the race, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Little Forest Medical Center v. Ohio Civil Rights Comm.*, 61 Ohio St.3d 607 (1991). Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action.³

³ Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine*, *supra* at 254, 25 FEP Cases at 116.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the [wage differential], the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

McDonnell Douglas, supra at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

... “clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption created by the establishment of a *prima facie* case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks, supra* at 511, 62 FEP Cases at 100.

7. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of a legitimate, nondiscriminatory reason for Complainants’ wage differential removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), *quoting Burdine, supra* at 255, 25 FEP Cases at 116.

Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.

Aikens, supra at 713, 31 FEP Cases at 611.

8. Respondent met its burden of production with the introduction of evidence that Complainants were not similar to employees within the “A” Wage Scale.

9. Respondent having met its burden of production, the Commission must prove Respondent unlawfully discriminated against Complainants. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent’s articulated reason for Complainants’ wage differential was not the true reason, but was “a pretext for discrimination.” *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine, supra* at 253, 25 FEP Cases at 115.

[A] reason cannot be proved to be a “pretext for discrimination” unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

10. Thus, even if the Commission proves Respondent's articulated reason is false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission's] proffered reason of race is correct. That remains a question for the factfinder to answer

Id., at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of race discrimination.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for wage differential between Complainants and similarly situated employees who are not in the protected class. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder to

infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination ... [n]o additional proof is required.⁴

Hicks, supra at 511, 62 FEP Cases at 100 (emphasis added).

12. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason is a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reason did not *actually* motivate the employment decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

⁴ Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* 511, 62 FEP Cases at 100, n.4.

13. The Commission attempted to show pretext in these cases by alleging disparate treatment. Specifically, the Commission alleged that employees who were supervisors of minority programs were all African-Americans and were treated differently after reclassification than employees who did not have the term “minority” in their job title.

14. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were “similarly situated in all respects”:

Thus to be deemed “similarly situated”, the individuals with whom ... [Complainants] seeks to compare ... [their] treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.

Mitchell v. Toledo Hospital, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

15. To be deemed similarly situated, employees:

need not hold the exact same jobs; however, the duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable.

Hollins v. Atlantic Co., Inc., 76 FEP Cases 553, 557 (N.D. Ohio 1997), quoting *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

16. Respondent argues the Commission failed to prove Complainants were treated differently than similarly situated Caucasian employees. This argument is well-taken.

17. During the 2001 Wage Scale Adjustment, seven (7) supervisory positions reviewed did not change grade. (Tr. 101, Resp. Ex. D)

18. There were eleven (11) other supervisory positions that were not included in the survey. (Tr. 102)

19. Some of the supervisory positions that changed in Grade A were positions held by African-Americans. (Tr. 103-105)

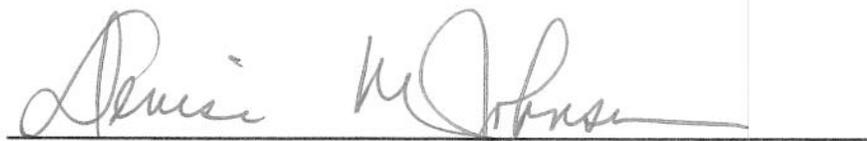
20. Some of the positions that did not change in Grade A were held by Caucasians. (Tr. 105-106)

21. The evidence presented by the Commission regarding allegedly comparable supervisory employees in the Wage Scale "A" classification involves the self-serving testimony of Complainants.

22. The Commission cannot prove pretext through disparate treatment without evidence that a similarly situated comparative was treated more favorably than Complainants.

RECOMMENDATION

For all of the foregoing reasons, it is recommended the Commission issue Dismissal Orders in Complaint No. 06-EMP-[DAY-17571] for Complainant Johnson and Complaint No. 06-EMP-[DAY-17572] for Complainant Bolden.

A handwritten signature in cursive script, reading "Denise M. Johnson", is written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 24, 2010

Statement
of
Objections

Memorandum

To: ✓ Mr. Desmon Martin
Chief of Enforcement and Compliance
Ohio Civil Right Commission
State Office Tower, Fifth Floor
30 East Broad Street
Columbus, Ohio 43215

From: Clarence L. Johnson & James A. Bolden
Ref: Clarence L. Johnson & James A. Bolden vs. Combined Health District of
Montgomery County (DAY) 76 (17572) 01182006 22A-2006-01512C
Complaint Number 06-EMP-(DAY-17571)

Date: December 13, 2010

RECEIVED

DEC 17 2010

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

On January 18, 2006, charging parties, Clarence L. Johnson and James A. Bolden filed an unlawful race and retaliation discrimination lawsuit against Respondent, Combined Health District of Montgomery (CHDMC), now known as Public Health-Dayton & Montgomery County (PHDMC), charging the agency has subjected them to ongoing and disparate terms and conditions by way of involuntary job classification and wages.

Evidence supports that respondent applied dissimilar conditions to charging parties as Supervisors of Minority Health Programs. On November 3, 2001 the Agency issued its Wage Scale Adjustment Reclassification for Supervisory Staff. Supervisors of Minority Programs (A-44) who were assigned to the Division of Special Services, and one other minority in another division, received far less in the wage adjustment than all other supervisors in CHDMC. Evidence supporting this claim is found in the 2001 Wage Scale Classification approved by the administrative staff of (CHDMC).

On January 14 2009, Attorney Shannon O'Brien, Assistant Attorney General found that our complaint fell in the protected class both as African Americans and as employees who were relegated to the Minority Programs based upon association with a particular race.

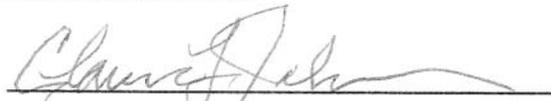
We object to the decision made by Administrative Judge Denise M. Johnson, based upon the following conditions:

- The administrative staff person, Jennifer Smith testified that a labor market study was conducted in 2005. In her testimony, she stated that she contacted Greg Rozelle, Director of Personal Health, who had a minority staff person classified as a Health Coordinator with similar responsibilities to that of the Supervisors of Minority Programs. He gave her the rationale as to why supervisors of Minority Programs should receive less compensation than supervisors dealing with majority population. Mr. Rozelle is not the labor market. Jennifer Smith also did not testify that she had contacted or received any information from Ricky Boyd, Director of Special Services, and our director as to why supervisors dealing with minority population should receive less compensation than those targeting the general population.

- The Health Department based its findings on the Wage Scale Classification adopted in 2005, five years after our complaint. Our original complaint was filed in October, 2001 and the Health Department failed to act until we went to the Civil Rights Commission and filed a complaint with them.

Submitted by:

Clarence L. Johnson



December 16, 2010

James A. Bolden



December 16, 2010

Copies to:

Robert J. Surdyk, Esq.

Dawn M. Frick, Esq.

Lori A. Anthony

Denise M. Johnson, Judge

Response
To
Objections



Surdyk, Dowd & Turner Co., L.P.A.

ATTORNEYS AT LAW

ROBERT J. SURDYK
EDWARD J. DOWD*
JEFFREY C. TURNER
BOYD W. GENTRY**
DAWN M. FRICK

*ALSO ADMITTED IN NEW YORK
**ALSO ADMITTED IN KENTUCKY

KEVIN A. LANTZ
JOHN P. LANGENDERFER
JOSHUA R. SCHIERLOH
MELANIE L. FRANKEL
CHRISTOPHER T. HERMAN
JENNIFER A. KIRBY

December 23, 2010

VIA UPS NEXT DAY AIR

Mr. Desmon Martin
Chief of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Tower, Fifth Floor
30 East Broad Street
Columbus, Ohio 43215-3414

RECEIVED

DEC 27 2010

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

RE: *Clarence L. Johnson and James A. Bolden v. Combined Health
District of Montgomery County*, Complaint Nos. 06-EMP-17571 and 06-EMP-17572
SD&T Nos. 2814.474 and 2814.473

Dear Mr. Martin:

Enclosed please find (1) Responses to Objections of Clarence L. Johnson and James A. Bolden.
Thank you.

Very truly yours,

SURDYK, DOWD & TURNER CO., L.P.A.



Dawn M. Frick

DMF/mw
Enclosures

cc: Lori A. Anthony, Chief (w/encs.)
Denise M. Johnson, Chief Administrative Law Judge (w/encs.)
Clarence L. Johnson (w/encs.)
James A. Bolden (w/encs.)

SURDYK, DOWD & TURNER Co., L.P.A.

bcc: Brad Tucker, Claim Nos. N1165, DOL 1/18/06 and N1173, DOL 1/18/06 (w/encs.)
Michael M. Matis, Esq. (w/encs.)

**STATE OF OHIO
CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:	:	Complaint Nos. 06-EMP-DAY-17571
	:	And 06-EMP-DAY-17572
CLARENCE JOHNSON AND JAMES	:	
BOLDEN,	:	Chief Administrative Law Judge
	:	Denise M. Johnson
Complainants,	:	
	:	
v.	:	RESPONSE TO OBJECTIONS OF
	:	CLARENCE L. JOHNSON AND
COMBINED HEALTH DISTRICT OF	:	JAMES A. BOLDEN
MONTGOMERY COUNTY,	:	
	:	
Respondent.	:	

Now comes, Respondent Combined Health District of Montgomery County, now known as Public Health Dayton and Montgomery County ("PHDMC"), and for its Response to the Objections of Clarence Johnson and James Bolden will address each of the objections, respectively.

Charging Parties claim that there was evidence of "dissimilar conditions," presented and but fail to point to any such evidence. Rather, the evidence presented clearly reveals that every three to four years, the Health District performs a labor market survey to determine if their wages are competitive with other agencies and if they are not there is a wage scale adjustment. (Tr. 19-20.) In a labor market survey, PHDMC benchmarks its positions against similar positions in other public health agencies to remain competitive in the market for purposes of retention and recruiting. (Tr. 20.) The last two labor market surveys were implemented in or about 2001 and 2006. (Tr. 22.)

During the 2001 labor market survey, the Division Directors performed the A scale survey, which included all management or supervisory positions. (Tr. 22, Exhs. C and D; ALJ Decision, Finding of Fact No. 26.) At that time, there were three Caucasian Division Directors and two African-American Division Directors. (Tr. 100, 103.) It is important to note that the A Wage Scale includes coordinators, supervisors, assistant supervisors, directors, bureau supervisors and all other supervisory personnel, regardless of whether their title included the word supervisor. (Tr. 102, Exh. D.) During the 2001 Wage Scale Adjustment, seven supervisory positions reviewed did not change grade. (Tr. 101.) Additionally, there were another eleven supervisory positions that were not even looked at to move. (Tr. 102.) Some of the supervisory positions that changed in Grade were positions held by African-Americans. (Tr. 103-105.) Similarly, some of the positions that did not change in Grade were held by Caucasians. (Tr. 105-106.)¹

During the most labor market survey, a third-party consulting firm was utilized. (Tr. 22.) The consulting firm compared the external equity and Human Resources reviewed the internal equity. (Tr. 23.) For example, within the Health District, there are positions that have historically been benchmarked higher than other positions. If a lower benchmarked position moves due to the labor market survey, then Human Resources may, for internal equity, bump the grade of the position that has historically been higher so that one does not surpass the other. (Tr. 23.)

The Administrative Law Judge's Decision correctly points out that Complainants were not similarly situated to those that they sought to compare themselves to on the "A" Wage Scale. Moreover, Complainants did not satisfy their burden to establish that the

¹ Notwithstanding the foregoing, the ALJ Decision correctly points out that any complaints relating to actions taken in 2001 were untimely and the Commission does not have jurisdiction to review those claims.

legitimate nondiscriminatory reasons given by PHDMC as to the actions taken were a pretext for discrimination. Complainants do not point to specific evidence in the record to dispute the factual and legal conclusion by the Administrative Law Judge. Accordingly, based upon the foregoing and all of the evidence set forth at the March 4, 2008 hearing and in Respondent's December 2008 Post Hearing Brief, Respondent respectfully requests that the Commission adopt and uphold the findings of fact and conclusions of law and recommendations made by the Chief Administrative Law Judge.

Respectfully submitted,

SURDYK, DOWD & TURNER CO., L.P.A.



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CERTIFICATE OF SERVICE

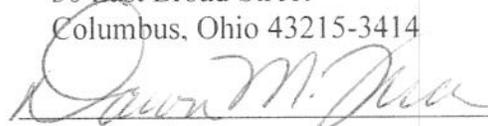
I hereby certify that on the 23rd day of December, 2010, I served the foregoing upon the following via regular U.S. Mail:

Lori A. Anthony, Chief
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428

Clarence Johnson
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Complainant

James Bolden
5853 Hillary Street
Trotwood, Ohio 45426
Complainant

Mr. Desmon Martin
Chief of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Tower, Fifth Floor
30 East Broad Street
Columbus, Ohio 43215-3414


Dawn M. Frick

Complainant's Rebuttal

Re: PHDMC Labor Market Survey

RECEIVED

To: Mr. Desmon Martin, Chief of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Lower, Fifth Floor
30 East Broad Street, Fifth Floor
Columbus, Ohio 43215 – 3414
From: Clarence L. Johnson and James A Bolden
Date: January 6, 2011

JAN 10 2011

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

In reference to the letter dated December 23, 2010, from Attorneys Surdyk, Dowd, & Turner Co., L.P.A., it is important to note that our claim was based upon the 2001 Wage Scale Classification and not the 2005 Wage Scale Classification, which was implemented five years after our complaint.

It is also important to note that that no action was taken when we first made our complaint known to the Ohio Civil Rights Commission. In 2005 we were reduced in status from Supervisors to Coordinators.

The third party Labor Market Survey addressed by the Law Firm of Surdyk, Dowd & Turner, presented no evidence in the hearing before Judge Johnson. It is our belief that other agencies in and around the state of Ohio, especially Green, Clark, and Miami Counties, should have been used to compare our positions. Our research indicates that there was no other health department 'Director of Special Services for Minority Programs' in the country. If so, our program positions should have been compared with their program positions so that an informed determination concerning the salary issue could be made.

A Labor Market Survey is an assessment tool used to collect information on an organization's labor force within a 30 mile radius – identifying the appropriate labor market for various types of positions. The results of such a survey analysis should disclose retention and recruitment, goals and objectives, workers qualifications and workers transferable skills for the job. It also looks at the maximum and minimum wages, overtime pay, sick leave and vacation policies. It also evaluates the employees' responsibilities and the number of employees in the agency. In the hearing held before Judge Johnson none of the above facts were stated nor were we given an opportunity to review such data if it existed.

The study should have contained the following elements

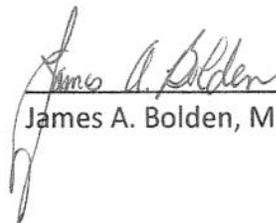
- Identify: Define the problem
- Method: Describe method used to conduct the study
- Summary: Recap previous investigations in order to inform staff of current study progress
- Recognize: Identify all relations, contradictions, gaps, and inconsistencies in the study
- Discussion: interpret and discuss the implication of results
- Recommend: Suggest the next step or steps needed to solve the problem
- Narrative: Report study findings

The only such data presented was a letter from PHDMC Human Resources stating that Gregory Rozelle, Director of the Division of Personal Health, had a staff person (an African American woman) in his division classified as a coordinator, who had duties similar to those of the supervisors in Special Services. Rather than reclassify that one African American staff person (under the Division of Personal Health) to supervisor status, Human Resources chose to reclassify the five supervisors of Minority Programs (under the Division of Special Services) to coordinators.

Since the agency, Combined Health District of Montgomery, now known as Public Health Dayton and Montgomery County, did not follow these procedures or give reference to procedures used when conducting their Labor Market Study, it is our belief that the agency's procedures are suspect and legally questionable. In light of the facts stated here, we humbly petition the Administrative Judge to revisit this issue.

Sincerely,


Clarence L. Johnson, MS.T. 1-6/11 Date


James A. Bolden, MBA 1/6/11 Date

CC: Lori A. Anthony, Office of Attorney General
 Denise M. Johnson, Chief Administrative Judge
 Surdyk, Dowd & Turner, Attorneys at Law