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COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHERYLE HINKLE,	:	
Complainant	:	
	:	
vs.	:	DOCKET NO. E-13029
	:	
WEATHERLY BOROUGH, LEONARD	:	
STRATCHKO, Manager; JOHN	:	
TIMKO, Personnel Chairman,	:	
Respondents	:	
	:	
AND	:	
	:	
CHERYLE HINKLE,	:	
Complainant	:	
	:	
vs.	:	DOCKET NO. E-13553
	:	
WEATHERLY BOROUGH COUNCIL,	:	
EDWARD DODSON, Mayor/Councilman;	:	
LEONARD STRATCHKO, Manager,	:	
Respondents	:	

HISTORY OF THE CASE, FINDINGS OF FACT,
CONCLUSIONS OF LAW, OPINION,
RECOMMENDATION OF HEARING COMMISSIONER,
COMMISSION'S DECISION AND FINAL ORDER

HISTORY OF THE CASE

This case involves two complaints filed by Cheryle Hinkle ("Complainant") with the Pennsylvania Human Relations Commission ("Commission"). The first, filed on October 24, 1977, against Weatherly Borough, Leonard Stratchko as Borough Manager, and John Timko as Borough Personnel Chairman ("Respondents"), alleged discrimination on the basis of sex in the terms and conditions of employment, in violation of Section 5(a) of the Human Relations Act, 43 P.S. 951 et seq. ("Act"). The second, filed on March 3, 1978, against Weatherly Borough Council, Edward Dodson as Borough Mayor/Councilman, and Leonard Stratchko as Borough Manager ("Respondents"), ^{1/} alleged retaliatory termination of Complainant's employment because of the filing of the original charge, in violation of Section 5(d) of the Act.

An investigation was made into the allegations of the complaints by representatives of the Commission, and a determination made that probable cause existed to credit the allegations of each complaint.

^{1/} Because of the intertwined nature of the two charges, and the near identity of Respondents, the term "Respondents" will be used to designate those named in each complaint.

Thereupon the Commission endeavored to eliminate the practices complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and on October 23, 1978, the Commission approved the cases for Public Hearing. The panel named to hear the case included E.E. Smith, Chairperson of the Panel, Doris M. Leader, Hearing Commissioner, and Raquel Otero de Yiengst, Hearing Commissioner. By subsequent agreement, Complainant and Respondents waived their statutory rights to a Public Hearing before three Commissioners and agreed to proceed to Public Hearing before Commissioner E. E. Smith.

Public Hearings were held on June 18, 19, and 30, 1979, in the Weatherly Borough Hall, 10 Wilbur Street, Weatherly, Pennsylvania, before Commissioner E. E. Smith, and were conducted at all times pursuant to Section 9 of the Act. Sidney V. Blecker, Assistant General Counsel to the Commission, presented the case on behalf of the Complainant. Roger Nanovic, Esq., represented the Respondents. Edith E. Cox, Assistant General Counsel to the Commission, served as Legal Advisor to Commissioner Smith.

1
FINDINGS OF FACT

1. Complainant attended the Hazleton campus of the Pennsylvania State University between 1975 and 1977, majoring in law enforcement and corrections. (N.T. 12)

2. Complainant's career goal was and continues to be entry into the field of law enforcement and corrections. (N.T. 12).

3. Complainant worked with the Weatherly Borough Police Force for ten weeks as part of a Pennsylvania State University course's clinical requirements. (N.T. 13)

4. Complainant worked for Weatherly Borough as a salaried special officer between June of 1976 and January of 1977. (N.T. 13-22; C-4, C-5).

5. As special officer, Complainant was issued a uniform, sidearm, gun belt and holster; she had the use of the police cruiser, and had full police powers, including arrest power. (N.T. 17-18, C-4, C-5)

6. Complainant's application for CETA Funding, through SCAM, was filled out on February 8, 1977, and stated that her occupational goal was police work. (N.T. 22, 23; C-6)

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The list of facts and conclusions of law to which Complainant and Respondents stipulated at the commencement of Public Hearing are attached at the end of these proposed Findings of Fact, for easy reference.

7. Complainant was interviewed for a police position by Respondent officials on February 7, 1977. (N.T. 24, 260, 261, 478).

8. At the February 17, 1977 interview, Complainant was not questioned about her ability or wish to do clerical work. (N.T. 25, 260, 261)

9. Complainant submitted an employment application to Weatherly Borough on February 17, 1977, which referred only to police work. (N. T. 25; Stip. Ex. 7)

10. Complainant was told at the February 17, 1977 interview that the police position was for a one year period with a possible extension. (N.T. 25, 144, 145, 261, 262)

11. Complainant was informed by Respondents after this interview that she had been hired as a police officer. (N.T. 26)

12. Complainant was informed by Mr. George Albeck on or after February 17, 1977, that she was to have full police powers, including arrest power and use of the police cruiser. (N.T. 27, 265)

13. Complainant had full police authority between February 25, 1977, and June 24, 1977. (N.T. 27, 111, 180)

14. Respondents did not indicate to Complainant prior to June 24, 1977, that she lacked full police authority. (N.T. 27, 28)

15. Respondents were aware that Complainant was performing regular police duties between February 25, 1977 and April 4, 1977. (N.T. 29, 482, 485)

16. On February 25, 1977, Complainant signed a SCAM "Intake Applicant Status Report," which contained the word "Patrolman" under the heading "Recommended Programming to Placement Activities." (N.T. 30-34, C-7)

17. Complainant's position after February 25, 1977 was full time (40 hours per week); her yearly salary was \$6000. (N.T. 34, 106, 140, 168)

18. SCAM supplied \$5000 of Complainant's salary; Weatherly Borough supplied \$1000. (N.T. 34, 106, 173)

19. During March of 1977, Complainant completed a Vehicle Code Training course conducted by the Pennsylvania State Police. (N.T. 35; C-8)

20. Between April 11, 1977 and June 24, 1977, Complainant attended training sponsored by the Pennsylvania State Police under the Municipal Police Officers' Training Program, with the approval of Respondent Stratchko (N.T. 36-38, 117, 280, 281, 489, 490, Stip. Ex. 12)

21. All persons who attended the training program described in No. 20 supra were police officers. (N.P. 38)

22. By letter dated April 1, 1977, Respondent Stratchko informed Complainant that she was serving a twelve month probationary period. (N.T. 40-41; C-11)

23. Following her return from the Police Academy, on or about June 24, 1977, Respondent Stratchko for the first time told Complainant that she was to perform only clerical duties, and that she had no police powers. (N.T. 41, 42, 43, 45, 271).

24. In February of 1977, prior to hiring Complainant, the Borough employed three male police officers: Albeck,

Wagner, and O'Donnell. (N.T. 43)

25. In February of 1977, the Borough hired Joseph Sando for a SCAM-funded police position. (N.T. 43)

26. Sando's salary was \$6000 per year. (N.T. 44, 106)

27. On June 24, 1977, the Borough employed two police officers other than Complainant: Albeck and O'Donnell. (N.T. 45, 590)

28. Sando and Wagner resigned while Complainant was attending the Police Academy. (N.T. 45, 509, 514)

29. After June 24, 1977, Complainant repeatedly asked Respondents to reassign her to police duties. (N.T. 46)

30. Complainant and her father attended Borough Council meetings and formally requested that she be returned to police work. (N.T. 48, 525)

31. In July of 1977, Complainant submitted an employment application to Respondents requesting employment as a special police officer. (N.T. 48, 49, 141, C-12)

32. Respondent Stratchko by letter dated September 14, 1977, asked SCAM's permission to use Complainant for police duties, and received SCAM's permission to do so. (N.T. 50, 51, 520, Stip. Ex. 21, C-13)

33. Police Chief Albeck suggested to the Borough Council at its meeting of September 12, 1977, that Complainant be transferred to the SCAM position vacated by Sando; Respondents did not contact SCAM to request this transfer. (N.T. 51, 198, 199, 278)

34. Complainant performed no police duties between June 24, 1977 and February 25, 1978. (N.T. 54, 55)

35. The Borough never tested Complainant's ability to perform clerical duties. (N.T. 55, 426)

36. Complainant was not allowed to attend Borough Council's workshop meeting of February 8, 1978. (N.T. 57, 538)

37. On February 10, 1978, Respondent Stratchko verbally informed Complainant that her employment was to be terminated effective February 24, 1978, but gave her no reason for the termination. (N.T. 57)

38. In November of 1977, SCAM extended Complainant's funding from February 24, 1978, to September 30, 1978. (N.T. 64, 146, 147, 148, 200, 201, 532, Stip. Ex. 38)

39. On or about February 23, 1978, Complainant received a memorandum from Respondent Stratchko directing her to return all police equipment to the Borough. (N.T. 64, 65, Stip. Ex. 25)

40. On February 26, 1978, Complainant returned to the Borough two police uniforms, a gun belt, a holster, a .38 caliber revolver, handcuffs and their case, a badge, a ticket book, and keys to the police office and police cruiser. (N.T. 65; Stip. Ex. 26)

41. Respondents had not requested that this equipment be returned prior to February 23, 1978. (N.T. 66)

42. Complainant's clerical duties required an average of one hour per day to perform. (N.T. 68, 427, 526)

43. Complainant informed Respondent Stratchko and a

SCAM representative of the amount of time required to perform her clerical duties. (N.T. 68, 69, 277, 526)

44. The Borough had no police officers on duty during the day shift for a substantial part of the period between June 24, 1977 and February 25, 1977. (N.T. 69, 276, 277)

45. Requests for police assistance were received by the Borough Police Office during the daytime hours described in No. 45, supra; Complainant offered but was not allowed to respond to these calls. (N.T. 69)

46. Karl Romberger was a member of Weatherly's Borough Council between January, 1974 and January, 1978. (N.T. 76)

47. Early in 1977, the Borough Council decided to and did apply for an LEAA grant, acting under the impression that only five person police departments were eligible. (N.T. 78, 79, 80, 294, 344, 345, 427, 428)

48. Council subsequently learned that a five person police department was not required for receipt of LEAA monies. (N.T. 80, 81, 294, 295, 345, 346, 429)

49. In April of 1977, Council received a letter of intent to commence collective bargaining from officers Wagner and O'Donnell. (N.T. 81, 82, 83, 359, 360, 375; R-1)

50. One of the items listed in the letter of intent was the number of police personnel; no specific number was named. (N.T. 82, 87, 89, 360; R-1)

51. The Borough employed three police officers continuously between October, 1975 and June, 1977. (N.T. 88, 103, 104, 116, 117, 274, 275, 346)

52. An agreement was reached between the officers and the Borough Council in the fall of 1977 which did not include num-

ber of personnel or groups for termination. (N.T. 82, 364, 377, 382, 505 R-2)

53. Complainant was not involved in the collective bargaining initiated by the letter described in No. 48 supra. (N.T. 96, 380; R-1)

54. Borough Council did not consider itself bound to retain Ms. Hinkle on the police force when her SCAM funds ran out. (N.T. 98)

55. On March 10, 1975, the Borough Council unanimously resolved to increase its police force to three regular full-time officers. (N.T. 101, 102, 105, 512, C-14)

56. The Borough Council was alerted in March of 1975 to the possibility that expansion of the police force might require formation of a civil service commission. (N.T. 104, 105, C-14)

57. SCAM agreed to sponsor one police officer and one clerk for employment with Weatherly Borough. (N.T. 108)

58. Borough Council in February of 1977 intended to increase the police department to five officers to enable it to apply for LEAA funds. (N.T. 108)

59. Both Joseph Sando and Cheryle Hinkle were hired in February of 1977 as police officers. (N.T. 114)

60. Borough Council approved Complainant's attendance at the Police Academy. (N.T. 117)

61. Borough Council appointed two civil service commissioners at its meeting in April of 1977, and stated that a third would be appointed subsequently; this was never done. (N.T. 196, 351, 513, 514, Stip. Ex. 9)

62. Borough Council decided at its workshop meeting of February 28, 1978, to terminate Complainant. (N.T. 219, Stip. Ex. 23)

63. Weatherly Borough employed no full time female police officer, other than Ms. Hinkle, between January of 1973 and March of 1978. (N.T. 224, Stip. Ex. 51)

64. No full time CETA employee of a total of seven, other than Complainant, was terminated by Respondents between January of 1975 and March of 1978. (N.T. 224, 225, Stip. Ex. 51)

65. On February 23, 1977, Respondent Stratchko signed a requisition for police uniforms for Complainant. (N.T. 265, 266, 270, 271, C-21, C-22)

66. Respondents were aware that Complainant was performing police work prior to June 24, 1977. (N.T. 272, 274)

67. Police Chief Albeck was not told until after June 24, 1977, that Complainant was to perform only clerical duties. (N.T. 285, 286)

68. Following Complainant's interview in February of 1977, Police Chief Albeck was asked by members of the Borough's personnel committee whether she could handle herself in a "fight situation" with a man. (N.T. 290)

69. SCAM was aware of the fact that both Complainant and Joseph Sando were initially functioning as police officers. (N.T. 335, 336)

70. Respondent Leonard Stratchko was Manager of Weatherly Borough between February 1, 1977, and April 14 or 15, 1979. (N.T. 344, 421)

71. Weatherly Borough's police department had never had a full time clerk typist prior to Complainant's assignment to clerical duties. (N.T. 425)

72. In June of 1977, Complainant would have been eligible for the position of third full time, regular police officer. (N.T. 590, 510)

73. Borough Council's 1975 resolution to increase the number of police officers to three was never rescinded. (N.T. 512)

74. Respondent Stratchko never inquired of SCAM whether Complainant could be transferred into the CETA position vacated by Joseph Sando. (N.T. 523)

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 Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this complaint pursuant to the provisions of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 951 et seq.

2. Complainant and Respondents waive their right established in 43 P.S. 959 to a Public Hearing before a panel of three Commissioners, and agree to proceed to Public Hearing before Commissioner Everett E. Smith.

3. Complainant herein is Cheryle Hinkle, 222 Sixth Street, Weatherly, Carbon County, Pennsylvania, 18255.

4. Respondents herein are Weatherly Borough, an incorporated borough with its principal place of business at the Weatherly Borough Building, 10 Wilbur Street, Weatherly, Carbon County, Pennsylvania, 18255; Leonard Stratchko, Borough Manager at the time of the actions complained of; John Timko, Borough Personnel Chairman at the time of the actions complained of; Edward Dodson, Borough Mayor/Councilman at the time of the actions complained of.

5. Complainant attended the Pennsylvania State University, Hazleton Campus.

6. On Thursday, February 17, 1977, the Complainant applied for a full time position as a police officer with the Borough of Weatherly.

7. On Thursday, February 24, 1977, the Complainant was informed by Leonard Stratchko, Weatherly Borough Manager, to start work effective Friday, February 25, 1977.

8. Act 120 (53 P.S. §5740 et seq.) June 18, 1974, creating the Municipal Police Officers' Education and Training Commission, requires that police officers must undergo specific training within one year of employment.

9. On Friday, March 11, 1977, the Complainant applied for training under the Municipal Police Officers' Education and Training Program (Act 120). Police Chief George Albeck and Leonard Stratchko, Weatherly Borough Manager, signed the application, certifying that the Complainant possesses the necessary qualifications for police training.

10. The minutes of the Weatherly Borough regular council meeting of April 11, 1977, stated: "Officer Cheryle Hinkle started the 12 week Municipal Police Course."

11. On Saturday, April 16, 1977, Joseph Sando, a police officer under the Schuylkill-Carbon Agency for Manpower, (SCAM) program in Weatherly Borough, resigned his position.

12. On Monday, June 13, 1977, William Wagner resigned his position as a police officer in the Borough of Weatherly.

13. On Friday, June 24, 1977, Complainant completed her training at the Police Academy.

14. On or about June 24, 1977, Leonard Stratchko, Weatherly Borough Manager, verbally informed the Complainant, on her return from training at the Police Academy, that her assignment would be solely limited to clerical duties.

15. On Tuesday, June 28, 1977, Leonard Stratchko, Weatherly Borough Manager, filed a reimbursement claim for \$1,693.98 with the Commonwealth of Pennsylvania, for the Complainant's police officer's training at the Academy, as well as clothing and luncheons.

16. On July 6, 1977, Complainant received a certificate of completion of her training as a police officer.

17. On Friday, July 8, 1977, Complainant completed an application for the position of Special Officer for the Borough of Weatherly.

18. On September 19, 1977, Agnes T. McCartney, SCAM Deputy Director, sent a letter to Leonard Stratchko, Weatherly Borough Manager, stating that "we see no reason why Cheryle Hinkle could not function in both categories -- clerical and police duties."

19. On Friday, October 14, 1977, Complainant filed a complaint with the Pennsylvania Human Relations Commission alleging that the Respondents discriminated against her in the terms and conditions of employment because of her sex, female.

20. On Friday, February 10, 1978, Complainant was verbally informed by Leonard Stratchko, Weatherly Borough Manager, that she would be terminated effective February 24, 1978.

21. On Thursday, February 23, 1978, the Complainant received a memorandum from the Respondent requesting her, for the first time, to return all Borough equipment which she had in her possession.

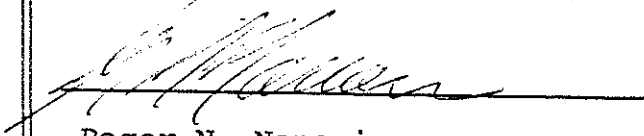
MM AVB 22. Respondents never provided Complainant with ^{personal} written notification of her termination or of the ^{written} reason(s) for said termination.

23. Complainant received \$6000.00 in salary from Respondent Borough during her course of employment from February 25, 1977, through February 24, 1978.

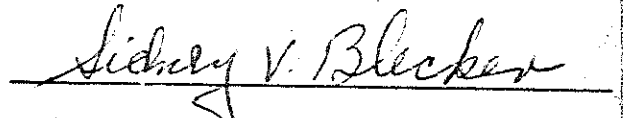
24. On Friday, March 3, 1978, the Complainant filed a complaint with the Pennsylvania Human Relations Commission alleging that on or about February 24, 1978, the Respondents discriminated against her by terminating her from her position as Police Officer, in retaliation because she had previously filed a Pennsylvania Human Relations Commission complaint E-13029, and Equal Employment Opportunity Commission complaint 031-780520.

25. On Friday, March 3, 1978, the Complaint timely requested the Respondent to hold a hearing on her termination, ^{under} the Civil Service Act for Police Personnel. *MM AVB*

Despite the Complainant's request, no hearing has been held to date.



Roger N. Nanovic
Attorney for Respondents



Sidney V. Blecker
Attorney for Complainants

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission properly has jurisdiction over the parties and subject matter of the Complaints in this action at Docket Nos. E-13029 and E-13553, pursuant to Sections 4 and 5 of the Act. (43 P.S. 954, 955)

2. The Pennsylvania Human Relations Commission and the parties have fully complied with all the procedural pre-requisites to an public hearing in accordance with Section 9 of the Act. (43 P.S. 959)

3. Respondents are "employers" within the meaning of Sections 4(b), 5(a), and 5(d) of the Act. (43 P.S. 954(b), 955).

4. Complainant is an "individual" within the meaning of Section 5 of the Act. (43 P.S. 955)

5. Complainant and Respondents waived their rights to Public Hearing before a Hearing Panel of three Commissioners and agreed to proceed to Public Hearing before Commissioner Everett E. Smith.

6. Respondents hired Complainant for the position of police officer.

7. Complainant functioned as a police officer between February 25, 1977 and June 24, 1977.

8. Once a complainant has established a prima facie case of discrimination under the Act, the burden of proof shifts to the Respondents to establish that the actions complained of were necessary for the safe and efficient operation of

their enterprise.

9. Respondents as a matter of law failed to establish that their reasons for assigning Ms. Hinkle to clerical duties were necessary for the safe and efficient operation of their enterprise.

10. Respondents' act of assigning Complainant to clerical duties after hiring her as a police officer was an act of discrimination based upon her sex, in violation of Section 5(a) of the Act.

11. The validity of a Section 5(d) retaliation claim is independent of the validity of the original complaint.

12. Respondents as a matter of law have failed to establish that they did not terminate Complainant because she had filed a complaint with the Commission.

13. Respondents' termination of Complainant was an act of retaliation, taken because she had filed a complaint with the Commission, in violation of Section 5(d) of the Act.

14. A prevailing Complainant in an action alleging retaliatory termination is entitled to an award of back pay.

(43 P.S. 959)

OPINION

STATEMENT OF CASE

This matter arises on two complaints filed with the Commission by Cheryle Hinkle against her former employer, the Borough Weatherly, and various Borough officials.

In her first complaint, Ms. Hinkle alleged that her employer discriminated against her in the terms and conditions of her employment because of her sex, in violation of Section 5(a) of the Act. Specifically, she alleged that, after hiring her as a police officer, Respondents unlawfully limited her to the performance of clerical duties.

In her second complaint, Ms. Hinkle alleged that Respondents retaliated against her because she had filed the initial charge with the Commission by terminating her from her position, in violation of Section 5(d) of the Act.

BACKGROUND OF THE CASE

On February 25, 1977, Complainant commenced full time employment with Respondents. The exact nature of this employment was a subject of considerable controversy at Public Hearing. Complainant steadfastly maintains that she was hired as a police officer; Respondents' position can best be described as vacillating in accordance with considerations having little to do with Complainant. Respondents' own brief

states first that she was hired as a police officer (at p.1). Three pages later, it is stated with equal certainty that she was hired as a clerk typist. This confusion was equally present at Public Hearing. Full discussion of the issue will follow.

Ms. Hinkle's position with Respondents was funded by the Schuylkill-Carbon Agency for Manpower (SCAM), an agency empowered to sponsor employees whose salaries are paid with federal funds disbursed under the Comprehensive Employment and Training Act (CETA).

Between February 25, 1977, and April 11, 1977, Ms. Hinkle performed regular police officers' duties. She had the use of the Borough's police cruiser, issued citations, went out on patrol, and in general conducted herself as would any regular police officer. Respondents nowhere indicate that her performance was unsatisfactory.

On April 11, 1977, Complainant began a twelve week training program, the Municipal Police Officers' Education and Training Course, at the Pennsylvania State Police Academy. Her application to this course was approved by Respondents; she attended it with their full knowledge and approval.

Upon her return from the Police Academy, on or about June 24, 1977, Complainant was informed by Borough Manager Stratchko that her duties would from thenceforth be solely clerical. It was this alteration in her duties that led to the filing of Complainant's first charge with the Commission.

On February 10, 1978, Complainant was informed by Borough Manager Stratchko that her employment was to be terminated effective February 24, 1978. No reason for this termination was given. Complainant thereupon filed her second complaint with the Commission, alleging retaliatory motives for the action.

LIABILITY

A. THE SECTION 5(a) COMPLAINT

Section 5(a) of the Act states in pertinent part:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification ... (a) For any employer, because of the ... sex ... of any individual ... to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.

Act of October 25, 1955, P.L. 744, Section 5(a), as amended, 43 P.S. 955 (a).

In General Electric Corporation vs. Pennsylvania Human Relations Commission, _____ Pa. _____, 365 A.2d 649 (1976), the Pennsylvania Supreme Court adopted principles first enunciated in McDonnell-Douglas Corp. vs. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d. 668 (1973), as to the elements and burden of proof required in a Title VII discrimination case. Holding that the Human Relations Act is the analogue to Title VII, the Pennsylvania Court stated:

In McDonnell-Douglas Corp. vs. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973), the United States Supreme Court held that a prima facie case of discrimination under Title VII is made out if the Complainant establishes that he is a member of a protected minority, that he applied for a job for which he was qualified, that his application was rejected, and that the employer continued to seek other applicants of equal qualifications. 411 U.S. at 800, 93 S. Ct. at 1823, 36 L.Ed. at 677. Once a complainant establishes these elements the burden then shifts to the employer to justify his employee selections on the basis of job related criteria which are necessary for the safety and efficiency of the enterprise. 411

U.S. at 802, 93 S.Ct. at 1824, 36
L.Ed. at 678 ... We agree with this
rationale. Id., at 365 A.2d 655, 656.

Adapting these requirements to the instant case, we find that Complainant, to make out her prima facie case, must establish:

1. That she is a member of a protected class;
2. That she was employed by Respondents in a position for which she was qualified and in which she was performing satisfactorily;
3. That Respondents took employment-related action which was adverse to her; and
4. That this action was taken because of a proscribed consideration -- in this case, because of Complainant's sex.

Once these elements are established, General Electric requires Respondents to prove that their action was legitimately required for the safe and efficient operation of their enterprise. The burden then shifts back to Complainant to establish that Respondents' explanations are pretextual.

It is not contested that Ms. Hinkle is a member of a protected class, that she was performing police duties satisfactorily, and that Respondents' act in changing her duties was one which she saw, and informed them that she saw, as adverse. Disagreement exists about the rationales for taking that action. Complainant alleges that Respondents discriminated against her because of her sex. Respondents in turn advance various non-discriminatory reasons for their conduct.

Pennsylvania courts have recognized "... the difficulty in obtaining affirmative, positive evidence of discrimination ..." Slippery Rock St. College vs. Pennsylvania Human Relations Commission, 11 Pa. Cmwlth. Ct. 501, 314 A.2d 344, 346 (1974). In St. Andrews Development Co., Inc., vs. Pennsylvania Human Relations Commission, 10 Cmwlth. Ct. 123, 308 A.2d 623 (1973), the Commonwealth Court held:

We recognize that in human relations cases it is rare for the respondent to have made positive statements or to have performed patent acts of discrimination; and therefore, many cases must be resolved by findings of discrimination based upon inferences and circumstantial evidence. *Id.*, at 10 Pa. Cmwlth. Ct. 130.

Resolution of this case therefore requires close examination of each of Respondents' proffered reasons for reassigning Ms. Hinkle from police to clerical duties. For the reasons which follow, we find none of their reasons to be persuasive, and hold that their reassignment of Ms. Hinkle was an act of discrimination based on her sex.

Respondents initially urge that Ms. Hinkle was in fact hired as a clerk typist, not a police officer, and that the change in her duties was thus not an adverse action, and not discriminatory. The evidence relied upon in support of this assertion is the fact that on her SCAM application forms, she was indeed designated as a clerk typist.

This argument, as Complainant urges, flies in the face of reality. The record overwhelmingly supports Complainant's assertion that she was hired as a police officer.

It should be noted first that Complainant had no clerical training or experience prior to February of 1977. She did, however, have police experience -- much of it with Weatherly Borough. Between 1975 and 1977, Complainant attended the Pennsylvania State University, majoring in law enforcement and corrections. When a clinical course required her to work for an agency doing work in her major field, she obtained a paid position with the Borough as a special officer. Between June of 1976 and January of 1977, she performed regular police duties for the Borough. Respondents' assertion that she had no qualifications for a police position is contradicted by facts to which they stipulated at Public Hearing.

Stipulated documents establish as well that the Borough Council itself claimed in the minutes of its meeting of February 23, 1977, to have hired Ms. Hinkle as a police officer. Again on April 11, 1977, the Council meeting minutes reflect the Council's own understanding of Complainant's position, stating that "Officer Cheryle Hinkle started the 12 week Municipal Police Course."

Complainant's actual duties between February and June of 1977 also indicate that she was hired as a police officer. She was issued regular police equipment, including a sidearm,

and performed regular police duties, with the full knowledge and consent of Respondents.

Likewise, Complainant's attendance at the Police Academy is not consistent with Respondents' assertion that she was hired to do clerical work. Nor did the record establish that there was or ever had been any need for a clerk in the police department. To the contrary, Complainant's uncontested testimony was that her clerical duties occupied her for roughly one hour per day.

Respondents asserted at Public Hearing that their hiring of Ms. Hinkle in February of 1977 was motivated at least in part by their desire to obtain federal funding, from the Law Enforcement Assistance Agency, for various items of police equipment. Their understanding at the time of filing the LEAA application was that only five person police departments would receive the federal funds. They therefore requested funding from SCAM for two police officers; when told by SCAM that only one officer could be funded, it was agreed that SCAM would fund one officer and one clerk typist, but that both persons would function as police officers. Testimony further established that Respondents did not become aware until they had received the LEAA funds, in the spring of 1977, after Complainant was hired, that five officers were not required. It is therefore an inescapable inference that on the LEAA grant application, Respondents represented that Ms. Hinkle was employed by them as a police officer.

Respondents had thus placed themselves in the position of hiring Ms. Hinkle for the purpose of performing police duties, paying her salary with CETA funds through an agency which if only on paper designated her as a clerk typist, apparently representing her to yet another federal agency as a police officer, permitting her to perform police duties for several months, and referring to her as a police officer in their own Borough Council meeting minutes. In the face of this confusion, created in part by Respondents, reliance may reasonably be placed on their own Council meeting minutes and on the duties which Ms. Hinkle in fact performed those of a police officer.

Respondents' reliance on Pennsylvania Human Relations Commission vs. Beaver Falls City Council et al., 366 A.2d 911, (1976), for the proposition that Ms. Hinkle was in fact a clerk typist, is puzzling in the extreme. The Pennsylvania Supreme Court there quoted with approval the Commonwealth Court's definition of the term "police officer":

As Judge Rogers put it in his opinion for a unanimous Commonwealth Court, 'the title of policeman [may] be properly applied to one who performs services critical to public safety in the investigation and detection of serious crimes -- a person trained, equipped (with ... gun, handcuffs, badge or office and motor vehicles) and actually engaged in the detection of persons suspected of crime.' Beaver Falls City Council et al. vs. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 17 Pa. Cmwlth. 31, 330 A.2d 581, 583 (1975). This definition is in accord with prior opinions which have addressed the issue. McNitt vs. Philadelphia, 325 Pa. 73, 189 A.300 (1973); Veneri vs. County of Allegheny, 5 Pa. Cmwlth. 105, 289 A.2d 523 (1974); County of Allegheny vs. Hartshorn, 9 Pa. Cmwlth. 132, 304 A.2d 716

(1973). Aff'd 460 Pa. 560, 333 A.2d
914 (1975).

Beaver Falls thus establishes the principle that controversy as to the nature of an individual's job is to be resolved by examination of the duties actually performed by that person. Conduct of the employer may also be examined: the issuance to an employee of equipment generally associated with police work tends to disprove the employer's claim that the individual was in fact hired to fill another job. Complainant has established that she performed police duties and was issued police equipment. Beaver Falls thus compels this Commission's conclusion of law that Complainant was hired by Respondents as a police officer.

This conclusion necessitates analysis of the remainder of Respondents' explanations for the sudden change in Complainant's duties from (stereotypically masculine) police work to (stereotypically feminine) clerical functions. In spite of their assertion that she was hired as a clerk, the remainder of their defenses indicate that at all relevant times they too considered her a police officer, and decided in the late Spring of 1977 to do everything in their power to alter that fact.

B. THE SECTION 5(a) and 5(d) CHARGES: JOINT DEFENSES

Section 5(d) of the Act provides in pertinent part:

It shall be an unlawful discriminatory practice ... for any employer ... to discriminate in any manner against any individual ... because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this Act.

43 P.S. 955(d)

Pennsylvania's Commonwealth Court in Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission vs. Thorpe, Reed and Armstrong, Pa. Cmwlth., 361 A.2d 497, (1976), enunciated the requirements for establishment of a Section 5(d) violation:

It must be noted, however, that an unlawful discriminatory practice may be established upon a well supported finding that an employer has taken "any manner" of discriminatory action against an individual because he or she has filed a charge under the Act, and that neither animosity nor resentment need be shown to establish a violation.

Id. at 502

Thorpe, Reed makes clear, as well, that the validity of the Section 5(d) claim does not depend upon the validity of the charge first filed: the underlying complaint in that case had not yet been adjudicated.

Proof of a Section 5(d) charge therefore requires only proof that:

1. Complainant filed a charge against Respondents;
2. Respondents subsequently took adverse action ("discriminated in any manner") against Complainant;
3. Respondents' adverse action was taken because Complainant filed a charge against them.

It is uncontroverted that Complainant did file a charge against Respondents, and that they subsequently took adverse action against her by termination of her employment. Thus, as with the Section 5(a) charge, resolution of this complaint requires analysis of Respondents' explanation for the termination. Here too direct proof of discriminatory intent is not required.

The essence of Respondents' explanation for their treatment of Ms. Hinkle may be summarized as follows:

During the spring of 1977, while Complainant was attending the Police Academy, the Weatherly Borough Council decided to limit its police departure to two people. The hiring of Complainant and the other SCAM employee, Joseph Sando, had brought the number of police officers up to five -- the number once thought to be required for obtaining the LEAA monies discussed supra. After Complainant's departure to attend the Police Academy, two officers resigned: Joseph Sando, and a regular officer named William Wagner. This, clearly, left two regular police officers -- and Ms. Hinkle. While the matter is not totally clear, Respondents seem to argue that both the

change, in duties and the eventual termination were means to the end of limiting the number of police officers to two.

The decision to so limit the size of the department, Respondents assert, was in its turn prompted by several considerations: the desire to avoid creation of a civil service commission; a contract demand made by the regular police officers, which initially referred to the size of the department and included a threat of arbitration; the fear that Ms. Hinkle would gain tenure; and an underlying general wish to conserve the Borough's limited financial resources. These will be discussed seriatim.

1. The Threat of Arbitration

In early April, 1977, the Borough Council received a letter, dated April 11, 1977, and introduced by Respondents as Exhibit R-1. The letter, signed by officers O'Donnell and Wagner, was a statement of intent to commence collective bargaining between the Council and the police department for a contract to commence January 1, 1978. The letter listed numerous requests relating to wages, benefits, working conditions and the like. Its paragraph twenty stated in pertinent part:

In order to continue to fully protect the public's health, safety and welfare, there shall be no layoffs, furloughs, terminations of employment or other reduction in the number of police officers employed during the term this contract or arbitration award except for

normal attrition ... matters of financial exigency or other financial considerations shall constitute a basis for layoff, furlough, or termination ... If the parties are unable to reach agreement, then the matter shall be submitted to final and binding arbitration ...

Respondents' witness Romberger, a Council member from January of 1974 to January of 1978, testified that this letter, and particularly paragraph twenty, created a "shockwave" in Council, and influenced the decision to limit the size of the police force.

Other facts of record draw the realistic impact of this shockwave into question, however.

First, the letter itself did not refer to either SCAM employee, nor did paragraph twenty mention any specific number of officers.

Second, before Complainant's return from the Police Academy, two regular Police Officers had resigned, and the specter of an entrenched five person police department had, or should have, receded. Even including Ms. Hinkle, the department now had three members -- as it had, continuously, since 1975.

Finally, it is uncontroverted that Council and the police department had arrived at a settlement by late 1977 -- well before Complainant's termination. This settlement did not include paragraph twenty, or indeed any reference to either the size of the department or the acceptable reasons for termination of police personnel. The threat of arbitration, whatever its initial impact, can not reasonably explain or justify

in any way Respondents' decision to terminate Ms. Hinkle.

2. The Civil Service Commission

Respondents urged vigorously at Public Hearing, and again in their brief, that their "removal" of Ms. Hinkle from the police force was motivated by their wish to avoid creation of a civil service commission, which they assert would have been financially unfeasible. Their use of the term "removal" seems to encompass both her reassignment to clerical duties and her eventual termination; their argument as to financial infeasibility seems to go to the costs both of forming the commission and of eventually being required to pay Ms. Hinkle's salary.

Respondents point to 53 P.S. 46171 et seq., that portion of the Borough Code requiring the creation of a civil service commission when a borough's police department has three or more members. While the cited sections do require that such a commission be created, the Borough's sudden decision to comply with the Code, at the expense of Complainant, remains essentially unexplained.

The cited sections of the Borough Code were enacted in 1966. Between 1975 and 1977, the Borough continuously employed three police officers; at no time during this period did it create the required commission. As already noted, the hiring of Complainant and Joseph Sando in February of 1977 arguably brought the number of officers to five -- "arguably" both because of Respondents' own assertion that Ms. Hinkle was a

clerk and because of the supposed confusion (prior to a 1978 amendment to §46171) regarding the status of CETA employees' ability to activate the civil service requirement.

Further, the Borough's Council meeting minutes for the April 11, 1977 meeting reflect the fact that two of the required three members of the Commission were in fact appointed, by unanimous vote of the Borough Council, with the statement that a third member would be appointed subsequently. This was never done. Nor does any explanation of the Borough Council's change of heart between April and June of 1977 appear in the minutes of its meeting. After two years of open violation of the Borough Code's requirement, and an apparently uncontroversial decision to achieve compliance by forming the necessary commission, the matter was simply dropped. Respondents' claim of economic hardship leave a number of important questions unanswered.

Chief among these is why, after at least two years of employing three police officers, it became impossible in the spring of 1977 to contemplate doing so even at an indefinite point in the future when Complainant's SCAM funding ran out -- Respondents' concern was with matters which were, in fact, obviously quite speculative: the expectable duration of the SCAM stipend was unknown; Complainant's own plans were unclear. Most important, it was not at all clear, in the spring of 1977, that the civil service commission provisions of the Borough Code were applicable to CETA employees. Thus, at least as to their eventual liability for Complainant's salary, Respondents had no more cause for alarm in June of

1977 than they had had the preceeding February, when she was hired.

Further, Respondents failed to produce a single bit of evidence as to the potential cost of forming a civil service commission. The Borough Code specifically provides that the commissioners shall serve without compensation (53 P.S. §46172). Certainly, other costs would be involved. Credibility is strained, however, by Respondents' assertion that these costs, nowhere calculated or discussed, were sufficient to cause Council to rescind its April 11, 1977 decision to form a civil service commission, and to do so without any official action at all.

3. The Matter of Tenure

Respondents further urge that, had Ms. Hinkle been employed as a police officer for more than one year, she would have gained tenure under the provisions of 53 P.S. 812, the "Police Tenure Act." As with the issue of the civil service commission just discussed, the tenure problem is claimed by Respondents to have motivated both Complainant's reassignment to clerical duties and her eventual termination.

Respondents' concern seems misplaced, given the clear pronouncement of 53 P.S. 811 that:

This act shall apply to each township of the second class, to each borough ... having a police force of less than three members and not subject to sections one thousand one hundred sixty five through one thousand one hundred ninety of the act ... known as the "The Borough Code"...

(emphasis added)

Thus, according to Section 811, either the Borough Code or the provisions following Section 811 govern the issue of police tenure -- but not both. Respondents' concerns regarding the civil service commission and the Police Tenure Act would seem to be mutually exclusive. Even if the provisions of 53 P.S. 811 et seq., did apply, Section 813 provides, as Respondent point out, that political subdivisions subject to the section retain the power to furlough police personnel, "for reasons of economy or other reasons." Thus, even if it were believable that Respondents, in the spring of 1977, suddenly concluded that they could no longer afford three police officers, it is not credible that they feared being forced to do so by the provisions of the Police Tenure Act.

4. General Economic Considerations

As already noted, much of Respondents' explanation of their treatment of Ms. Hinkle revolves around an underlying argument that the Borough could not afford to maintain a three person police force. The tenuous nature of this claim in the context of the civil service commission issue has already been discussed. Full treatment of this issue requires fuller explanation of the funding arrangement between Respondents and SCAM.

As previously stated, Complainant and Joseph Sando were hired by Respondents at the same time; both were funded by SCAM. SCAM's unwillingness to fund two police officers has already been alluded to. SCAM therefore authorized funding for one clerk typist and one police officer. It was Respondents who decided that Sando would get the police position, although there was conflicting testimony at Public Hearing as to exactly who made the decision.

SCAM's allotment for the two positions was not equal. They provided \$6,000 for the police position; \$5,000 for the clerical one. Respondents thereupon agreed to pay \$1,000 in Borough funds to equalize the two salaries. This \$1,000 was of course paid to Complainant.

SCAM initially agreed to fund the two positions for one year, from February, 1977 to February, 1978. Testimony at Public Hearing established that the possibility of an ex-

tension past February of 1978 was made known to Respondents at the outset; it was said to be common knowledge in the area that many if not most CETA employees received funding for a period exceeding one year.

Sando's resignation in April of 1977 left his position open -- a position that, unlike Ms. Hinkle's, did not involve supplementary payments from the Borough. In spite of repeated suggestions that they do so, Respondents never formally approached SCAM to request that Ms. Hinkle be transferred to Sando's position. This step would have saved the Borough many months of supplementary payments. The fact that they failed to explore it casts doubt upon their claim of wishing to conserve Borough funds.

A step that was explored, but never implemented, was leaving Complainant in the position labelled clerical but continuing to use her for police work, as had been done between February and April of 1977. By letter dated September 14, 1977, Respondent Stratchko inquired of SCAM whether this arrangement would be permissible. In spite of an affirmative answer from SCAM, Complainant was never allowed to return to police work. It is significant here that the Borough at no time had genuine need of a clerk in the police department. Complainant's testimony that her clerical duties occupied her for a small fraction of each day was never contradicted. Nor was it seriously contested that the Borough did need the services of extra

police officers during the same time period. Respondents would thus have us believe that they supplemented the salary of an unnecessary clerk while depriving themselves of the needed and gratis services of a police officer, and all in the name of saving money.

Finally, the expected extension in Complainant's CETA funding had been granted by December, 1977, before Complainant was terminated. Stipulated Exhibit No. 36 establishes that Respondent Stratchko had knowledge of the extension early in December. Respondents thus had no legitimate financial motive for terminating Complainant in February of 1978. Their explanation to SCAM that the services of a clerk were "no longer" required understates the matter. The services of a clerk had never been required.

SUFFICIENCY OF EVIDENCE

For the reasons articulated supra, this Commission finds Respondents' explanations of their reassignment and termination of Ms. Hinkle to be unpersuasive. We are well aware of the absence of direct proof that either act was motivated by proscribed considerations. However, as discussed above, direct proof is not required -- only sufficient evidence to permit reasonable minds to conclude that the reasons advanced by Respondents were pretextual, and to infer the existence and operation of discriminatory motives. Pennsylvania's Commonwealth Court has stated in A.P. Weaver & Sons vs. Sanitary Water Board, 3 Pa. Cmwlth. 499, 505, 284 A.2d 515, 518 (1971) cited with approval in St. Andrews Development Co., Inc. vs. Commonwealth, Pennsylvania Human Relations Commission, Pa. Cmwlth., 308 A.2d 623, 625:

Substantial evidence should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision

...

("might" emphasized in the original; remaining emphasis added)

Additional facts of record, while not determinative, tend to lend further support to Complainant's position.

First, Complainant was the first and only female police officer in the Borough's history. Even more significant is the

fact that she was the only CETA employee, of a total of seven, who was terminated during the period between 1975 and 1978. Finally, at no time did Respondents indicate to Complainant that her performance as a police officer was other than satisfactory.

While these facts do not, of course, prove discriminatory or retaliatory intent, they may properly be considered as probative. See Furnco Construction Corp. vs. Waters, _____ U.S. _____, 17 FEP 1062 (1978).

Therefore, for all of the reasons articulated in this opinion, this Commission finds that Respondents discriminated against Complainant on the basis of her sex by hiring her as a police officer and assigning her to clerical duties, in violation of Section 5(a) of the Act. We further find that Respondents retaliated against Complainant by terminating her from her employment, because she had filed a prior charge against them, in violation of Section 5(d) of the Act.

DAMAGES

Our finding of discriminatory treatment, including retaliatory termination, leads necessarily to consideration of appropriate relief.

Section 9 of the Act provides in part:

If upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in ... any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue ... 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 ... back pay ... as, in the judgment of the Commission, will effectuate the purposes of this act ...

Any complainant entitled to back pay should receive an amount which will restore that person to the economic position in which he or she would have been had it not been for the discriminatory act. The method used to calculate the back pay award need been only reasonable and realistic, not mathematically precise. See Pennsylvania Human Relations Commission vs. Transit Casualty Insurance Company, Pa. Cmwlth. 340 A.2d 624; Pettway vs. American Cast Iron Pipe Co., 494 F. 2d 211 (5th Cir., 1974).

The record establishes clearly in this case that Complainant's earnings were \$6,000.00 yearly, or \$115.38 per week. Had it not been for Respondents' retaliatory termination, she

would have continued to earn this amount from February 24, 1978 through September 30, 1978, the period of extension authorized by SCAM.

The record also establishes that the Borough directly paid for Complainant's Blue Cross/Blue Shield coverage, at the rate of \$24.95 monthly. She is therefore entitled to receive this sum at the monthly rate of \$24.95 for the period between February 24, 1978 and September 30, 1978.

Finally, Pennsylvania law provides for the assessment of interest on a backpay award at the rate of 6%, compounded annually. See Goetz vs. Norristown Area School District, Pa. Cmwlth., 328 A.2d 579 (1975).

The Commission is aware that Respondents would not have paid Ms. Hinkle the entire amount described above, had it not been for their unlawful termination of her; SCAM would have continued to fund her at the rate of \$5000 yearly. This does not, however, preclude assessment of the entire amount against the Borough.

Initially, it is obvious that SCAM, never named as Respondent, cannot be required to provide relief to Complainant.

More significantly, the record establishes clearly that Respondents, and they alone, were responsible for terminating Ms. Hinkle. At no time did they attempt to attribute responsibility to SCAM; nor could they, since the record establishes that as of February of 1978, SCAM remained ready and able to sponsor Ms. Hinkle through at least September of 1978. Transit

Casualty, cited supra, clearly permits assessment of backpay damages against the party who performed the discriminatory act, whether or not that party paid the Complainant's salary, in whole or part, at the time the complaint arose.

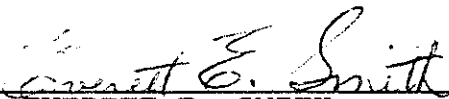
Wherefore, having concluded that Respondents discriminated against Complainant on the basis of her sex by hiring her as a police officer and then assigning her to clerical duties, in violation of Section 5(a) of the Act, and having further concluded that their termination of her was retaliatory and in violation of Section 5(d) of the Act, this Commission finds that she is entitled to back pay and payment for medical insurance, plus interest, as described above.

RECOMMENDATION OF HEARING COMMISSIONER

AND NOW, this ____ day of _____, 1979, in consideration of the entire record in this matter, including the Complaints, Stipulations of Fact, Exhibits, Record of the Hearing, and Briefs filed on behalf of Complainant and Respondents, the Hearing Commissioner hereby adopts the attached as his proposed History of the Case, Findings of Fact, Conclusions of Law, Opinion and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:



EVERETT E. SMITH
Presiding Commissioner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHERYLE HINKLE,
Complainant

vs.

DOCKET NO. E-13029

WEATHERLY BOROUGH, LEONARD
STRATCHKO, Manager; JOHN
TIMKO, Personnel Chairman,
Respondents

and

CHERYLE HINKLE,
Complainant

vs.

DOCKET NO. E-13553

WEATHERLY BOROUGH COUNCIL,
EDWARD DODSON, Mayor/Councilman,
LEONARD STRATCHKO, Mayor,
Respondents

COMMISSION'S DECISION AND FINAL
ORDER

AND NOW, this _____ day of _____, 1979, upon
consideration of the full record in this case and of the fore-
going Recommendation of the Hearing Commissioner, and pursuant
to the provisions of Section 9 of the Human Relations Act,
the Pennsylvania Human Relations Commission hereby adopts the
foregoing History of the Case, Findings of Fact, Conclusions

of Law, and Opinion, and therefore,

O R D E R S :

1. That Respondents shall cease and desist from discriminating against any individual on the basis of that individual's sex;

2. That Respondents shall not retaliate against any individual who took part in this case, or any other case filed under the Act;

3. That [Respondents] shall pay Complainant backpay in the amount she would have received from them had she remained in their employe until September 30, 1978 along with payment for medical insurance, plus interest at the rate of 6% per annum, all as described in the foregoing Opinion.


4. That Respondents shall submit proof of payment to Complainant of the amount described in No. 3, supra, to Commission staff, within forty-five days of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____

JOSEPH X. YAFFE
Chairperson

ATTEST:



ELIZABETH M. SCOTT
Secretary