

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**EILEEN TIANO,
Complainant**

v.

**CITY OF PHILADELPHIA,
POLICE DEPARTMENT,
Respondent**

:
:
:
:
:
:
:
:
:

DOCKET NO. E-46771

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

EILEEN TIANO,	:	DOCKET NO. E-46771
Complainant	:	
v.	:	
CITY OF PHILADELPHIA, POLICE DEPARTMENT,	:	
Respondent	:	

PROPOSED STIPULATIONS OF FACT

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

1. The Complainant herein is Eileen Tiano (hereinafter "Complainant").
2. The Respondent herein is the City of Philadelphia (hereinafter "Respondent").
3. The Respondent, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth of Pennsylvania.
4. On or about March 3, 1989, the Complainant filed a notarized Complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-46771. A copy of the Complaint will be included as a docket entry in this case at time of hearing.
5. On or about March 30, 1989, the Respondent filed a motion to dismiss the complaint in which it contended that the provisions found in the federal Age Discrimination in Employment Act (hereinafter "ADEA") 29 U.S.C. § 621 *et. seq.*, as amended, were controlling and, therefore, the Complainant had failed to state a claim for age discrimination that was cognizable under the Pennsylvania Human Relations Act (hereinafter "PHRA").

6. On or about February 28, 1990, the Commission issued an Interlocutory Order denying Respondent's motion and ordering Commission staff to proceed with its investigation of the complaint. A copy of the February 28, 1990 order is attached hereto as Stipulation Exhibit "A".

7. In correspondence, dated July 7, 1992, the Commission staff notified the Complainant and Respondent that Probable Cause existed to credit the allegations contained in the above referenced complaint.

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

9. In correspondence, dated January 7, 1993, the Commission staff notified the Complainant and Respondent that a public hearing had been approved.

10. The Complainant was born on June 14, 1943.

11. On or about August 12, 1987, the Complainant applied for an available position as a police officer with the Respondent.

12. Subsequent to her application, on or about November 21, 1987, the Complainant successfully completed a written examination for the position in question.

13. On or about December 19, 1988, the Respondent advised the Complainant that she was not eligible for further consideration because of her age. Complainant ^{was permitted to} did not enter nor did she complete the background/medical/psychiatric screening process.

14. The Complainant was forty-five years old at the time of her rejection by the Respondent.

15. The Respondent's refusal to consider the Complainant for hire is based upon its existing civil service regulations which require automatic disqualification of all applicants for Police Officer who are more than thirty-five years of age as of the date of the civil service examination scheduled for the position.

16. The Respondent, while admitting that it rejected the Complainant solely because of her age, contends that at the time of Complainant's application for police officer provisions found in the ADEA permitted it to engage in such age-based differing treatment and that the ADEA pre-empted the PHRA with respect to age-based restrictions applicable to the hiring of police officers by the Respondent. Respondent ^{contends it} relied upon its authority under The First Class City Home Rule Act, April 21, 1949, P.L. 665, ^{and} ~~are~~ The Philadelphia Home Rule Charter to enact legislation ~~(i.e. Civil Service Regulations)~~ ^{age} establishing ~~are~~ requirements for ~~the~~ hiring police officers, pursuant to the ADEA exception to age based restrictions on the hiring of police officers.

17. The Respondent, prior to its rejection of the Complainant, did not have a factual basis sufficient to believe that automatic disqualification of all applicants above age forty was reasonably necessary to the essential operation of the police department.

18. The Respondent, prior to its rejection of the Complainant did not have a factual basis sufficient to believe that all or substantially all individuals above the age of forty were incapable of performing the job duties of a police officer effectively or safely because of their age.

19. The Respondent, prior to its rejection of the Complainant, did not have a factual basis sufficient to believe that it was impossible or impractical to determine job fitness on an individualized basis.

20. The Respondent, prior to the rejection of the Complainant, did not make an individualized assessment of the Complainant's ability to perform the job duties of a police officer nor did it have a factual basis to believe that the Complainant was not capable of performing the job duties of a police officer effectively or safely because of her age.

21. The Respondent, at the time it rejected the Complainant because of her age, did not require its current police officers to undergo periodic physical examinations in order to determine their continued fitness for duty.

22. At or about the time of the Complainant's disqualification the Respondent's total complement of police officers was 6336. By age, the complement breaks down as follows:

- a) below 35 - 1759
- b) between 35 and 39 - 1383
- c) between 40 and 44 - 1834
- d) between 45 and 49 - 978
- e) over 50 - 382

23. ^{as of 12/31/93} Presently, the Respondent's total complement of police officers is ^{was 5452} By age, the complement breaks down as follows:

- a) below 35 - 1345
 - b) between 35 and 39 - 1192
 - c) between 40 and 44 - 1250
 - d) between 45 and 49 - 1049
 - e) over 50 - ~~543~~
- 1634

24. Police officers employed by the Respondent do not have a mandatory retirement age.

25. The Complainant received a score of 93.84 on the written examination and was entitled to an additional ten points pursuant to applicable veterans' preference legislation.

26. The Complainant, as a result of her score on the written examination, was placed on the eligibility list for continuing processing for hire.

27. Had the Complainant not had her name removed from the eligibility list because of her age she would have been scheduled for a medical examination, psychiatric examination and a background investigation.

28. Had the Complainant been determined to be qualified (pass/fail basis) as a result of the medical and psychiatric examinations and the background investigation her rank on the

eligibility list would have been determined based solely on the written test results and applicable veterans preference.

29. The Complainant would have been ranked 228.5 on the eligibility list.

30. The Complainant, had she passed the remaining three steps, ~~and~~ would have been offered a position as a police officer and scheduled to begin training at the Police Academy not later than March 20, 1989.

31. The Complainant, had she been offered a position as a police officer, would have accepted the offer.

32. Had the Complainant been hired as a police officer she would have been paid in accordance with the relevant pay schedule in effect at that time for pay range 201 ^{STEP 1} while in training at the Police Academy.

33. After completion of the five month training program and graduation from the academy the Complainant would have been given a duty assignment and received base pay in accordance with the relevant pay schedule in effect at that time for pay range 202, step 1.

34. A true and correct copy of each of the relevant pay range schedules applicable to the case at hand is attached as Stipulation Exhibit B-1 through B-6.

35. Pay range schedule step increases occur once a year on the anniversary date of employment for the employee for the first four years of service in the class of police officer.

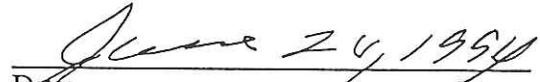
36. Had the Complainant been hired as a police officer she would have been eligible for all employment related benefits provided for in applicable collective bargaining agreements including, but not limited to: longevity pay; the opportunity to earn overtime pay; stress (shift) differential; health and welfare benefits; pension benefits; life insurance benefits; accrued vacation an sick leave allowances; legal services; and promotion possibility.

37. In correspondence, dated February 28, 1994, Commission staff requested the Respondent to immediately schedule the Complainant for completion of the application process for the position of police officer.

38. The Respondent declined the opportunity to permit the Complainant to complete the application process.



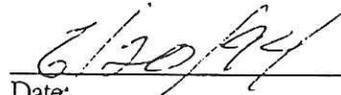
Michael Hardiman, Esquire
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complaint)



Date:



John Straub, Esquire
(Counsel for Respondent)



Date:

39. The Respondent, effective January 1, 1994, discontinued use of the maximum living age disqualification policy pursuant to the expiration of the public safety exemption of the ADFA.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

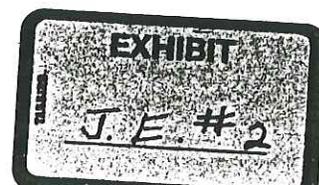
EILEEN TIANO, : DOCKET NO. E-46771
: :
Complainant : :
: :
v. : :
: :
CITY OF PHILADELPHIA : :
POLICE DEPARTMENT, : :
: :
Respondent :

ADDITIONAL STIPULATION OF FACT

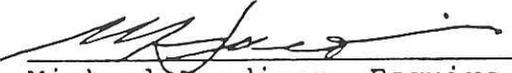
The parties to the above-captioned hereby submit for inclusion in the evidentiary record in this case this additional stipulation together with the document attached thereto which is identified as Additional Stipulation Exhibit "A" ("Payroll Histories (W-2 Yearly Gross)"). For purposes of the record this stipulation has been marked as Joint Exhibit #2.

Attached as Additional Stipulation Exhibit "A" is a one page memorandum that summarizes the yearly gross income payroll history for the five individuals ranked closest but above Complainant on the written examination who were appointed as police officers after having been determined to be qualified upon completion of the medical and psychiatric examinations and the background investigation and the four individuals ranked closest but below the Complainant on the written examination who were appointed as police officers after having been determined to be qualified upon completion of the medical and psychiatric examinations and the background investigation. The test score rank and appointment date for each of the nine is as follows:

1. Julius Tate: 203 - 11/14/88.

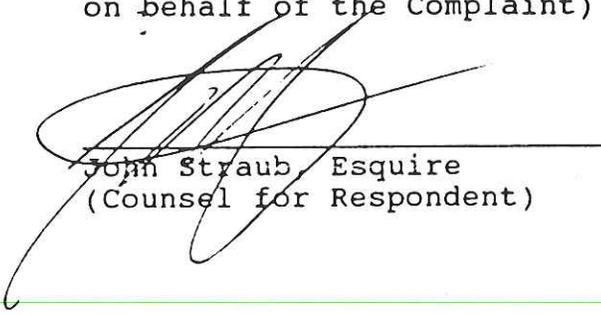


- | | | | | |
|----|-------------------|-----|---|-----------|
| 2. | Mark Howard: | 205 | - | 11/14/88. |
| 3. | Frank MacKereth: | 207 | - | 4/17/89. |
| 4. | Edward Breslin: | 222 | - | 11/14/88. |
| 5. | Raymond Pinkney: | 224 | - | 11/14/88. |
| 6. | Debra Chance: | 243 | - | 11/14/88. |
| 7. | Bradley Wallace: | 251 | - | 11/14/88. |
| 8. | Kenneth McKinney: | 254 | - | 11/20/89. |
| 9. | Daniel Angelucci: | 257 | - | 11/14/88. |



Michael Hardiman, Esquire
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complaint)

June 30, 1994
Date:



John Straub, Esquire
(Counsel for Respondent)

7-18-94
Date:

MEMORANDUM

CITY OF PHILADELPHIA
OFFICE OF THE DIRECTOR OF FINANCE
PAYROLL DIVISION

To : Albert L. D'Attilio, Assistant City Solicitor

From : Jessye McQuay, Payroll Supervisor

Date June 22, 1994

Subject: Payroll Histories (W-2 Yearly Gross)

<u>Employee Name</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>
Joseph Morano * (162093)	39755.75	37382.88	38898.69	38248.08	39589.15	38244.59
Kenneth McKinney (200798)	6276.58	31767.26	26859.76	34242.39	38101.68	32961.64
Bradley Wallace (201011)	2761.18	26150.21	30265.26	32758.54	30810.68	30732.40
Daniel Angelucci (201013)	2725.32	28478.80	33896.94	35145.30	37131.03	35890.81
Edward Breslin (201015)	2725.32	27763.56	32826.42	34793.82	37509.56	36373.02
Lebra Chance (201033)	2725.32	28109.11	33523.22	34257.23	36724.08	44089.55
Mark Howard (201046)	2725.32	27596.41	33560.36	38720.31	39734.82	38273.83
Raymond Pinkney (201083)	2725.32	27073.66	31472.50	35904.86	36690.00	35130.30
Julius Tate (201088)	2725.32	27704.34	33835.36	36694.35	43457.29	40273.34
Frank Mackereth (202303)	-	18254.88	32111.88	33186.39	36556.15	35406.25

* Police Lieutenant hired 2/21/78. Information provided in error. *Albert D'Attilio*

ADDITIONAL STIPULATIONS
EXHIBIT "A"

FINDINGS OF FACT *

1. The Complainant, at the time of her disqualification by the Respondent, was employed by the Respondent as a civilian clerk for the Police Department. (NT 14.)

2. The Complainant worked as a clerk typist with Respondent Police Department until May 1990. (CE 1.)

3. Following her resignation in 1990, the Complainant worked for the School District of Philadelphia. (NT 15-16.)

4. The Complainant, in March 1991, was reinstated into her position with the Police Department and continued in the Respondent's employ until March 11, 1992, when she resigned. (CE 6.)

5. During this period of employment, the Complainant was on military leave of absence from October 14, 1991 through April 1, 1992. (CE 1.)

6. The Complainant resigned because she anticipated remaining on full-time military status, and she wanted to provide the Respondent with an opportunity to fill her position. (NT 43.)

7. Thereafter, funding for the military program was cut, and the Complainant was removed from full-time active duty. (NT 43.)

* The foregoing Stipulations of Fact are incorporated herein as if fully set forth. The following abbreviations will be utilized throughout for reference purposes:

CE	Complainant's Exhibit
JE	Joint Exhibit
NT	Notes of Testimony
SF	Stipulations of Fact

8. The Complainant did not seek reinstatement with the Respondent. (NT 43.)

9. The Complainant earned \$18,858 in 1989 while working for the Respondent.

(CE 7.)

10. The Complainant earned \$18,421 in 1990 while employed by the Respondent, and \$5,267 while employed by the School District of Philadelphia. (CE 8, 9.)

11. In 1991, the Complainant earned \$3,446 while employed by the School District; \$8,959 while employed by the Respondent; and \$6,007 in active duty wages while in the military. (CE 11-13.)

12. The Complainant earned approximately \$6,007 in active duty wages for the time period January 1, 1992 through September 30, 1992. (NT 43.)

13. The Complainant also applied for employment as a police officer in 1989, 1992 and 1994. (NT 35-36.)

14. The Complainant, other than the applications mentioned above, has not applied for other full-time positions subsequent to her March 1992 resignation. (NT 35.)

15. As of the date of public hearing, the Complainant had served approximately twenty-two and one-half years in the military. (NT 34.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of the complaint under the Pennsylvania Human Relations Act ("PHRA").
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter.
3. The Complainant is an individual within the meaning of the PHRA.
4. The Respondent is an employer within the meaning of the PHRA.
5. The complaint in the instant case satisfies the filing requirements found in the PHRA.
6. The PHRA prohibits employers from refusing to employ individuals because of their age unless age is a *bona fide* occupational qualification for the position in question.
7. The PHRA defines the term "age" to include any person forty years of age or older.
8. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against her because of her age when the Respondent disqualified the Complainant from consideration as a police officer solely because of age.
9. The Respondent has failed to establish that age is a *bona fide* occupational qualification for the job of police officer.
10. The provision of Age Discrimination in Employment Act ("ADEA") relied upon by Respondent does not preempt the Commission from asserting jurisdiction in this matter.

11. The Respondent has failed to establish as a matter of law that its policy of automatic disqualification of individuals over age thirty-five from consideration was based on either an applicable state or local law in effect on March 3, 1983.

12. The Respondent, as a matter of law, is precluded from relying upon civil service regulations that purport to allow age-based restrictions to the extent that such restrictions are inconsistent with the provisions found in the PHRA.

OPINION

This matter arises out of a complaint filed by Eileen Tiano (hereinafter "Complainant") against the City of Philadelphia Police Department (hereinafter "Respondent"), Docket No. E-46771, with the Pennsylvania Human Relations Commission (hereinafter "the Commission"). On March 3, 1989, the Complainant filed her complaint with the Commission alleging that she was unlawfully discriminated against because of her age, forty-five, when she was disqualified from further consideration for a position as a police officer for the Respondent. The complaint alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951, *et seq.* (hereinafter "PHRA").

Commission staff conducted an investigation and found probable cause to credit the allegations of the complaint. Thereafter, Commission staff endeavored to conciliate this matter, and efforts were unsuccessful. Subsequently, a public hearing was approved in this matter.

The public hearing in this matter was convened on June 20, 1994. Alvin E. Echols Jr., Esquire, Commissioner and duly appointed chairperson of the hearing panel, presided at the public hearing. The other members of the panel are Aubra S. Gaston, Esquire, and Dr. Daniel D. Yun, Commissioners. Phillip A. Ayers, Esquire, served as panel advisor to the hearing panel. Michael Hardiman, Assistant Chief Counsel for the Commission, appeared on behalf of the complaint. John Straub, Esquire, Albert L. D'Attilio, Esquire, and E. Jane Hix, Esquire, appeared on behalf of the Respondent. Subsequent to the public hearing, both the Commission and the Respondent submitted post-hearing briefs. Commission Counsel also submitted a reply brief.

In the interest of clarity, it is necessary to discuss, albeit briefly, the factual scenario in the instant case. Most of the factual issues in this matter have been stipulated.

The Complainant, in August of 1987, applied for a police officer position with Respondent. The Complainant was forty-four years old at that time. In November of 1987, the Complainant successfully completed the written examination for the job. (SF 12.) The Complainant's test score was fairly high (93.84), and she was entitled to an additional ten points due to veteran's preference. (SF 25.) Consequently, the Complainant was placed on an eligibility list for continued processing for hire. (SF 25.) Subsequent to that action, the Complainant was notified that she was not eligible for further consideration because of her age. As a result of not being eligible for further consideration, the Complainant was not permitted to complete the three remaining processing steps. Those steps included: a medical examination, a psychiatric examination, and a background investigation. It has been stipulated that had the Complainant been found qualified on the last three remaining steps, her rank on the eligibility list would have been 228.5. (SF 28.) The Complainant, with her ranking on the list, would have been offered and would have accepted a position with the Respondent as a police officer. The Complainant, subsequent to the disqualification, did request an opportunity to complete the application process, and her request was denied by the Respondent.

The Respondent has stipulated that the decision regarding the Complainant because of her age was based on its policy of automatically disqualifying any applicant for a police officer position if they were more than thirty-five years old at the time of the written examination. (SF 15.) The Respondent further asserts that it was legally entitled to engage in this disparate treatment because of a provision found in the Age Discrimination in Employment Act, and because the ADEA preempted the PHRA with respect to age-based restrictions applicable to hiring police officers by the Respondent. (SF 16.) (It should be noted that, effective

January 1, 1994, the Respondent discontinued its use of the maximum-hiring-age disqualification policy.)

The initial issue to be resolved in this matter is whether the Respondent's action, in refusing to consider the Complainant for employment because of age, violates the PHRA. It is unlawful under the PHRA for employers to refuse to employ individuals because of their age, unless age is determined to be a *bona fide* occupational qualification (hereinafter "BFOQ") for the position. Commission regulations provide that otherwise unlawful discrimination is valid as a BFOQ only when it is ". . . reasonably necessary to the essence of the normal operation of a particular business or enterprise."

In the instant case, the Respondent admits that the Complainant was rejected solely because of her age. Certainly, this is evidence of the Respondent's motivation and does establish a violation of the PHRA. Furthermore, the Respondent admits that, before rejecting the Complainant,

- 1) it did not have a factual basis sufficient to believe that its age-based disqualification policy was reasonably necessary to the essential operation of the police department;
- 2) it did not have any factual basis to believe that all individuals above age forty would be unable to perform the duties of the position safely and efficiently; and
- 3) it had not made an individualized assessment of the Complainant's ability to perform the job duties of a police officer, nor did the Respondent know whether the Complainant was not capable because of her age.

Stated succinctly, the Respondent did not attempt to show that age was a BFOQ and has stipulated that age clearly was not a BFOQ in this matter. Consequently, the Respondent has, as a matter of law, violated the PHRA.

The Respondent's defense is that it was permitted to engage in this disparate treatment under federal law, and the existence of that law preempted the PHRA. Our discussion now turns to those issues. The Respondent asserts the initial position that the ADEA permits it to engage in disparate hiring practices based on age in hiring police officers. The relevant section of the ADEA provides:

"(j) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State, or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

"(1) with respect to the employment of an individual as a fire-fighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

"(2) pursuant to a *bona fide* hiring or retirement plan that is not a subterfuge to evade the purposes of this Act."

Simply stated, the Respondent seeks to use this exemption provision to justify its policy.

However, the Respondent must further show:

- 1) the refusal to hire based on age must be based on a state or local law that prohibited hiring above a certain age; and
- 2) the law upon which the refusal was based had to be in effect on March 3, 1983.

In the instant case, it should be noted that the Respondent's policy is not based on a state or local law, but rather a regulation adopted by the civil service commission. (SF 15.) Also, the Respondent did not show that the civil service regulation was in effect on March 3, 1983, which is a date specifically indicated in the ADEA. Therefore, the exemption provision does not apply in this case.

In the instant case, the Respondent's reliance on the civil service regulation is based on its Home Rule Charter. The Home Rule Charter allows for the adoption of civil service regulations. The relevant part of the Home Rule Charter reads as follows:

"(g) The rejection of candidates or eligibles who fail to comply with reasonable requirements in regard to such factors as age, physical condition, training and experience, or who have attempted any deception or fraud in connection with an examination."

Firstly, the Respondent's reliance on this provision is in error, because the Charter only authorizes adopting reasonable requirements. The Respondent has stipulated that it had no factual basis to believe that the age-based cutoff policy was even necessary. The record does not reveal any evidence of reasonableness in the Respondent's reliance on this policy.

Secondly, the General Assembly did not give the Respondent authority to enact legislation. As Commission Counsel notes, the PHRA exists as an exercise of the police powers of the Commonwealth of Pennsylvania. Certainly any law inconsistent with the PHRA would not have any applicability.

Another issue in this case is whether the doctrine of federal preemption has any applicability. Generally, the concept of federal preemption operates to prevent the state from legislating where the federal government has elected to exclusively occupy the entire area. There are a number of cases dealing with federal preemption and its use. For example, Carolina Freight Carriers v. Cmwlth., Human Relations Commission, 99 Pa. Cmwlth. 428, 513 A.2d 579 (1986); Jones v. Rath Packing Co., 430 U.S. 519, 525 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); and Fidelity Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

The ADEA explicitly provides state jurisdiction over age-based discrimination and requires the federal government to give deference to state agency proceedings. The relevant part of ADEA is as follows:

"(a) Nothing in this Act shall affect the jurisdiction of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action."

29 U.S.C. §633(a), (b).

It is quite clear that the Respondent in this matter cannot show that the PHRA should be preempted by ADEA, because the ADEA itself does not present such a barrier.

Next the Respondent, in its brief, raises the issue of whether the Political Subdivision Tort Claims Act renders the City of Philadelphia immune from liability under the PHRA for discrimination claims. This argument is without merit. The PHRA is, in effect, an exercise of the police power of the Commonwealth of Pennsylvania for the protection of the public welfare of the people of Pennsylvania. 43 P.S. §952. Certainly the PHRA forbids employers from refusing to hire individuals because of their age. The term "employer" expressly includes the Commonwealth and political subdivisions when either is acting as an employer. Furthermore, the PHRA provides that the provisions of the Act ". . . should be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply." 43 P.S. §962(a).

The PHRA certainly indicates an intent to forbid both the Commonwealth and its political subdivisions from engaging in unlawful discrimination. Therefore, the PHRA does exist as an express exception to the governmental immunity found in the Political Subdivision Tort Claims Act, Act of October 5, 1980, P.L. 693, No. 142, 42 Pa. C.S. §§8541, *et seq.* ("PSTCA"). Conversely, the Respondent has offered no Pennsylvania judicial authority to

support its position. The Respondent cites the case of Adamietz v. Philadelphia, Civil Action No. 93-0672 (E.D. Pa. June 23, 1994), but that case is not similar to the instant case. Also, in the case of Mansfield State College v. Kovich, 46 Pa. Cmwlth. 399, 407 A.2d 1387 (1979), the Commonwealth Court rejected the argument that sovereign immunity precluded a complainant from proceeding under the PHRA. Even though Mansfield involved sovereign as opposed to governmental immunity, the analysis has application in the instant case.

Also, finally, the PHRA provides that any laws inconsistent shall not apply, and the PSTCA does not have a parallel provision. Upon review of the record in this matter, the PSTCA has no applicability in matters of employment discrimination before the Pennsylvania Human Relations Commission.

Upon review of the record in this matter, the Complainant has shown that the Respondent unlawfully discriminated against her. We now move to the issue of appropriate remedy. Section 9 of the PHRA provides, in pertinent part:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practices as defined in this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay. . ."

43 P.S. §959(f). This particular section of the PHRA has always been broadly interpreted. In Murphy v. Cmwlth., Pa. Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985), the Pennsylvania Supreme Court said, "We have consistently held that the Commissioners, when fashioning an award, have broad discretion. . ."

The Commission, in awarding any remedy, has two purposes. The first purpose is to insure that the unlawful discriminatory practice is completely eradicated. The second purpose is to restore the injured party to her pre-injury status and make her whole. Williamsburg

Community School District v. Cmwlth, Human Relations Commission, 99 Pa. Cmwlth. 206, 512 A.2d 1339 (1986). Certainly in the instant case, the cease and desist portion of Section 9 is somewhat relevant. The Respondent must be directed to cease and desist from automatically disqualifying applicants for employment as police officers because they are forty years of age or older. Also, the Respondent must be directed to cease and desist from utilizing and/or applying the existing civil service regulation that requires the automatic disqualification of applicants who are more than forty years of age. In the instant case, the Respondent, on January 1, 1994, ceased automatically disqualifying applicants for police officer positions because of their age. However, a cease and desist is warranted to prevent any reoccurrence of the Respondent's policy.

With regard to the relief that the Complainant is entitled to, the question remains as to specifically what the Complainant should receive. Firstly, the Complainant should immediately be allowed to complete the application process. Next, if the Complainant is determined to be qualified, she would be entitled to the next available position with all employment-related benefits. (These benefits have been stipulated to. SF 36.)

However, there is a remaining question of whether the Complainant should receive back pay at all, and if so, whether the award should be conditioned upon successful completion of the application process or awarded to the Complainant regardless of whether she completes the process. Certainly in cases involving discrimination, there is a presumption of entitlement to back pay. Albermarle Paper Company v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed 2d 280 (1975). The burden is squarely on the employer to show that monetary relief is not warranted. Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976).

In the instant case, there is some difficulty where the Respondent has unlawfully eliminated a Complainant from consideration before the entire application process is completed. An important case on this particular point is Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977); cert. denied, 436 U.S. 913 (1978). In Rodriguez, there was an age-based refusal, by virtue of an automatic disqualification, of all applicants. The plaintiff was not permitted to take a civil service examination. The court in Rodriguez, after finding that the Respondent had engaged in age discrimination, not only ordered the Respondent to offer the plaintiff an opportunity to take the examination, but also ordered a back pay award, irrespective of examination results. The Third Circuit upheld the unconditional back pay award. The appellate court in Rodriguez sets forth very clear rules that are directly applicable to retrospective relief:

"The case at hand advances us beyond proven liability to the matter of evidentiary rules for the individualized relief phase of ADEA actions. Just as with the underlying liability determination, the twin objectives of monetary relief -- deferring discrimination and making victims of discrimination whole -- are furthered by judicial recognition of evidentiary presumptions and burdens of proof designed to resolve uncertainties in favor of the aggrieved employee or applicant. Thus, we hold, in view of this record which, *inter alia*, awards back pay only to an individual plaintiff, not to a class of numerous applicants, that an employee who has prevailed in proving that an employer committed a *per se* violation of the ADEA shoulders the initial burden of production to present a *prima facie* case of entitlement to damages. This burden is discharged upon a showing that at the time of the unlawful discrimination, (1) vacancies existed from which plaintiff was impermissibly excluded, and (2) that the plaintiff possessed physical and mental capabilities generally required of employees performing the type of work for which he applied. Upon such a showing, the burdens of production and persuasion shift to the employer to prove that the plaintiff would not have been hired even absent discriminatory age barriers. The defendant must, therefore, adduce evidence of either no job vacancies or plaintiff's lack of qualification for the particular job."

569 F.2d at 1239.

The instant case presents a number of similarities to Rodriguez. The Complainant was disqualified after she completed the written examination, but before the medical, psychiatric testing, and background investigation.

However, we must consider in our analysis the Pennsylvania Supreme Court decision in the case of Pennsylvania State Police v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission (Williams), 512 Pa. 534, 517 A.2d 1253 (1986). In that case, the Commission decision to award back pay was reversed by the Pennsylvania Supreme Court. The Court's rationale was that the plaintiff was not entitled to a back-pay award because he had not been denied a job position.

The Williams case can be distinguished from the instant case in several areas. First, the Williams case discusses the difficulty in anticipating whether the Complainant would have successfully completed the process. The Court reasoned that neither party should bear the burden for such foretelling of the future. "Suffice it to say that in this type of case it is improper to require any party to establish that the hiring would not have occurred absent the discrimination." Williams, supra. In the instant case, the Respondent was specifically requested by the Commission to resolve this issue before the public hearing. Therefore, it is without question that this Respondent had the opportunity to permit the Complainant to complete the application process, and this particular question would have been resolved. Since Respondent chose to ignore resolution of this question, it should not benefit from its refusal to allow Complainant to complete the process.

Secondly, the Respondent's entire defense rested on a federal preemption argument which the defense reasonably knew would not be successful. The Commission, on February 28, 1990, issued an interlocutory order denying Respondent's motion based on the preemption argument. The incurable defects and flaws of the preemption argument were

clearly articulated in the interlocutory order. At that point, the Respondent still chose not to permit the Complainant to complete the process. There is no question but that this candidate would in all likelihood have been successful, given her then-present employment within the department and her military occupation/status.

Finally, on the issue of back pay, the purpose is to eradicate the unlawful discriminatory practice and to make the Complainant whole. In the instant case, an award of back pay is necessary to deter future discrimination. Simply to order the Respondent to restore the Complainant is insufficient for this Complainant and would not deter future discrimination. There must be an economic consequence for this Respondent who permitted Complainant to embark upon an employment journey and then threw her overboard in midstream, arbitrarily excluding her from the job. The appropriate date of commencement should be the date of the interlocutory order served on the Respondent. That date is February 28, 1990. The record contains the stipulation of the parties as to wage rates. (SF 33-35.) Also, the Complainant has presented evidence of interim earnings as to non-military employment. Certainly, in a case of this nature, the calculation need not be exact but, rather, reasonable.

Williamsburg Community School District, *supra*.

The most reasonable method of calculation would appear to be the average salary of the individuals ranked before and after the Complainant, with the appropriate deduction of interim earnings for a yearly amount.

The final issue in this matter would be the issue of mitigation of damages. This question is within the discretion of the Commission, and it is the Respondent's burden to establish that the Complainant failed to mitigate damages. Cardin v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3rd Cir. 1988). The Respondent must show that the Complainant did not exercise reasonable diligence in seeking other employment. In the instant case, the

Complainant presented substantial evidence as to her work record and applications for employment. The Respondent did not present any evidence to contradict the position that the Complainant made reasonable efforts to mitigate damages.

Certainly, the record before the Commission justifies both injunctive and monetary relief. Therefore, having found that the Complainant is a victim of unlawful discrimination, an appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EILEEN TIANO,
Complainant

v.

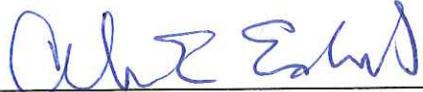
CITY OF PHILADELPHIA,
POLICE DEPARTMENT,
Respondent

:
:
:
:
:
:
:
:
:

DOCKET NO. E-46771

RECOMMENDATION OF THE HEARING PANEL

Upon consideration of the entire record in the above-captioned case, it is the Recommendation of the Hearing Panel that the Complainant has proved discrimination in violation of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Panel's Recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion and Final Order be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, this Hearing Panel recommends issuance of the attached Final Order.



Alvin E. Echols Jr., Esquire, Commissioner
Hearing Panel Chairperson



Aubra S. Gaston, Esquire, Commissioner



Daniel D. Yun, M.D., Commissioner

2. The Respondent shall cease and desist from using any pre-employment selection criteria that mandates automatic rejection of applicants for the position of police officer because of the applicant's age, or which otherwise imposes differing qualification criteria based upon age.

3. The Respondent shall cease and desist from using the current civil service regulation relating to the automatic disqualification because of age of applicants for positions of police officer to the extent that such civil service regulation automatically disqualifies individuals who are forty years of age or older.

4. The Respondent shall restore the Complainant into the same position in the application process as she was at the time of her unlawful disqualification.

5. The Respondent, irrespective of whether Complainant is successful in completing the process, shall pay the Complainant an amount equal to the sum she would have earned had she been hired on February 28, 1990, through the date of her instatement, or the date of her refusal of an offer of instatement, or up through the date of her rejection on non-discriminatory grounds.

6. This amount shall be reduced by the interim earnings that could not have been earned if the Complainant had been working as a police officer as of February 28, 1990.

7. The Respondent shall also pay interest of six percent per annum from February 28, 1990, to the date that the payment is made.

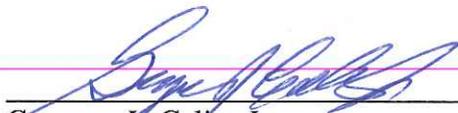
8. The Respondent, upon instatement, shall restore or otherwise provide Complainant with all benefits otherwise available to a person who has functioned as a police officer from February 28, 1990 through the present, including but not limited to any necessary pension payments required to be made for that timeframe.

9. Within thirty days of the date of this Order, Respondent shall report on the manner of compliance with the terms of this Order by letter addressed to Michael Hardiman, Assistant Chief Counsel, at the Commission's Philadelphia Regional Office, located at 711 State Office Building, 1400 Spring Garden Street, Philadelphia, Pennsylvania 19130.

Pennsylvania Human Relations Commission

By: 
Robert Johnson Smith
Chairperson

Attest:


Gregory J. Cella, Jr.
Secretary