COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES BENNETT, COMPLAINANT, V. BROWNSVILLE AREA SCHOOL DISTRICT, RESPONDENT.	: : : : : : : : :	Docket No. E-89538-A

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above captioned matter and no further proof thereof shall be required at hearing:

1. The Complainant herein is James R. Bennett, an adult male, residing in Grindstone, Fayette County, Pennsylvania, 15442 (hereinafter "Bennett" or "Complainant"). Complainant's date of birth is January 26, 1935.

2. The Respondent herein is the Brownsville Area School District with its administrative offices located at RD#1 Box 202, Grindstone PA 15442. (hereinafter "School District" or Respondent) and at all times relevant hereto, having four (4) or more employees.

3. On November 12, 1998, Complainant filed a verified Complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission" or "PHRC") alleging Respondent refused to hire him

EXHIBIT
Joint
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2 04-30-02

based upon his age, 63 years, and filled the positions with younger, less experienced persons.

4. On February 4, 1999, the Respondent filed a verified Answer to the Complaint denying that age was a determinative factor in its decision to employ persons other than Complainant to the positions at issue.

5. On October 4, 2000, following investigation into Complainant's allegations, Commission staff made a finding of probable cause to credit the allegations of discrimination based upon age. Notwithstanding such finding, Respondent continues to deny the allegations of age discrimination.

6. Respondent was notified of the finding of probable cause to credit the allegations of age discriminations and was invited to enter into conciliation.

7. Efforts to resolve the complaint of age discrimination by means of conference, conciliation and persuasion were unsuccessful and on August 27, 2001, the Commission approved a public hearing and the parties were so notified.

Stipulated to:

Diane Blancett-Maddock

Diane Blancett-Maddock
Assistant Chief Counsel
PA Human Relations Commission
Counsel for the Commission

Peter M. Suwak, Esquire
Counsel for Complainant

Matthew M. Hoffman, Esquire
Hoffman & McCann
Counsel for Respondent prerequisites

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS OFFICE

JAMES BENNETT, COMPLAINANT,	:	
V.	:	DOCKET NO. E-89538-A
BROWNSVILLE AREA SCHOOL DISTRICT, RESPONDENT	:	

STIPULATIONS OF FACT

The following facts regarding earnings are admitted by all parties to the above captioned matter and no further proof thereof shall be required at hearing:

1. Respondent hired two permanent full-time custodians on August 3, 1998. The employees were Susan Zupich and Raul Delgado.

2. In 1998, Complainant earned $7970.80 from part-time employment with Respondent and received $623.00 in unemployment compensation.

3. In 1999, Complainant earned $ 8379.50 from part-time employment with Respondent and received $710.00 in unemployment compensation.

4. In 2000, Complainant earned $ 8735.35 from part-time employment with Respondent.

5. In 2001, Complainant earned $ 8339.88 from part-time employment with Respondent.

6. In 2002, Complainant has earned $ 1644.00 year to date from part-time employment with Respondent. In 2002, Complainant earns at the hourly rate of $ 6.85 per hour.

7. In 1998, Susan Zupich earned $14,186.84 from employment with Respondent and Raul Delgado earned $8042.28.

8. In 1999, Susan Zupich earned $ 21,030.02 from employment with Respondent and Raul Delgado earned $ 20,609.28.

9. In 2000, Susan Zupich earned $ 21785.36 from employment with Respondent and Raul Delgado earned $ 21416.22.

10. In 2001, Susan Zupich earned $ 22276.20 from employment with Respondent and Raul Delgado earned $ 21623.44.

11. In 2002, Susan Zupich has earned $ 7493.22 year to date from employment with the Respondent.

12. In 2002, Raul Delgado has earned $ 6896.04 year to date from employment with the Respondent.

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Hoffmann & McCann
Counsel for Respondent

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES BENNETT Complainant	:	
v.	:	DOCKET NO. E-89538-A
BROWNSVILLE AREA SCHOOL DISTRICT Respondent	:	

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES BENNETT, COMPLAINANT, V. BROWNSVILLE AREA SCHOOL DISTRICT, RESPONDENT.	: : : : : : : : :	Docket No. E-89538-A

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COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS OFFICE

JAMES BENNETT,	:	
COMPLAINANT,	:	
	:	
	:	**DOCKET NO. E-89538-A**
V.	:	
	:	
	:	
BROWNSVILLE AREA	:	
SCHOOL DISTRICT,	:	
RESPONDENT	:	

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Assistant Chief Counsel
PA Human Relations Commission
Counsel for the Commission

Peter M. Suwak, Esquire
Counsel for Complainant

Matthew M. Hoffman, Esquire
Hoffmann & McCann
Counsel for Respondent

FINDINGS OF FACT *

1. The Complainant herein is James R. Bennett (hereinafter, "Bennett") who resides in Grindstone, Pennsylvania. (S.F. 1).
2. Bennett's date of birth is January 26, 1935. (N.T. 15-16).
3. The Respondent herein is the Brownsville Area School District (hereinafter, "the School District"). (N.T. 15-16).
4. At all times relevant to the instant complaint, the School District had four (4) or more employees. (N.T. 15-16).
5. Bennett was first hired by the School District in December, 1989, as a part-time substitute custodian. (N.T. 223).
6. At the time of his hire in 1989, Bennett was fifty-four (54) years of age. (N.T. 223-224).
7. When Bennett was hired as a part-time substitute custodian, he did not have any experience as a custodian. (N.T. 229-230).

* The foregoing "Stipulations of Fact" are incorporated herein as if fully set forth to the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes.

S.T. Stipulations of Fact
N.T. Notes of Testimony
C.E. Complainant's Exhibit

8. In 1993, Bennett was hired by the School District as a seasonal grass-cutter. (N.T. 224).
9. When Bennett was hired as a seasonal grass-cutter, he was fifty-eight (58) years of age. (N.T. 224-225).
10. By letter dated February 15, 1997, the School District requested that Bennett work as a substitute custodian in addition to his employment as a seasonal grass-cutter. (N.T. 118-119) R.E. 1.
11. At that time, Bennett was sixty-two (62) years of age. (N.T. 227).
12. As of August, 1998, Bennett was employed by the School District for six (6) months per year as a seasonal grass-cutter and intermittently during the other six (6) months per year as a substitute custodian. (N.T. 242-243).
13. Bennett continued in this status up to and including the time of the public hearing in this matter. (N.T. 242-243).
14. In the position of substitute custodian, Bennett is called in "as needed" and his weekly hours varied depending on need. (N.T. 207).
15. In November of 1994, Bennett wrote a letter to the Superintendent expressing interest in a full-time custodian position with the School District. (C-Ex 1).
16. On February 26, 1997, Bennett again sent a letter to the Superintendent expressing his interest in a full-time custodian position. C-Ex 1).
17. On April 3, 1997, Bennett submitted an employment application further expressing interest in a full-time position with the School District. (C-Ex 1).
18. On august 3, 1998, the School District's Board of Directors appointed Raul Delgado (hereinafter "Zupich") to full-time custodian position. (N.T. 61-63;C-E1).

19. When they were hired as full-time custodians, Delgado was twenty-two (22) years of age and Zupich was twenty-eight (28) years of age. (N.T. 186).

20. Zupich was previously appointed as a substitute custodian in January of 1997. (N.T. 184).

21. Delgado was previously appointed as a substitute custodian in January of 1998. (N.T. 184-185).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and subject matter of this case.
2. All parties have complied with the procedural requisites to a public hearing in this case.
3. James Bennett (hereinafter "Bennett) is an individual within the meaning of the PHRA.
4. The Brownsville Area School District (hereinafter "the School District") is an employer within the meaning of the PHRA.
5. Bennett has met his burden of establishing a *prima facie* case by showing that:
    a. He is a member of a protected class;
    b. He applied for a position for which he was qualified;
    c. He was rejected; and
    d. The School District filled the position with persons not in his protected class.
6. The School District met its burden of articulating a legitimate non-discriminatory reason for its action.
7. Bennett has shown that the reasons articulated by the School District are pretextual and unworthy of credence.
8. Bennett has established by a preponderance of the evidence that the School District unlawfully discriminated against him by failing to hire him for a full-time position.

9. The Commission has broad discretion in fashioning a remedy.

10. When the Commission concludes that a Respondent has engaged in unlawful discrimination, the Complainant is entitled to the position, lost wages, lost benefits and statutory interest.

OPINION

This case arises from a complaint filed on or about November 12, 1998 at Docket Number E-89538-A by James Bennett (hereinafter "Bennett") against the Brownsville Area School District (hereinafter" School District"). In his verified complaint, Bennett alleges that the School District refused to hire him as a full-time custodian because of his age. Bennett further alleges that the School District's actions are in violation of Section 5 (A) of the Pennsylvania Human Relations Act, (hereinafter "PHRA"), the Act of October 27, 1955, P.L. 744 as amended, 43 P.S. Section 955 (a).

PHRC staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. These efforts proved unsuccessful in resolving the matter and the case was approved for public hearing. The public hearing was held on April 30, 2002 in Uniontown, Pennsylvania. The case was held before a PHRC Commissioner Panel, consisting of Commissioner Sylvia A. Waters (Chairperson), Commissioner Carl E. Denson and Commissioner Joseph J. Borgia. Phillip A. Ayers, Permanent Hearing Examiner, served as Panel Advisor. Peter M. Suwak, Esquire appeared on behalf of Mr. Bennett and the State's interest in the matter was overseen by Diane Blancett-Maddock, Assistant Chief Counsel. Matthew M. Hoffman, Esquire, appeared on behalf of the Respondent. Post hearing briefs were submitted simultaneously by both parties on or about August 19, 2002.

Section 5 (A) of the PHRA states "it shall be an unlawful discriminatory practice . . . for any employer because of the . . . age . . . of any individual, to bar or

to discharge from employment such individual . . . or to otherwise discriminate against such individual . . . with respect to compensation, hire, tenure, terms, conditions or privileges of employment . . ."

In order to prevail in this matter, Bennett must show that he is a victim of age discrimination. The analysis for a case of this nature was articulated in the landmark case of McDonnell-Douglass v. Green, 411 U.S. 792, 93 S. Ct 181 7 (1973). The Mc Donnell-Douglas framework was adopted by Pennsylvania in General Electric Corp., v. Pennsylvania Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976). The Complainant must establish a *prima facie* case by showing:

1) he is a member of a protected class;
2) he applied for a position for which he was qualified;
3) despite his qualifications, he was rejected, and
4) the Respondent filled the position.

When the Complainant has established a *prima facie* case, the burden of production then shifts to the Respondent to produce evidence of a legitimate non-discriminatory reason for taking the action that it took. Allegheny Housing Rehabilitation Corp., v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). When the Respondent meets its burden, the Complainant must show that the proffered reasons are pretextual or unworthy of credence. Texas Department of Community Affairs., v. Burdine, 450 U.S. 248 (1981).

Therefore, we move to the question of whether Bennett has met his burden of establishing a *prima facie* case. It is not disputed that Bennett was 62 years of age when he applied for the full time custodian position with the School District. Secondly, the record clearly reflects that Bennett applied for and was qualified for the position. Bennett creditably testified that he applied every time a position was open

in the School District (N.T. 223). In addition, the School District Received a letter of intent from Bennett, dated February 26, 1997. The School District then received a completed application on April 3, 1997 (N.T. 252). Furthermore, the record reflects that Bennett was certainly qualified for the position. Bennett had worked for the School District on a part-time basis since 1989. He was first employed as a substitute custodian and subsequently as a seasonal grass cutter and a substitute custodian. Bennett's supervisor testified that his work performance was good. Clearly, Bennett has met the second element of the *prima facie* case.

Next, we move to the last two elements of the *prima facie* case. Bennett was not hired for either of the two full-time positions, thereby meeting the third element. Lastly the School District has admitted that it filled the positions with two individuals younger than Bennett. Bennett has met his burden of establishing a prima *facie case.*

Since Bennett has established is *prima facie* case, the analysis model shifts the burden to the School District to produce evidence of a legitimate non-discriminatory reason for its action. In the instant case, the School District, interestingly, points to its own arbitrary and capricious, political and nepotistic reasons for not hiring Bennett. The School District asserts that the above reasons involving politics and nepotism were the only reasons for its actions.

Assuming arguendo that the School District has met its burden of articulating a legitimate non-discriminatory reason, Bennett can still prevail if he can show, by a preponderance of the evidence, that the reasons asserted are pretextual or unworthy of credence, Burdine, *supra*. The Commission is entitled to infer that the Complainant's ultimate burden can be met, if they find that the facts needed to make up the *prima facie* case have been established and they disbelieve the employer's

explanation. Smith v. Borough of Willkinsburg, 145 F,3d 272, 280 (3d Cir. 1998). In the instant case before the Commission, the School District, In its answer, initially claimed that they were unaware that Bennett had any interest in the job. This assertion was blatantly false. All of the School District witnesses were clearly aware that Bennett's name was on the list. Furthermore, there was an earlier application by Bennett that the School District had knowledge of. As Commission counsel notes, when the School District's own documents contradicted their position, it is then, and only then, that the School District argued a strategy of nepotism and political favoritism. This inconsistency by the School District may certainly be viewed as evidence of pretext.

The testimony of the School District clearly showed that they failed to follow their own policies. The School District did not review evaluations from supervisors or rely on any documents from the superintendent. As Complainant counsel notes, the School District now argues that this clearly flawed process is legitimate and non-discriminatory. Certainly when the process involves nepotism and political favoritism, there needs to be a careful scrutiny of the School Districts Actions. Rowe v. General Motor Corp., 457 F.2d 348 (5th Cir 1997). In the instant case, the School District did not find that Bennett did not have the credentials for the job. The School District did not find that someone else had more seniority. The School District did not find that there was any factor in Bennett's record that justified his rejection. In EEOC v. H.S. Camp & Sons, Inc., nepotism was rejected as defense to a charge of discrimination when it resulted in discrimination. In the instant case, the process engaged in by School District resulted in discrimination against Bennett. The testimony of School District members (Broadwater, Rohrer, Brashear and Sally) contradicted each other's testimony. Upon review of the entire record in this matter Bennett has met his

ultimate burden of persuasion by showing that the School District proffered explanations are pretextual.

Having shown that Bennett has met his ultimate burden of persuasion, we now move to the issue of remedy. Once there is a finding of unlawful discrimination, a remedy shall be fashioned to grant a complainant "make whole relief" and to deter further discrimination PHRC v. Alto Reste Park Cemetery Assn., 453 Pa. 124, 306 A.2d 881 (1973). The Pennsylvania Human Relations Commission has broad discretion when it fashions an award to a Complainant. Murphy v. PHRC, 506 Pa., 549, 486 A.2d 388 (1985).

Furthermore, as Commission counsel notes, the function of back pay relief is to put the victim of discrimination in the position he would have been absent the discrimination. PHRC v. Transit Casualty Insurance Co., 478 Pa 430, 387 A.2d. 58 (1975).

In the instant case, but for the School District's actions, Bennett would have been a full time custodian on August 3, 1998. First Bennett shall be placed in the next available full-time custodian position with the School District. Next, Bennett should receive back pay commensurate with other employees hired on August 3, 1998 minus any interim earnings. In addition, Bennett shall be reimbursed for any out-of-pocket medical expenses he had to incur because of part-time employment. The specific earnings of the successful candidates and Bennett from 1998-2002 have been stipulated to by the parties. The figures are contained in the following chart entitled "Bennett Calculation of Damages". Bennett is entitled to a back pay award of $54,147.31, plus statutory interest.

Having found that Bennett met his ultimate burden of persuasion, and having stipulated to the amount of damages, an appropriate Order follows:

Bennett Calculation of Damages

Comparison Wages

	1998*	1999	2000	2001	2002 Jan-Apr.
Canditates Hired Full-time					
1 **Zupich**	$14,186.84	$21,030.02	$21,785.36	$22,276.20	$7,943.23
2 **Delgado**		$20,609.28	$21,416.22	$21,623.44	$6,896.04
SUM:	$14,186.84	$41,639.30	$43,201.58	$43,899.64	$14,839.27
AVG F/T SALARY:	$14,186.84	$20,819.65	$21,600.79	$21,949.82	$7,419.64

* AVG SALARY for 1998 calculated from Zupich only as Delagado was a new hire in June of 1998.

Estimated Wage Loss	1998	1999	2000	2001	2002 Jan-Apr.	
Bennett Wages	$7,970.70	$8,379.50	$8,735.35	$8,339.88	$1,644.00	
AVG F/T SALARY	$14,186.84	$20,819.65	$21,600.79	$21,949.82	$7,419.64	**Total Lost Wages**
LOST WAGES	$6,216.14	$12,440.15	$12,865.44	$13,609.94	$5,775.64	$50,907.31

Lost Medical Benefits	1998	1999	2000	2001	2002 Jan-Apr.	**Total lost Medical**
(calc. @ $72/mo)	$360.00	$864.00	$864.00	$864.00	$288.00	$3,240.00

Total Damages: $54,147.31

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(calc. @ $72/mo)	$360.00	$864.00	$864.00	$864.00	$288.00	$3,240.00

Total Damages: $54,147.31

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES BENNETT **Complainant**	:	
v.	:	**DOCKET No. E-89538-A**
BROWNSVILLE AREA **SCHOOL DISTRICT** **Respondent**	:	

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above captioned case, the Hearing Commissioner Panel finds that Bennett has proven by a preponderance of the evidence that the School District unlawfully discriminated against him refusing to hire him to a full time custodian position because of his age.

It is, therefore, the Hearing Panel's Recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Commission. If so approved and adopted, the Hearing Panel recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Sylvia A. Waters
Commissioner Sylvia A. Waters

Joseph J. Borgia
Commissioner Joseph J. Borgia

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES BENNETT **Complainant**	:	
v.	:	**DOCKET NO. E-89538-A**
BROWNSVILLE AREA **SCHOOL DISTRICT** **Respondent**	:	

FINAL ORDER

AND NOW, this 24th day of November, 2003, after review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That the School District shall cease and desist from discriminating against persons because of their age.
2. That the School District shall pay Bennett $54,147.31 which represents back pay commensurate with employees hired on August 3, 1998, minus interim earnings.
3. That the School District shall pay interest of six percent per annum on the back pay award, calculated from August 3, 1998 until December 31, 1998 and interest at the rate of eight percent for the calendar year 2000, and interest at the rate nine percent per annum until the date of the public hearing in this matter.
4. That the School District shall report the means by which it will comply with the order, in writing, to Diane Blancett-Maddock, Assistant Chief Counsel, Pittsburgh Regional Office within thirty days of the date of this order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Stephen A. Glassman, Chairperson

ATTEST:

By: Sylvia A. Waters, Secretary