

9/26/14

STATE OF RHODE ISLAND  
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 10 ERA 236

EEOC NO. 16J-2010-00188

In the matter of

Matthieu Yangambi, Ed.D.  
Complainant

v.

DECISION AND ORDER  
ON RELIEF

Providence School Board, Jointly and  
Severally, and Stephen T. Napolitano, Treasurer  
Respondent

**INTRODUCTION**

On April 2, 2010, Matthieu Yangambi (hereafter referred to as the Complainant) filed a charge against the Providence School Board, Jointly and Severally, and Stephen T. Napolitano, Treasurer (hereafter referred to as the Respondent) with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The charge was investigated and on June 17, 2011, Preliminary Investigating Commissioner Camille Vella-Wilkinson assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the Respondent violated the provisions of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA). On February 23, 2012, a Complaint and Notice of Hearing issued. The Complaint alleged that the Respondent discriminated against the Complainant with respect to denial of promotions because of his race, color and ancestral origin and in retaliation for protected activity. On October 18, 2012, the Complainant moved to amend the Complaint to clarify the allegations. On November 14, 2012, the Commission issued a Decision on Motion to Amend, granting the Motion to Amend with respect to some of the allegations and denying the Motion to Amend with respect to other allegations.

Hearings on the Amended Complaint were held before Commissioner John B. Susa on January 9 and 10, 2013. The Complainant represented himself. The Respondent was represented by counsel. The parties filed post-hearing memoranda and motions.

On October 16, 2013, the Commission issued a Decision and Order finding that the Respondent discriminated against the Complainant with respect to the denial of four positions of Acting Assistant Principal in retaliation for filing charges of discrimination and opposing unlawful employment practices, a violation of the FEPA.<sup>1</sup> The

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<sup>1</sup> The Commission found that the Complainant did not prove the other allegations against the Respondent by a preponderance of the evidence.

Commission ordered the Respondent to post a copy of the Commission's anti-discrimination poster prominently in the Respondent's facilities and train management personnel on the anti-retaliation provisions in state and federal law. The Respondent has submitted certification of completion of the training.

The Order further provided that:

The Commission will schedule a hearing on relief at which the parties can present evidence and argument on the appropriate award of damages, on how to frame the Order relating to offering the Complainant an available position of Acting Assistant Principal and on whether the Commission should order the Respondent to establish written standards for its selection process and selection criteria for filling positions of Acting Assistant Principals.

Decision and Order, p. 21.<sup>2</sup>

A hearing was held on the question of relief, as outlined above, on March 6, 2014 before Commissioner Susa.<sup>3</sup> The Respondent was represented by Counsel; the Complainant represented himself.

On March 13, 2014, the Complainant filed a post-hearing memorandum entitled Motion on Relief. On March 27, 2014, the Respondent filed a post-hearing memorandum entitled Respondent's Reply to Complainant's Motion on Relief. On July 29, 2014, the Complainant filed a Motion on Cost. The Respondent did not object to the Motion. The Commission has taken the Motion into consideration in its determination on relief.

## FINDINGS OF FACT

1. Of the four positions which the Commission found were denied to the Complainant in violation of the FEPA<sup>4</sup>, three were filled in the same time period. Mr. Rao was hired on March 1, 2010; Ms. Cerra and Mr. Moreau were hired on March 8, 2010. Of these three appointments, Mr. Rao served the longest time period - 106 calendar days or approximately 76 working days. The fourth position in question, the

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<sup>2</sup> The Respondent moved for a Stay of the Commission Order before the Commission which was denied. The Respondent moved for a Stay of the Commission Order before the Rhode Island Superior Court and it was granted in part and denied in part on March 5, 2014. Associate Justice Luis Matos granted the Respondent additional time to train management personnel and provided that a Commission hearing on relief could proceed.

<sup>3</sup> The March 6, 2014 transcript of the hearing on relief will hereafter be referred to as "Trans."

<sup>4</sup> These four positions were filled by Paul Rao, Dina Cerra, Charles Moreau and Cynthia Robles.

position filled by Ms. Robles in 2009, was filled for 68 calendar days or approximately 50 working days.

2. The Respondent calculated the salary awarded for an Acting Assistant Principal position by paying the selected individual half of the difference between the salary of an Assistant Principal and the base salary of the selected individual in his/her then current position. The additional amount paid to the individuals for the four positions in question ranged from \$47.80 per day to \$58.18 per day.
3. The additional amount which the Complainant would have been paid if he had been placed in a position of Acting Assistant Principal was approximately \$57 per day.
4. The Respondent did not appoint Mr. Rao, Mr. Moreau or Ms. Robles in a permanent position of Principal or Assistant Principal at a later date. In the school year after Ms. Cerra served as an Acting Assistant Principal, the Respondent appointed her to a permanent position of Assistant Principal. At a later time, she was placed in a permanent position of Principal.

## **DISCUSSION**

The Commission utilizes the decisions of the Rhode Island Supreme and Superior Courts, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for relief after finding a violation of the FEPA. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the FEPA. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See Newport Shipyard, Inc.*, 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998).

### **A. BACK PAY**

R.I.G.L. Section 28-5-24(a) states in relevant part that:

If upon all the testimony taken the commission determines that the respondent has engaged in or is engaging in unlawful employment practices, the commission ... shall issue ... an order requiring the respondent to cease and desist from the unlawful employment practices, and to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, .... Back pay shall include the economic value of all benefits and raises to which an employee would have been entitled had an unfair employment practice not been committed, plus interest on those amounts.

The Commission found that the Respondent retaliated against the Complainant for protected conduct in the denial of Acting Assistant Principal positions awarded to Mr. Rao, Mr. Moreau, Ms. Cerra and Ms. Robles. Back pay is authorized by the FEPA and is generally awarded when the factfinder finds that there was discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362 (1975) (when discrimination is found, back pay should be awarded, barring special circumstances); *Climent-Garcia v. Autoridad de Transporte Maritimo y Las Islas Municipio*, 754 F.3d 17, 22 (1st Cir. 2014) (“Back pay is intended to ‘fully compensate a plaintiff in a manner that suits the specific facts of the case.’ *Selgas v. Am. Airlines, Inc.*, 104 F.3d 9, 12–13 (1st Cir.1997) ....”).

The Respondent introduced evidence on the method for calculating the extra pay given to Acting Assistant Principals. Trans. p. 28. (*See* Finding of Fact No. 2). It also produced evidence on the data needed to determine what the Complainant would have been paid if he had been awarded the positions in question – the number of days worked by the individuals in the four positions, the Complainant’s base pay<sup>5</sup> and the salary for an Assistant Principal. *See* Trans. pp. 32, 33, 52 and Respondent’s Exhibits C, D, E and F. Using that data, the Commission concludes that the Complainant would have received approximately \$2,850 (50 days x \$57<sup>6</sup> per day) if he had been appointed to the position held by Ms. Robles and \$4,332 (76 days X \$57 per day) if he had been appointed to the position held by Mr. Rao. As the other two Acting Assistant Principal positions were filled in the same time period as the one filled by Mr. Rao, the Complainant could not have served in them simultaneously and the Commission does not award back pay for them.

The Commission awards 12% interest on this award, from the time the cause of action accrued until paid.

## **B. EFFECT OF RETALIATION ON FUTURE EMPLOYMENT OPPORTUNITIES**

The Complainant sought damages for permanent positions which he might have received if he had been selected as an Acting Assistant Principal. It is the Complainant’s contention that the persons selected for Acting Assistant Principal were generally awarded permanent positions of Assistant Principal and/or Principal. *See, e.g.*, Trans., pp. 19, 20, 90.

The evidence showed that of the persons who filled the four positions, three of the individuals were not promoted to permanent administrative positions. There is insufficient

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<sup>5</sup> The Complainant did not agree with the Respondent’s evidence on the amount of his base salary but he did not provide testimony as to the precise amount of his salary nor did he provide documentation of his base salary. In closing argument, the Complainant said that his salary was around \$70,000, “about 70 something”. Trans. p. 100. In these circumstances, the Commission credited the Respondent’s evidence.

<sup>6</sup> The current salary for Assistant Principal (slightly over \$97,000) minus the Complainant’s base salary (\$76,580) divided by two (according to Respondent’s formula) divided by 181 school days.

evidence to conclude that the Complainant would have been selected for a permanent administrative position if he had had experience as an Acting Assistant Principal. How he would have performed in the Acting Assistant Principal position would undoubtedly be a factor in selection and it would require speculation to assess that factor. The Commission is unable to determine if the Respondent's retaliation in question in the instant case caused the Complainant to be denied later permanent administrative positions. Therefore the Commission will award damages for lost salary only as specified in the previous section. *See Oakley v. City of Memphis*, 566 F. App'x 425 (6th Cir. 2014) (lower court's rejection of damages for lost promotional opportunities in discrimination case upheld as the remedy was too speculative).

### C. COMPENSATORY DAMAGES

The FEPA also authorizes the Commission to award damages for pain and suffering. R.I.G.L. Section 28-5-24(b) provides in relevant part that:

(b) If the commission finds that the respondent has engaged in intentional discrimination in violation of this chapter, the commission in addition may award compensatory damages. The complainant shall not be required to prove that he or she has suffered physical harm or physical manifestation of injury in order to be awarded compensatory damages....

The U.S. Equal Employment Opportunity Commission (EEOC) has issued Enforcement Guidance on "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", 1992 WL 1364354 (EEOC Guidance 1992) (hereafter referred to as the Enforcement Guidance). The Enforcement Guidance provides that it is EEOC's interpretation that compensatory damages are available for pecuniary and non-pecuniary losses caused by discriminatory acts. Non-pecuniary losses include damages for pain and suffering, inconvenience and loss of enjoyment in life. "Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." Enforcement Guidance, p. 5. "Emotional harm will not be presumed simply because the complaining party is a victim of discrimination". *Id.*

The Commission finds that the Complainant did not provide evidence that the unlawful actions of the Respondents caused him damages for pain and suffering or other compensatory damages. Therefore, the Commission will not award compensatory damages.

### D. COSTS FOR MEDIATION

The Complainant seeks reimbursement for the costs of mediation in the amount of \$400. In the past, the Commission has awarded various costs in association with awards of attorney's fees. R.I.G.L. Section 28-5-24(a)(3) provides in relevant part that: "(3) In appropriate circumstances attorney's fees, including expert fees and other litigation expenses, may be granted to the attorney for the plaintiff if he or she prevails....". If a Complainant is acting pro se, he should be eligible for an award of litigation expenses. While mediation

fees are not routinely granted as a part of costs (*see Tetrault v. Steere*, C.A. NO. PC 90-124, 1996 WL 936864 (R.I. Super. Jan. 5, 1996) (award of arbitrator's fee denied when the defendant objected)), the Respondent has not objected and the FEPA encourages informal resolution (*see* R.I.G.L. Section 28-5-16). In these circumstances, the Commission finds it appropriate to award the \$400 as reimbursement to the Complainant for mediation expenses.

#### **E. CONSIDERATION FOR ACTING ASSISTANT PRINCIPAL POSITIONS**

As noted above, when the Commission finds a violation of the FEPA, it can order the Respondent: "... to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring ...". R.I.G.L. Section 28-5-24(a). The Commission also recognizes that there are unique and unpredictable circumstances with respect to various acting positions. Therefore, the Commission orders the Respondent to consider the Complainant for all Acting Assistant Principal positions at Mt. Pleasant High School for the next three years. With respect to each Acting Assistant Principal position filled in that time period, if the Complainant is not selected, the Respondent must send the Complainant notice, in writing, of the specific reasons<sup>7</sup> why he was not selected. The Respondent may not refuse to appoint him because it is difficult to find a substitute with a science certificate. The Respondent unlawfully denied the Complainant four positions; it cannot now disqualify him from a remedy because of administrative difficulties.

#### **F. CLARIFICATION OF THE SELECTION PROCESS**

The Decision and Order in this case described the Respondent's process for selecting Acting Assistant Principals as "a byzantine selection process". Such an opaque process can easily disguise choices based on retaliation or prejudice. The Order seeks to provide more transparency, without unduly interfering with the Respondent's procedures. The Commission does not order the Respondent to change its process, but does order the Respondent to clarify the process for its employees. The Respondent is ordered to reduce to writing the process and standards for selecting Acting Assistant Principals. It is further ordered to provide a copy of that description to Human Resources, to the relevant unions, and to post it in each school in a location which is utilized by teaching staff.

### **ORDER**

- I. Violations of R.I.G.L. Sections 28-5-7 having been found, in addition to the relief ordered in the Decision and Order dated October 16, 2013, the Commission hereby orders the Respondent:
  - A. Within forty-five days of the date of this Order, to pay the Complainant back pay

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<sup>7</sup> For example – the Respondent may not say simply that another person was more qualified, it must state specifically why it found another person more qualified.

in the amount of \$2,850 together with interest at the rate of 12% per year from the date the cause of action accrued, April 24, 2009, until paid;

- B. Within forty-five days of the date of this Order, to pay the Complainant additional back pay in the amount of \$4,332 together with interest at the rate of 12% per year from the date the cause of action accrued, March 1, 2010, until paid;
- C. Within forty-five days of the date of this Order, to pay the Complainant \$400 to reimburse him for the costs of mediation;
- D. To consider the Complainant for every Acting Assistant Principal position available at Mt. Pleasant High School in the next three years and, if the Complainant is not selected for a position, to provide in writing the specific reason why he was not selected, as described above;
- E. Within sixty days of the date of this Order, to reduce to writing the process and criteria for selection of Acting Assistant Principals; to provide a copy for Human Resources, the relevant unions and the Commission; to post it in every school in a location accessible to the teaching staff and to provide a certification to the Commission that it has been distributed and posted as described above.

Entered this 26<sup>th</sup> day of September, 2014.

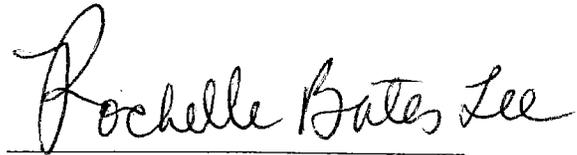


John B. Susa  
Hearing Officer

I have read the record and concur in the judgment.



Iraida Williams  
Commissioner



Rochelle Bates Lee  
Commissioner

