COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

HISTORY OF THE CASE

On November 27, 1974 Complainant, David E. Howell, filed a complaint with the Pennsylvania Human Relations Commission alleging that the Respondent, the Board of Directors of the School District of Erie, violated §5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (the Act), by denying him two(2) days of paid leave of absence to observe two holidays in accordance with his religious belief while granting a majority of employees the right to observe their religious holidays without financial penalty. He further alleged that this action was taken against him because of his religious creed, Jewish. The complaint was subsequently amended On May 2, 1978 to include the allegation that the unlawful discriminatory practice is of a continuing nature.

An investigation of the allegations was conducted pursuant to §9 of the Act resulting in a Finding of Probable Cause to credit those allegations. An effort to conciliate the matter as mandated by §9 failed and the case proceeded to a Public Hearing on May 2, 1978 before Alvin E. Echols, Esquire, Presiding

Commissioner and Commissioners Mary Dennis Donovan, C.S.J. and Everett E. Smith. Benjamin G. Lipman, Esquire acted as Legal Advisor to the Hearing Panel, William B. Churchill, Esquire appeared on behalf of the Complainant and John W. Beatty, Esquire appeared on behalf of Respondent.

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SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

FINDINGS OF FACT

1. The Complainant herein is David E. Howell, 3904 Mertyl Street, Erie, Pennsylvania. (Exh. C-1, N.T. 19)

2. The Respondent herein is the Board of Directors of the School District of the City of Erie, Pennsylvania, 1511 Peach Street, Erie, Pennsylvania. (Exh. C-1)

3. The Complainant is presently and has been employed as a classroom teacher by the Respondent since September,1959. (N.T. 19, 48)

4. The Complainant is presently and has been a faithful practicing member of the Jewish faith for more than 20 years. (N.T. 20, 21, 45)

5. By memo dated September 11, 1974, Complainant requested leaves of absence without penalty for the observance of the 2 major Jewish holidays on the 17th and 26th of September. (Exh. C-4, N.T. 20-21)

6. Complainant's memo of September 11, 1974 was properly directed to his building supervisor, a Respondent employee, James Murphee. (N.T. 21, 29)

7. The two days for which Complainant sought leave by his September 11, 1974 memo were Rosh Hashanah and Yom Kippur, the most significant days in the religious year for the Jewish people , observed by prayer, repentance and attendance at religious services. (N.T. 22-23)

8. To have attended to the requirements of his job for the days he sought leaves of absence by his September 11, 1974 memo would have interfered with Complainant's religious observance of Rosh Hashana and Yom Kippur. (N.T. 23)

9. Complainant's request by memo of September 11, 1974 was responded to by Respondent's Superintendent of Schools, Mr. Richard R. Hilinski, who wrote on the back of Complainant's memo "approved as unpaid leave, 9/13/74" above his signature. (Exh. C-4, N.T. 29-30)

10. A collective bargaining agreement between Respondent and the Erie Education Association governing the terms and conditions of Complainant's employment was not in effect in September 1974 but was effective for the period January 10, 1975 to June 30, 1978. (Exh. C-6, N.T. 24, 31)

11. After the January 10, 1975 effective date of the new collective bargaining agreement, Complainant's leaves of absence for September 17 and 26, 1974 were changed from unpaid leave to personal days. (N.T. 31-32)

12. When the collective bargaining agreement became effective on January 10, 1975, all employees who so desired, like Complainant, were permitted to apply personal leave against leave taken without pay, retroactive to the beginning of the school year in September, 1974. (N.T. 73-74, 85)

13, The collective bargaining agreement permits two personal leave days for the 1974-75 and 1975-76 school years and three personal leave days for the 1976-77 and 1977-78 school years. "Such leave shall be used for matters which cannot be scheduled outside of school hours." (Exh. C-6/p.22, N.T. 33)

14. The allowance of personal leave days was not mandated by the Pennsylvania School Code but was a right of teachers that derived from the collective bargaining agreement between the Respondent and the Erie Education Association. (N.T. 74)

15. By letter dated August 18, 1975 to James Murfee, principal at Respondent's Wilson Middle School, Complainant requested a leave of absence, without penalty, for the purpose of attending high holy day services on Yom Kippur, September 15, 1975 . (Exh. C-7, N.T. 34)

16. By letter dated September 12, 1975 to James Murfee, Complainant noted that his August 18 letter was not answered and, under protest, he changed his August 18 request to a request for use of a personal leave day in order to observe Yom Kippur on September 15, 1975. (Exh. C-8, N.T. 36-37)

17. Complainant's request letters of August 18 and September 12 were properly directed to his immediate supervisor, Mr. Murfee. (N.T. 35)

18. Complainant's September 12 request for use of a personal leave day on September 15 was granted by Respondent. (N.T. 37)

19. By letter dated August 23, 1976 to James Murfee, Complainant requested a leave of absence, without penalty, for the purpose of attending high holy day services on Yom Kippur, October 4, 1976 . (Exh. C-9, N.T. 37-38)

20. Complainant's August 23, 1976 request was approved as a personal leave day. (N.T. 38-39)

21. By letter dated August 22, 1977 to James Murfee, Complainant requested leave of absence, without penalty, for the purpose of attending traditional high holy day services on Yom Kippur, September 22, 1977 and Rosh Hashanah, September 13, 1977 . (Exh. C-10, N.T. 40-41)

22. Complainant's August 22, 1977 request was approved as personal leave days. (Exh. C-11, N.T. 41-43)

23. The Collective Bargaining agreement effective from January 10, 1975 to June 30, 1978 provided for certain holidays, during which Respondent's employees subject to the contract would not be obliged to work. These holidays included seven days for Christmas and three days for Easter - Thursday, Friday and Monday. No Jewish holidays were scheduled. (Exh. C-6/ p.11, N.T. 32-33)

24. As a practicing member of the Jewish faith, Complainant does not observe the holidays of Christmas or Easter. (N.T. 28)

25. By utilizing personal leave days for the observance of religious holidays in 1974, 1975, 1976 and 1977, Complainant did not have the same number of personal leave days available to him to use for non-religious purposes as did other employees. (N.T. 44)

26. Respondent has never prevented Complainant or any other employee from taking a day off for religious observance. (N.T. 52, 66, 68-70, 89-90)

27. The dates upon which Rosh Hashanah and Yom Kippur are celebrated are determined in accordance with the Jewish calendar and so may fall on different dates and days, including Saturdays and Sundays, in different years. (N.T. 58-59)

28. The Collective Bargaining agreement in effect from January 10, 1975 to June 30, 1978 established 184 days of classroom instruction and 6 non-classroom days to be worked by teachers and for which teachers were to be paid. Teachers are not paid for holidays, including those scheduled around Christmas and Easter. (Exh. C-6/p.11, N.T. 67-68, 71)

29. Holidays are not leave days but rather are days when no work is scheduled and for which employees are not paid. (N.T. 68, 77-79)

30. The Pennsylvania School Code requires that a school district provide for a minimum of 180 days of instruction per year. (N.T. 70)

31. Many days that are scheduled working days for Respondent's school teachers represent holidays for various religious groups. (N.T. 70)

32. If Respondent were to designate every day that had religious significance for some faith as a holiday, it would be difficult or impossible to meet the 180 day requirement of the Pennsylvania School Code. (N.T. 71)

33. It is not practicable to have the Complainant make up the time taken off for religious observance at any other time. (N.T. 67)

34. In accordance with Pennsylvania law the dates on which holidays are scheduled and the number of days for holidays are matters that are negotiable between school districts such as Respondent and teacher's unions such as the Erie Education Association. (N.T. 79)

35. Days scheduled as holidays were so scheduled in the course of negotiating a collective bargaining agreement between Respondent and the Erie Education Association. (N.T. 68, 79-80)

36. In the course of negotiations, Respondent accepted the Association's suggestion that a three-day holiday be scheduled aroung Easter. (N.T. 80-81)

37. Scheduling a school holiday around Easter has been done traditionally in Respondent's school district. (N.T. 81, 97-100)

38. The Christian holidays of Easter and Christmas have taken on certain commercial and secular attributes in contemporary American society. (N.T. 93-94, 101-102, 118-124)

39. Christmas and the Thursday and Friday before Easter are significant days in the observation of Christianity (N.T. 109, 118, 124-125)

40. The Monday following Easter is not a significant day in the observation of Christianity. (N.T. 110)

COMMONWEALTH OF PENNSYLVANIA

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DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (the Commission) has jurisdiction over the parties and subject matter of the complaint in the above-captioned case pursuant to the Pennsylvania Human Relations Act, Act of October 27, 1955 P.L. 744 as amended, 43 P.S. Section 951 et seq. (the Act).

2. All procedural prerequisites to a public hearing as set forth in §9 of the Act were complied with in this case.

3. Complainant did not establish by substantial evidence that Respondent had any religious motive or that Respondent intended to benefit any particular religious group or groups in scheduling school holidays.

4. Complainant did not establish by substantial evidence that any of the school holidays scheduled by Respondent was other than secular in nature.

5. Section 5.1(b) of the Act is not applicable to a case such as this one where the Respondent-employer is not a political subdivision as defined at §4(m) of the Act; however, §5.1(b) is

instructive for purposes of determining what obligations the Legislature intended to impose upon Respondent School District to accommodate the religious needs of its employees.

6. Respondent's conduct in scheduling school holidays for the school years 1974-75 through 1977-78 did not directly or indirectly impose unlawfully discriminatory burdens on Complainant because of his religion and religious practices in violation of §5(a) of the Act.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL, Complainant	:	
v.	:	DOCKET NO. E-8174
SCHOOL DISTRICT OF THE CITY OF ERIE, BOARD OF DIRECTORS, Respondent	:	

OPINION

The gravaman of the complaint in this case is that the Respondent School District has engaged in an unlawful discriminatory practice in violation of §5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (the Act), by establishing certain days connected with Christian religious holidays as school holidays, i.e., unpaid days when school is not in session and when, therefore, teachers need not work; and that this scheduling practice has the effect of allowing Christian employees to observe their religious holidays without work related interference; but that Complainant, who is Jewish, can only observe the Jewish religious holidays of Rosh Hashanah and Yom Kippur, by absenting himself from work and using some of the limited number of personal leave days granted him under terms of his employment contract.

A threshhold problem for this Commission is to identify an appropriate analytical framework for the resolution of this

case which does not fit neatly and exclusively into any of the ordinary categories. The complaint alleges, in effect, that Complainant has been victimized by unlawful disparate treatment, i.e., that he has been treated differently than others because of his religion. However, coupled with the proof offered at the Public Hearing, the complaint also has elements which might invoke what is commonly characterized as disparate impact analysis, i.e., analysis applied to a facially neutral policy which has the effect of disproportionately burdening one class.

The U.S. Supreme Court recently explained and distinguished these two modes of analysis:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate impact theory.

International Brotherhood of Teamsters v. United States, 431 U.S. ____ , 335, n. 15 (1977).

The Teamsters case, quoted above was, of course, decided pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. However, the Pennsylvania Supreme Court has made clear that Title VII is a federal analogue to §5(a) of the Human Relations Act, General Electric Corporation v. PHRC, 469 Pa. 292, 365 A.2d 649 (1976), and thus the Teamsters distinction

between and ordinary federal court application of the disparate treatment and disparate impact modes of analysis can be considered readily adoptable to §5(a) cases. The irony and difficulty with the present case is that it is a hybrid and seems to be somewhat subject to both analytical modes.

If Complainant's allegation is treated simply as one of disparate treatment, his burden of proof includes showing that Respondent intended to treat him differently - not necessarily that Respondent intended to treat him unlawfully, just differently. This showing must be made by substantial evidence. J. Howard Brandt, Inc. v. PHRC, 15 Pa. Cmwlth. 123, 324 A.2d 840 (1974). Such a showing has not been made on the record of this case.

Little testimony was elicited at the Public Hearing relating to school holidays scheduled around any events other than the Christian holiday of Good Friday. And even the Good Friday testimony does not appear to have been intended to show that Respondent had a religious motive in scheduling Good Friday as a school holiday or in any way wished to promote or encourage the observance of Good Friday. Rather, there was substantial testimony on the record that Good Friday was made a school holiday as a result of good faith collective bargaining and as a continuance of long standing tradition in the school district.

Of course, the Commission recognizes the religious origins of Good Friday and recognizes that school holidays were not scheduled on Good Friday every year, merely by virtue of the date having been coincidentially plucked at random from the

calendar. The origin of the tradition is no doubt tainted by recognition of Christian observance of Good Friday as a holy day. Nevertheless, the Commission has found, based on the evidence, and also takes notice of the fact, that Easter related holidays have taken on substantially secular characteristics in contemporary America.

Had Respondent, to facilitate observance or for other religious reasons, scheduled Good Friday or any other Christian holy day as a school holiday the complaint in this case would be meritorious. However, there is no suggestion in the evidence that Respondent had such motives, and in light of the substantially secular nature of the Christian Holy Week, the Commission cannot, without substantial evidence to the contrary, infer any intent on the part of Respondent to benefit Christians. In other words, it cannot be presumed and Complainant has not established by substantial evidence that Good Friday or any other day was scheduled as a school holiday because of the religious significance of the day to Christians. Thus having failed to establish any intentional nexus between Respondent's scheduling of holidays and recognition of the Christian faith, Complainant has not carried his disparate treatment burden of proof.

However, as previously acknowledged, there are also elements of this case which appear to properly invoke a disparate impact analysis. Even under the very liberal standards for class action pleading set forth by our state Supreme Court in PHRC v. Freeport Area School District, ____ Pa. ____, 359 A.2d 724 (1976), the allegations in this complaint cannot be construed

to be class allegations. They are allegations of discrimination perpetrated against an individual plain and simple - they allege that Complainant alone was discriminated against, i.e., treated differently, because of his religion.

Nevertheless, disparate impact analysis suggests itself. The Respondent actions are neutral on their face and negatively effect Complainant, he alleges, because he is Jewish. But they are not directed against him personally. They would similarly impact any practicing Jew employed by Respondent. Thus, setting aside the technical niceties of pleading, the allegations can be read as asserting and the evidence clearly supports the proposition that Complainant, as a committed member of the Jewish faith,and by implication all practicing Jews must absent themselves from employment and make use of the limited number of personal leave days allotted under the terms of their employment contract, in order to observe the holiest days of the Jewish year. On the contrary, Respondent's Christian employees can observe certain religious days, at least Good Friday, without incurring any such hardship. Thus, Respondent's facially neutral scheduling policy has a disparate impact upon or negatively effects all observing members of the Jewish faith (and presumably other faiths as well).

Respondent can only defend against this prima facie showing of disparate impact with a demonstration by substantial evidence that it had a good business justification for the arrangement of its school schedule. The Commission believes that Respondent has sustained its burden of demonstrating such

a business justification, and in reaching this conclusion, is particularly influenced by the instructive pronouncement of the Pennsylvania Legislature at §5.1(b) of the Human Relations Act. Section 5.1(b) provides:

> Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of public business, no person employed by the State or any of its political subdivisions shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

The above quoted language limits the applicability of §5.1(b) to "person(s) employed by the State or any of its political subdivisions." "Political subdivisions" are defined at §4(m) of the Act as: ". . . any county, city, borough, incorporated town or township of this Commonwealth." Thus, notwithstanding the apparent contrary assumption of all parties to this action and notwithstanding previous inconsistent Commission actions and cases, §5.1(b) is not applicable in a case such as this where Respondent employer is a school district, but not a "political subdivision."

Nevertheless, because of the similarity for these purposes between "political subdivisions" and school districts, this

Commission regards §5.1(b) as instructive with respect to the nature of the legislatively imposed obligation owed by the Respondent to Complainant. In other words, the Commission regards §5.1(b) as a legislatively sanctioned limitation on how far a political subdivision (and by analogy, any other public employer such as Respondent school district) need go to accommodate an employee's religious convictions - a legislative determination of how much religious accommodation is consistent with sound business practices in the public sector.

The evidence clearly establishes that Respondent has complied with §5.1(b). Complainant was never required to remain at his place of employment during the Jewish high holy days. The proviso in §5.1(b) gives the employer much latitude in either 1) requiring the employee to make up the absence at another time; 2) charging the absence against paid leave; or 3) charging the absence against unpaid leave (in that order). In this case, it has been established by substantial evidence that it would not be practicable for the Complainant to make up his absence. The Respondent, exercising its judgment, thus acted in accordance with the Act by charging the absence to the paid personal leave granted the Complainant by the collective bargaining agreement.

In addition to compliance with §5.1(b) as a sound business justification, Respondent also has established another plain and practical business reason for its scheduling policy. The evidence and common sense plainly support the notion that virtually every day on the calendar is a holiday or significant

day in the observance of one of the many religions represented in our contemporary, pluralistic society. A school holiday, even if scheduled by chance, is likely to fall on a day of observance for some religious sect, thus disparately impacting non-members of that sect. But to schedule a school holiday on every holy day of every religion would render it impossible to maintain a school calendar - certainly impossible to meet the state mandated 180 days of instruction.

Thus, the hard facts of scheduling a school year, a business necessity, coupled with the vagaries of the calendar, make it absurd to impose any greater obligation upon Respondent than that it establish a schedule based upon neutral, non-invidious considerations.

Interestingly, if this analysis properly leads to a search for invidiousness in Respondent's scheduling there is a suggestion that, as applied in this case, there is no difference between disparate treatment and disparate impact analysis. On the other hand, proper application of the latter mode of analysis, in light of Complainant's prima facie case of disparate impact discrimination, shifts the burden of proof to Respondent to show that its scheduling is just a non-invidious and neutral effort to deal with the vagaries of the calendar.

We believe that Respondent has made this showing. It has acceded, in the course of negotiating a collective bargaining agreement, to the tradition of scheduling Good Friday as a school holiday. And while neither tradition nor the collective bargaining process are defenses to discriminatory acts, we believe that, in this case, proof of the process by which Good

Friday became a school holiday sufficiently disassociates the day from its Christian roots so as to establish the present non-invidiousness of the schedule.

This approach is supported by the analysis applied in California School Employees Association v. Sequoia Union High School District, 67 C.A. 3d 157, 136 Cal Rptr. 594 (1977). There a school district and teachers' union had negotiated Good Friday as a paid holiday. Subsequently, concerned about the constitutionality of this aspect of its schedule because of Mandel v. Hodges, discussed infra, the school district unilaterally changed the schedule so that another day, not Good Friday, was given as a holiday. The union sought to compel restoration of the Good Friday holiday and its position was sustained by the Court of Appeals which noted that primary discretionary authority for choosing school holidays rested with the union, a non-governmental entity not subject to First Amendment constraints. The Court also noted that secular considerations, such as the fact that a holiday on Good Friday, which immediately preceded the week designated for the employees' spring vacation, would increase the length of that vacation, may have entered into the choice.

We see no inconsistency between the result we reach this day and our earlier decision in the nearly identical case of Lipner v. Bellefonte Area School District, PHRC Docket No. E-5260 (1974). The complaint in Lipner pleaded a violation of §5.1(b) and we treated §5.1(b) as controlling. Regardless of the correctness of that treatment Lipner was plainly distinguishable

on the facts in that the Respondent school district in that case refused to permit Complainant to use contractual emergency leave days to celebrate the Jewish holidays. In the case at bar Complainant has been permitted to use the only non-sick leave form of contractual leave available.

We also find this case to be distinguishable from Ebler v. City of Newark, 54 N.J. 487, 256 A.2d 44 (N.J. Sup. Ct. 1969), relied upon by Complainant in his brief. In Ebler, all city police officers were permitted to take off 6 days with pay for religious holidays. The court found the extra benefit for Jewish officers unreasonable. But, of course, the nature of the benefit was very different from that in the present case where all of Respondent's employees are entitled to the same number of days off with pay and it is only the scheduling of certain days off without pay that is an issue.

Mandel v. Hodges, 54 Cal App. 3d 596, 127 Cal. Rptr. 244, 11 EPD ¶10891 (1976), cited in Complainant's brief also fails to persuade us. That case found violative of the First Amendment an order by the Governor of California allowing paid time off for state employees between the hours of noon and 3 o'clock P.M. on Good Friday with no similar time off provision for Yom Kippur. However, the result in Mandel was based not on a finding of unlawful discrimination but rather on the ground that the Governor's edict violated the Establishment Clause of the First Amendment which prohibits undue entanglement of church and state. The Establishment Clause argument was never made in this case and seems largely irrelevant in light of the determination made

by this Commission that Respondent's alleged unlawful scheduling practices were benign in purpose and intent.

Finally, the Commission regards this decision as consistent with present judicial trends in the area of religious discrimination law as manifest in the U.S. Supreme Court case of Trans World Airlines, Inc. v. Hardison, ____ U.S. ____, 97 S. Ct. 2264 (1977). That case held that an employer's obligation of reasonable accommodation to the religious needs of an employee is not such as to require the employer to violate seniority terms of a bona fide union contract or to incur more than minimal expense.

For all of the above reasons we thus hold that Respondent's holiday scheduling policies do not unlawfully discriminate against Complainant in violation of §5(a) of the Act. Therefore, we find for Respondent and the complaint is dismissed with prejudice.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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SCHOOL DISTRICT OF THE CITY
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Respondent

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this 28th day of August, 1978, upon consideration of all the evidence presented at the public hearing in the above-captioned matter, the Hearing Commissioners recommend to the entire Commission that an Order be entered dismissing the complaint.

Alvin E. Echols, Jr., Esq., Commissioner

Everett E. Smith, Commissioner

Mary Donovan, Commissioner

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SCHOOL DISTRICT OF THE CITY
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COMMISSION'S DECISION

AND NOW, this 28th day of August, 1978, upon consideration of the record in this case and upon consideration of the recommendation of the Hearing Commissioners, the Pennsylvania Human Relations Commission hereby adopts the attached History of the Case, Findings of Fact, Conclusions of Law, and Opinion and enters the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Joseph X. Yaffe, Esq., Chairperson

ATTEST:

By: Elizabeth M. Scott
Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA

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Respondent

FINAL ORDER

AND NOW, this 12th day of September, 1978, pursuant to Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959, the Pennsylvania Human Relations Commission hereby

ORDERS:

that the Complaint in the above-docketed matter be dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Joseph X. Yaffe, Esq., Chairperson

ATTEST:

By: Elizabeth M. Scott, Secretary

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12. When the collective bargaining agreement became effective on January 10, 1975, all employees who so desired, like Complainant, were permitted to apply personal leave against leave taken without pay, retroactive to the beginning of the school year in September, 1974. (N.T. 73-74, 85)

13, The collective bargaining agreement permits two personal leave days for the 1974-75 and 1975-76 school years and three personal leave days for the 1976-77 and 1977-78 school years. "Such leave shall be used for matters which cannot be scheduled outside of school hours." (Exh. C-6/p.22, N.T. 33)

14. The allowance of personal leave days was not mandated by the Pennsylvania School Code but was a right of teachers that derived from the collective bargaining agreement between the Respondent and the Erie Education Association. (N.T. 74)

15. By letter dated August 18, 1975 to James Murfee, principal at Respondent's Wilson Middle School, Complainant requested a leave of absence, without penalty, for the purpose of attending high holy day services on Yom Kippur, September 15, 1975 . (Exh. C-7, N.T. 34)

16. By letter dated September 12, 1975 to James Murfee, Complainant noted that his August 18 letter was not answered and, under protest, he changed his August 18 request to a request for use of a personal leave day in order to observe Yom Kippur on September 15, 1975. (Exh. C-8, N.T. 36-37)

17. Complainant's request letters of August 18 and September 12 were properly directed to his immediate supervisor, Mr. Murfee. (N.T. 35)

18. Complainant's September 12 request for use of a personal leave day on September 15 was granted by Respondent. (N.T. 37)

19. By letter dated August 23, 1976 to James Murfee, Complainant requested a leave of absence, without penalty, for the purpose of attending high holy day services on Yom Kippur, October 4, 1976 . (Exh. C-9, N.T. 37-38)

20. Complainant's August 23, 1976 request was approved as a personal leave day. (N.T. 38-39)

21. By letter dated August 22, 1977 to James Murfee, Complainant requested leave of absence, without penalty, for the purpose of attending traditional high holy day services on Yom Kippur, September 22, 1977 and Rosh Hashanah, September 13, 1977 . (Exh. C-10, N.T. 40-41)

22. Complainant's August 22, 1977 request was approved as personal leave days. (Exh. C-11, N.T. 41-43)

23. The Collective Bargaining agreement effective from January 10, 1975 to June 30, 1978 provided for certain holidays, during which Respondent's employees subject to the contract would not be obliged to work. These holidays included seven days for Christmas and three days for Easter - Thursday, Friday and Monday. No Jewish holidays were scheduled. (Exh. C-6/ p.11, N.T. 32-33)

24. As a practicing member of the Jewish faith, Complainant does not observe the holidays of Christmas or Easter. (N.T. 28)

25. By utilizing personal leave days for the observance of religious holidays in 1974, 1975, 1976 and 1977, Complainant did not have the same number of personal leave days available to him to use for non-religious purposes as did other employees. (N.T. 44)

26. Respondent has never prevented Complainant or any other employee from taking a day off for religious observance. (N.T. 52, 66, 68-70, 89-90)

27. The dates upon which Rosh Hashanah and Yom Kippur are celebrated are determined in accordance with the Jewish calendar and so may fall on different dates and days, including Saturdays and Sundays, in different years. (N.T. 58-59)

28. The Collective Bargaining agreement in effect from January 10, 1975 to June 30, 1978 established 184 days of classroom instruction and 6 non-classroom days to be worked by teachers and for which teachers were to be paid. Teachers are not paid for holidays, including those scheduled around Christmas and Easter. (Exh. C-6/p.11, N.T. 67-68, 71)

29. Holidays are not leave days but rather are days when no work is scheduled and for which employees are not paid. (N.T. 68, 77-79)

30. The Pennsylvania School Code requires that a school district provide for a minimum of 180 days of instruction per year. (N.T. 70)

31. Many days that are scheduled working days for Respondent's school teachers represent holidays for various religious groups. (N.T. 70)

32. If Respondent were to designate every day that had religious significance for some faith as a holiday, it would be difficult or impossible to meet the 180 day requirement of the Pennsylvania School Code. (N.T. 71)

33. It is not practicable to have the Complainant make up the time taken off for religious observance at any other time. (N.T. 67)

34. In accordance with Pennsylvania law the dates on which holidays are scheduled and the number of days for holidays are matters that are negotiable between school districts such as Respondent and teacher's unions such as the Erie Education Association. (N.T. 79)

35. Days scheduled as holidays were so scheduled in the course of negotiating a collective bargaining agreement between Respondent and the Erie Education Association. (N.T. 68, 79-80)

36. In the course of negotiations, Respondent accepted the Association's suggestion that a three-day holiday be scheduled aroung Easter. (N.T. 80-81)

37. Scheduling a school holiday around Easter has been done traditionally in Respondent's school district. (N.T. 81, 97-100)

38. The Christian holidays of Easter and Christmas have taken on certain commercial and secular attributes in contemporary American society. (N.T. 93-94, 101-102, 118-124)

39. Christmas and the Thursday and Friday before Easter are significant days in the observation of Christianity (N.T. 109, 118, 124-125)

40. The Monday following Easter is not a significant day in the observation of Christianity. (N.T. 110)

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL, Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY OF ERIE, BOARD OF DIRECTORS, Respondent :

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (the Commission) has jurisdiction over the parties and subject matter of the complaint in the above-captioned case pursuant to the Pennsylvania Human Relations Act, Act of October 27, 1955 P.L. 744 as amended, 43 P.S. Section 951 et seq. (the Act).

2. All procedural prerequisites to a public hearing as set forth in §9 of the Act were complied with in this case.

3. Complainant did not establish by substantial evidence that Respondent had any religious motive or that Respondent intended to benefit any particular religious group or groups in scheduling school holidays.

4. Complainant did not establish by substantial evidence that any of the school holidays scheduled by Respondent was other than secular in nature.

5. Section 5.1(b) of the Act is not applicable to a case such as this one where the Respondent-employer is not a political subdivision as defined at §4(m) of the Act; however, §5.1(b) is

instructive for purposes of determining what obligations the Legislature intended to impose upon Respondent School District to accommodate the religious needs of its employees.

6. Respondent's conduct in scheduling school holidays for the school years 1974-75 through 1977-78 did not directly or indirectly impose unlawfully discriminatory burdens on Complainant because of his religion and religious practices in violation of §5(a) of the Act.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL, Complainant	:	
v.	:	DOCKET NO. E-8174
SCHOOL DISTRICT OF THE CITY OF ERIE, BOARD OF DIRECTORS, Respondent	:	

OPINION

The gravaman of the complaint in this case is that the Respondent School District has engaged in an unlawful discriminatory practice in violation of §5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (the Act), by establishing certain days connected with Christian religious holidays as school holidays, i.e., unpaid days when school is not in session and when, therefore, teachers need not work; and that this scheduling practice has the effect of allowing Christian employees to observe their religious holidays without work related interference; but that Complainant, who is Jewish, can only observe the Jewish religious holidays of Rosh Hashanah and Yom Kippur, by absenting himself from work and using some of the limited number of personal leave days granted him under terms of his employment contract.

A threshhold problem for this Commission is to identify an appropriate analytical framework for the resolution of this

case which does not fit neatly and exclusively into any of the ordinary categories. The complaint alleges, in effect, that Complainant has been victimized by unlawful disparate treatment, i.e., that he has been treated differently than others because of his religion. However, coupled with the proof offered at the Public Hearing, the complaint also has elements which might invoke what is commonly characterized as disparate impact analysis, i.e., analysis applied to a facially neutral policy which has the effect of disproportionately burdening one class.

The U.S. Supreme Court recently explained and distinguished these two modes of analysis:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate impact theory.

International Brotherhood of Teamsters v. United States, 431 U.S. ____, 335, n. 15 (1977).

The Teamsters case, quoted above was, of course, decided pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. However, the Pennsylvania Supreme Court has made clear that Title VII is a federal analogue to §5(a) of the Human Relations Act, General Electric Corporation v. PHRC, 469 Pa. 292, 365 A.2d 649 (1976), and thus the Teamsters distinction

between and ordinary federal court application of the disparate treatment and disparate impact modes of analysis can be considered readily adoptable to §5(a) cases. The irony and difficulty with the present case is that it is a hybrid and seems to be somewhat subject to both analytical modes.

If Complainant's allegation is treated simply as one of disparate treatment, his burden of proof includes showing that Respondent intended to treat him differently - not necessarily that Respondent intended to treat him unlawfully, just differently. This showing must be made by substantial evidence. J. Howard Brandt, Inc. v. PHRC, 15 Pa. Cmwlth. 123, 324 A.2d 840 (1974). Such a showing has not been made on the record of this case.

Little testimony was elicited at the Public Hearing relating to school holidays scheduled around any events other than the Christian holiday of Good Friday. And even the Good Friday testimony does not appear to have been intended to show that Respondent had a religious motive in scheduling Good Friday as a school holiday or in any way wished to promote or encourage the observance of Good Friday. Rather, there was substantial testimony on the record that Good Friday was made a school holiday as a result of good faith collective bargaining and as a continuance of long standing tradition in the school district.

Of course, the Commission recognizes the religious origins of Good Friday and recognizes that school holidays were not scheduled on Good Friday every year, merely by virtue of the date having been coincidentially plucked at random from the

calendar. The origin of the tradition is no doubt tainted by recognition of Christian observance of Good Friday as a holy day. Nevertheless, the Commission has found, based on the evidence, and also takes notice of the fact, that Easter related holidays have taken on substantially secular characteristics in contemporary America.

Had Respondent, to facilitate observance or for other religious reasons, scheduled Good Friday or any other Christian holy day as a school holiday the complaint in this case would be meritorious. However, there is no suggestion in the evidence that Respondent had such motives, and in light of the substantially secular nature of the Christian Holy Week, the Commission cannot, without substantial evidence to the contrary, infer any intent on the part of Respondent to benefit Christians. In other words, it cannot be presumed and Complainant has not established by substantial evidence that Good Friday or any other day was scheduled as a school holiday because of the religious significance of the day to Christians. Thus having failed to establish any intentional nexus between Respondent's scheduling of holidays and recognition of the Christian faith, Complainant has not carried his disparate treatment burden of proof.

However, as previously acknowledged, there are also elements of this case which appear to properly invoke a disparate impact analysis. Even under the very liberal standards for class action pleading set forth by our state Supreme Court in PHRC v. Freeport Area School District, ____ Pa. ____, 359 A.2d 724 (1976), the allegations in this complaint cannot be construed

to be class allegations. They are allegations of discrimination perpetrated against an individual plain and simple - they allege that Complainant alone was discriminated against, i.e., treated differently, because of his religion.

Nevertheless, disparate impact analysis suggests itself. The Respondent actions are neutral on their face and negatively effect Complainant, he alleges, because he is Jewish. But they are not directed against him personally. They would similarly impact any practicing Jew employed by Respondent. Thus, setting aside the technical niceties of pleading, the allegations can be read as asserting and the evidence clearly supports the proposition that Complainant, as a committed member of the Jewish faith,and by implication all practicing Jews must absent themselves from employment and make use of the limited number of personal leave days allotted under the terms of their employment contract, in order to observe the holiest days of the Jewish year. On the contrary, Respondent's Christian employees can observe certain religious days, at least Good Friday, without incurring any such hardship. Thus, Respondent's facially neutral scheduling policy has a disparate impact upon or negatively effects all observing members of the Jewish faith (and presumably other faiths as well).

Respondent can only defend against this prima facie showing of disparate impact with a demonstration by substantial evidence that it had a good business justification for the arrangement of its school schedule. The Commission believes that Respondent has sustained its burden of demonstrating such

a business justification, and in reaching this conclusion, is particularly influenced by the instructive pronouncement of the Pennsylvania Legislature at §5.1(b) of the Human Relations Act. Section 5.1(b) provides:

> Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of public business, no person employed by the State or any of its political subdivisions shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

The above quoted language limits the applicability of §5.1(b) to "person(s) employed by the State or any of its political subdivisions." "Political subdivisions" are defined at §4(m) of the Act as: ". . . any county, city, borough, incorporated town or township of this Commonwealth." Thus, notwithstanding the apparent contrary assumption of all parties to this action and notwithstanding previous inconsistent Commission actions and cases, §5.1(b) is not applicable in a case such as this where Respondent employer is a school district, but not a "political subdivision."

Nevertheless, because of the similarity for these purposes between "political subdivisions" and school districts, this

Commission regards §5.1(b) as instructive with respect to the nature of the legislatively imposed obligation owed by the Respondent to Complainant. In other words, the Commission regards §5.1(b) as a legislatively sanctioned limitation on how far a political subdivision (and by analogy, any other public employer such as Respondent school district) need go to accommodate an employee's religious convictions - a legislative determination of how much religious accommodation is consistent with sound business practices in the public sector.

The evidence clearly establishes that Respondent has complied with §5.1(b). Complainant was never required to remain at his place of employment during the Jewish high holy days. The proviso in §5.1(b) gives the employer much latitude in either 1) requiring the employee to make up the absence at another time; 2) charging the absence against paid leave; or 3) charging the absence against unpaid leave (in that order). In this case, it has been established by substantial evidence that it would not be practicable for the Complainant to make up his absence. The Respondent, exercising its judgment, thus acted in accordance with the Act by charging the absence to the paid personal leave granted the Complainant by the collective bargaining agreement.

In addition to compliance with §5.1(b) as a sound business justification, Respondent also has established another plain and practical business reason for its scheduling policy. The evidence and common sense plainly support the notion that virtually every day on the calendar is a holiday or significant

day in the observance of one of the many religions represented in our contemporary, pluralistic society. A school holiday, even if scheduled by chance, is likely to fall on a day of observance for some religious sect, thus disparately impacting non-members of that sect. But to schedule a school holiday on every holy day of every religion would render it impossible to maintain a school calendar - certainly impossible to meet the state mandated 180 days of instruction.

Thus, the hard facts of scheduling a school year, a business necessity, coupled with the vagaries of the calendar, make it absurd to impose any greater obligation upon Respondent than that it establish a schedule based upon neutral, non-invidious considerations.

Interestingly, if this analysis properly leads to a search for invidiousness in Respondent's scheduling there is a suggestion that, as applied in this case, there is no difference between disparate treatment and disparate impact analysis. On the other hand, proper application of the latter mode of analysis, in light of Complainant's prima facie case of disparate impact discrimination, shifts the burden of proof to Respondent to show that its scheduling is just a non-invidious and neutral effort to deal with the vagaries of the calendar.

We believe that Respondent has made this showing. It has acceded, in the course of negotiating a collective bargaining agreement, to the tradition of scheduling Good Friday as a school holiday. And while neither tradition nor the collective bargaining process are defenses to discriminatory acts, we believe that, in this case, proof of the process by which Good

Friday became a school holiday sufficiently disassociates the day from its Christian roots so as to establish the present non-invidiousness of the schedule.

This approach is supported by the analysis applied in California School Employees Association v. Sequoia Union High School District, 67 C.A. 3d 157, 136 Cal Rptr. 594 (1977). There a school district and teachers' union had negotiated Good Friday as a paid holiday. Subsequently, concerned about the constitutionality of this aspect of its schedule because of Mandel v. Hodges, discussed infra, the school district unilaterally changed the schedule so that another day, not Good Friday, was given as a holiday. The union sought to compel restoration of the Good Friday holiday and its position was sustained by the Court of Appeals which noted that primary discretionary authority for choosing school holidays rested with the union, a non-governmental entity not subject to First Amendment constraints. The Court also noted that secular considerations, such as the fact that a holiday on Good Friday, which immediately preceded the week designated for the employees' spring vacation, would increase the length of that vacation, may have entered into the choice.

We see no inconsistency between the result we reach this day and our earlier decision in the nearly identical case of Lipner v. Bellefonte Area School District, PHRC Docket No. E-5260 (1974). The complaint in Lipner pleaded a violation of §5.1(b) and we treated §5.1(b) as controlling. Regardless of the correctness of that treatment Lipner was plainly distinguishable

on the facts in that the Respondent school district in that case refused to permit Complainant to use contractual emergency leave days to celebrate the Jewish holidays. In the case at bar Complainant has been permitted to use the only non-sick leave form of contractual leave available.

We also find this case to be distinguishable from Ebler v. City of Newark, 54 N.J. 487, 256 A.2d 44 (N.J. Sup. Ct. 1969), relied upon by Complainant in his brief. In Ebler, all city police officers were permitted to take off 6 days with pay for religious holidays. The court found the extra benefit for Jewish officers unreasonable. But, of course, the nature of the benefit was very different from that in the present case where all of Respondent's employees are entitled to the same number of days off with pay and it is only the scheduling of certain days off without pay that is an issue.

Mandel v. Hodges, 54 Cal App. 3d 596, 127 Cal. Rptr. 244, 11 EPD ¶10891 (1976), cited in Complainant's brief also fails to persuade us. That case found violative of the First Amendment an order by the Governor of California allowing paid time off for state employees between the hours of noon and 3 o'clock P.M. on Good Friday with no similar time off provision for Yom Kippur. However, the result in Mandel was based not on a finding of unlawful discrimination but rather on the ground that the Governor's edict violated the Establishment Clause of the First Amendment which prohibits undue entanglement of church and state. The Establishment Clause argument was never made in this case and seems largely irrelevant in light of the determination made

by this Commission that Respondent's alleged unlawful scheduling practices were benign in purpose and intent.

Finally, the Commission regards this decision as consistent with present judicial trends in the area of religious discrimination law as manifest in the U.S. Supreme Court case of Trans World Airlines, Inc. v. Hardison, ____ U.S. ____, 97 S. Ct. 2264 (1977). That case held that an employer's obligation of reasonable accommodation to the religious needs of an employee is not such as to require the employer to violate seniority terms of a bona fide union contract or to incur more than minimal expense.

For all of the above reasons we thus hold that Respondent's holiday scheduling policies do not unlawfully discriminate against Complainant in violation of §5(a) of the Act. Therefore, we find for Respondent and the complaint is dismissed with prejudice.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this day of , 1978, upon consideration of all the evidence presented at the public hearing in the above-captioned matter, the Hearing Commissioners recommend to the entire Commission that an Order be entered dismissing the complaint.

Alvin E. Echols, Jr., Esq., Commissioner

Everett E. Smith, Commissioner

Mary Donovan, Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

COMMISSION'S DECISION

AND NOW, this day of , 1978, upon consideration of the record in this case and upon consideration of the recommendation of the Hearing Commissioners, the Pennsylvania Human Relations Commission hereby adopts the attached History of the Case, Findings of Fact, Conclusions of Law, and Opinion and enters the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Joseph X. Yaffe, Esq., Chairperson

ATTEST:

By: _____
Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

FINAL ORDER

AND NOW, this day of , 1978, pursuant to Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959, the Pennsylvania Human Relations Commission hereby

ORDERS:

that the Complaint in the above-docketed matter be dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Joseph X. Yaffe, Esq., Chairperson

ATTEST:

By: _____
Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

HISTORY OF THE CASE

On November 27, 1974 Complainant, David E. Howell, filed a complaint with the Pennsylvania Human Relations Commission alleging that the Respondent, the Board of Directors of the School District of Erie, violated §5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (the Act), by denying him two(2) days of paid leave of absence to observe two holidays in accordance with his religious belief while granting a majority of employees the right to observe their religious holidays without financial penalty. He further alleged that this action was taken against him because of his religious creed, Jewish. The complaint was subsequently amended On May 2, 1978 to include the allegation that the unlawful discriminatory practice is of a continuing nature.

An investigation of the allegations was conducted pursuant to §9 of the Act resulting in a Finding of Probable Cause to credit those allegations. An effort to conciliate the matter as mandated by §9 failed and the case proceeded to a Public Hearing on May 2, 1978 before Alvin E. Echols, Esquire, Presiding

Commissioner and Commissioners Mary Dennis Donovan, C.S.J. and Everett E. Smith. Benjamin G. Lipman, Esquire acted as Legal Advisor to the Hearing Panel, William B. Churchill, Esquire appeared on behalf of the Complainant and John W. Beatty, Esquire appeared on behalf of Respondent.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL, :
Complainant

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

FINDINGS OF FACT

1. The Complainant herein is David E. Howell, 3904 Mertyl Street, Erie, Pennsylvania. (Exh. C-1, N.T. 19)

2. The Respondent herein is the Board of Directors of the School District of the City of Erie, Pennsylvania, 1511 Peach Street, Erie, Pennsylvania. (Exh. C-1)

3. The Complainant is presently and has been employed as a classroom teacher by the Respondent since September,1959. (N.T. 19, 48)

4. The Complainant is presently and has been a faithful practicing member of the Jewish faith for more than 20 years. (N.T. 20, 21, 45)

5. By memo dated September 11, 1974, Complainant requested leaves of absence without penalty for the observance of the 2 major Jewish holidays on the 17th and 26th of September. (Exh. C-4, N.T. 20-21)

6. Complainant's memo of September 11, 1974 was properly directed to his building supervisor, a Respondent employee, James Murphee. (N.T. 21, 29)

7. The two days for which Complainant sought leave by his September 11, 1974 memo were Rosh Hashanah and Yom Kippur, the most significant days in the religious year for the Jewish people , observed by prayer, repentance and attendance at religious services. (N.T. 22-23)

8. To have attended to the requirements of his job for the days he sought leaves of absence by his September 11, 1974 memo would have interfered with Complainant's religious observance of Rosh Hashana and Yom Kippur. (N.T. 23)

9. Complainant's request by memo of September 11, 1974 was responded to by Respondent's Superintendent of Schools, Mr. Richard R. Hilinski, who wrote on the back of Complainant's memo "approved as unpaid leave, 9/13/74" above his signature. (Exh. C-4, N.T. 29-30)

10. A collective bargaining agreement between Respondent and the Erie Education Association governing the terms and conditions of Complainant's employment was not in effect in September 1974 but was effective for the period January 10, 1975 to June 30, 1978. (Exh. C-6, N.T. 24, 31)

11. After the January 10, 1975 effective date of the new collective bargaining agreement, Complainant's leaves of absence for September 17 and 26, 1974 were changed from unpaid leave to personal days. (N.T. 31-32)

12. When the collective bargaining agreement became effective on January 10, 1975, all employees who so desired, like Complainant, were permitted to apply personal leave against leave taken without pay, retroactive to the beginning of the school year in September, 1974. (N.T. 73-74, 85)

13, The collective bargaining agreement permits two personal leave days for the 1974-75 and 1975-76 school years and three personal leave days for the 1976-77 and 1977-78 school years. "Such leave shall be used for matters which cannot be scheduled outside of school hours." (Exh. C-6/p.22, N.T. 33)

14. The allowance of personal leave days was not mandated by the Pennsylvania School Code but was a right of teachers that derived from the collective bargaining agreement between the Respondent and the Erie Education Association. (N.T. 74)

15. By letter dated August 18, 1975 to James Murfee, principal at Respondent's Wilson Middle School, Complainant requested a leave of absence, without penalty, for the purpose of attending high holy day services on Yom Kippur, September 15, 1975 . (Exh. C-7, N.T. 34)

16. By letter dated September 12, 1975 to James Murfee, Complainant noted that his August 18 letter was not answered and, under protest, he changed his August 18 request to a request for use of a personal leave day in order to observe Yom Kippur on September 15, 1975. (Exh. C-8, N.T. 36-37)

17. Complainant's request letters of August 18 and September 12 were properly directed to his immediate supervisor, Mr. Murfee. (N.T. 35)

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23. The Collective Bargaining agreement effective from January 10, 1975 to June 30, 1978 provided for certain holidays, during which Respondent's employees subject to the contract would not be obliged to work. These holidays included seven days for Christmas and three days for Easter - Thursday, Friday and Monday. No Jewish holidays were scheduled. (Exh. C-6/ p.11, N.T. 32-33)

24. As a practicing member of the Jewish faith, Complainant does not observe the holidays of Christmas or Easter. (N.T. 28)

25. By utilizing personal leave days for the observance of religious holidays in 1974, 1975, 1976 and 1977, Complainant did not have the same number of personal leave days available to him to use for non-religious purposes as did other employees. (N.T. 44)

26. Respondent has never prevented Complainant or any other employee from taking a day off for religious observance. (N.T. 52, 66, 68-70, 89-90)

27. The dates upon which Rosh Hashanah and Yom Kippur are celebrated are determined in accordance with the Jewish calendar and so may fall on different dates and days, including Saturdays and Sundays, in different years. (N.T. 58-59)

28. The Collective Bargaining agreement in effect from January 10, 1975 to June 30, 1978 established 184 days of classroom instruction and 6 non-classroom days to be worked by teachers and for which teachers were to be paid. Teachers are not paid for holidays, including those scheduled around Christmas and Easter. (Exh. C-6/p.11, N.T. 67-68, 71)

29. Holidays are not leave days but rather are days when no work is scheduled and for which employees are not paid. (N.T. 68, 77-79)

30. The Pennsylvania School Code requires that a school district provide for a minimum of 180 days of instruction per year. (N.T. 70)

31. Many days that are scheduled working days for Respondent's school teachers represent holidays for various religious groups. (N.T. 70)

32. If Respondent were to designate every day that had religious significance for some faith as a holiday, it would be difficult or impossible to meet the 180 day requirement of the Pennsylvania School Code. (N.T. 71)

33. It is not practicable to have the Complainant make up the time taken off for religious observance at any other time. (N.T. 67)

34. In accordance with Pennsylvania law the dates on which holidays are scheduled and the number of days for holidays are matters that are negotiable between school districts such as Respondent and teacher's unions such as the Erie Education Association. (N.T. 79)

35. Days scheduled as holidays were so scheduled in the course of negotiating a collective bargaining agreement between Respondent and the Erie Education Association. (N.T. 68, 79-80)

36. In the course of negotiations, Respondent accepted the Association's suggestion that a three-day holiday be scheduled aroung Easter. (N.T. 80-81)

37. Scheduling a school holiday around Easter has been done traditionally in Respondent's school district. (N.T. 81, 97-100)

38. The Christian holidays of Easter and Christmas have taken on certain commercial and secular attributes in contemporary American society. (N.T. 93-94, 101-102, 118-124)

39. Christmas and the Thursday and Friday before Easter are significant days in the observation of Christianity (N.T. 109, 118, 124-125)

40. The Monday following Easter is not a significant day in the observation of Christianity. (N.T. 110)

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL, :
Complainant

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (the Commission) has jurisdiction over the parties and subject matter of the complaint in the above-captioned case pursuant to the Pennsylvania Human Relations Act, Act of October 27, 1955 P.L. 744 as amended, 43 P.S. Section 951 et seq. (the Act).

2. All procedural prerequisites to a public hearing as set forth in §9 of the Act were complied with in this case.

3. Complainant did not establish by substantial evidence that Respondent had any religious motive or that Respondent intended to benefit any particular religious group or groups in scheduling school holidays.

4. Complainant did not establish by substantial evidence that any of the school holidays scheduled by Respondent was other than secular in nature.

5. Section 5.1(b) of the Act is not applicable to a case such as this one where the Respondent-employer is not a political subdivision as defined at §4(m) of the Act; however, §5.1(b) is

instructive for purposes of determining what obligations the Legislature intended to impose upon Respondent School District to accommodate the religious needs of its employees.

6. Respondent's conduct in scheduling school holidays for the school years 1974-75 through 1977-78 did not directly or indirectly impose unlawfully discriminatory burdens on Complainant because of his religion and religious practices in violation of §5(a) of the Act.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL, Complainant	:	
v.	:	DOCKET NO. E-8174
SCHOOL DISTRICT OF THE CITY OF ERIE, BOARD OF DIRECTORS, Respondent	:	

OPINION

The gravaman of the complaint in this case is that the Respondent School District has engaged in an unlawful discriminatory practice in violation of §5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (the Act), by establishing certain days connected with Christian religious holidays as school holidays, i.e., unpaid days when school is not in session and when, therefore, teachers need not work; and that this scheduling practice has the effect of allowing Christian employees to observe their religious holidays without work related interference; but that Complainant, who is Jewish, can only observe the Jewish religious holidays of Rosh Hashanah and Yom Kippur, by absenting himself from work and using some of the limited number of personal leave days granted him under terms of his employment contract.

A threshhold problem for this Commission is to identify an appropriate analytical framework for the resolution of this

case which does not fit neatly and exclusively into any of the ordinary categories. The complaint alleges, in effect, that Complainant has been victimized by unlawful disparate treatment, i.e., that he has been treated differently than others because of his religion. However, coupled with the proof offered at the Public Hearing, the complaint also has elements which might invoke what is commonly characterized as disparate impact analysis, i.e., analysis applied to a facially neutral policy which has the effect of disproportionately burdening one class.

The U.S. Supreme Court recently explained and distinguished these two modes of analysis:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate impact theory.

International Brotherhood of Teamsters v. United States, 431 U.S. ____ , 335, n. 15 (1977).

The Teamsters case, quoted above was, of course, decided pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. However, the Pennsylvania Supreme Court has made clear that Title VII is a federal analogue to §5(a) of the Human Relations Act, General Electric Corporation v. PHRC, 469 Pa. 292, 365 A.2d 649 (1976), and thus the Teamsters distinction

between and ordinary federal court application of the disparate treatment and disparate impact modes of analysis can be considered readily adoptable to §5(a) cases. The irony and difficulty with the present case is that it is a hybrid and seems to be somewhat subject to both analytical modes.

If Complainant's allegation is treated simply as one of disparate treatment, his burden of proof includes showing that Respondent intended to treat him differently - not necessarily that Respondent intended to treat him unlawfully, just differently. This showing must be made by substantial evidence. J. Howard Brandt, Inc. v. PHRC, 15 Pa. Cmwlth. 123, 324 A.2d 840 (1974). Such a showing has not been made on the record of this case.

Little testimony was elicited at the Public Hearing relating to school holidays scheduled around any events other than the Christian holiday of Good Friday. And even the Good Friday testimony does not appear to have been intended to show that Respondent had a religious motive in scheduling Good Friday as a school holiday or in any way wished to promote or encourage the observance of Good Friday. Rather, there was substantial testimony on the record that Good Friday was made a school holiday as a result of good faith collective bargaining and as a continuance of long standing tradition in the school district.

Of course, the Commission recognizes the religious origins of Good Friday and recognizes that school holidays were not scheduled on Good Friday every year, merely by virtue of the date having been coincidentially plucked at random from the

calendar. The origin of the tradition is no doubt tainted by recognition of Christian observance of Good Friday as a holy day. Nevertheless, the Commission has found, based on the evidence, and also takes notice of the fact, that Easter related holidays have taken on substantially secular characteristics in contemporary America.

Had Respondent, to facilitate observance or for other religious reasons, scheduled Good Friday or any other Christian holy day as a school holiday the complaint in this case would be meritorious. However, there is no suggestion in the evidence that Respondent had such motives, and in light of the substantially secular nature of the Christian Holy Week, the Commission cannot, without substantial evidence to the contrary, infer any intent on the part of Respondent to benefit Christians. In other words, it cannot be presumed and Complainant has not established by substantial evidence that Good Friday or any other day was scheduled as a school holiday because of the religious significance of the day to Christians. Thus having failed to establish any intentional nexus between Respondent's scheduling of holidays and recognition of the Christian faith, Complainant has not carried his disparate treatment burden of proof.

However, as previously acknowledged, there are also elements of this case which appear to properly invoke a disparate impact analysis. Even under the very liberal standards for class action pleading set forth by our state Supreme Court in PHRC v. Freeport Area School District, ____ Pa. ____, 359 A.2d 724 (1976), the allegations in this complaint cannot be construed

to be class allegations. They are allegations of discrimination perpetrated against an individual plain and simple - they allege that Complainant alone was discriminated against, i.e., treated differently, because of his religion.

Nevertheless, disparate impact analysis suggests itself. The Respondent actions are neutral on their face and negatively effect Complainant, he alleges, because he is Jewish. But they are not directed against him personally. They would similarly impact any practicing Jew employed by Respondent. Thus, setting aside the technical niceties of pleading, the allegations can be read as asserting and the evidence clearly supports the proposition that Complainant, as a committed member of the Jewish faith,and by implication all practicing Jews must absent themselves from employment and make use of the limited number of personal leave days allotted under the terms of their employment contract, in order to observe the holiest days of the Jewish year. On the contrary, Respondent's Christian employees can observe certain religious days, at least Good Friday, without incurring any such hardship. Thus, Respondent's facially neutral scheduling policy has a disparate impact upon or negatively effects all observing members of the Jewish faith (and presumably other faiths as well).

Respondent can only defend against this prima facie showing of disparate impact with a demonstration by substantial evidence that it had a good business justification for the arrangement of its school schedule. The Commission believes that Respondent has sustained its burden of demonstrating such

a business justification, and in reaching this conclusion, is particularly influenced by the instructive pronouncement of the Pennsylvania Legislature at §5.1(b) of the Human Relations Act. Section 5.1(b) provides:

> Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of public business, no person employed by the State or any of its political subdivisions shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

The above quoted language limits the applicability of §5.1(b) to "person(s) employed by the State or any of its political subdivisions." "Political subdivisions" are defined at §4(m) of the Act as: ". . . any county, city, borough, incorporated town or township of this Commonwealth." Thus, notwithstanding the apparent contrary assumption of all parties to this action and notwithstanding previous inconsistent Commission actions and cases, §5.1(b) is not applicable in a case such as this where Respondent employer is a school district, but not a "political subdivision."

Nevertheless, because of the similarity for these purposes between "political subdivisions" and school districts, this

Commission regards §5.1(b) as instructive with respect to the nature of the legislatively imposed obligation owed by the Respondent to Complainant. In other words, the Commission regards §5.1(b) as a legislatively sanctioned limitation on how far a political subdivision (and by analogy, any other public employer such as Respondent school district) need go to accommodate an employee's religious convictions - a legislative determination of how much religious accommodation is consistent with sound business practices in the public sector.

The evidence clearly establishes that Respondent has complied with §5.1(b). Complainant was never required to remain at his place of employment during the Jewish high holy days. The proviso in §5.1(b) gives the employer much latitude in either 1) requiring the employee to make up the absence at another time; 2) charging the absence against paid leave; or 3) charging the absence against unpaid leave (in that order). In this case, it has been established by substantial evidence that it would not be practicable for the Complainant to make up his absence. The Respondent, exercising its judgment, thus acted in accordance with the Act by charging the absence to the paid personal leave granted the Complainant by the collective bargaining agreement.

In addition to compliance with §5.1(b) as a sound business justification, Respondent also has established another plain and practical business reason for its scheduling policy. The evidence and common sense plainly support the notion that virtually every day on the calendar is a holiday or significant

day in the observance of one of the many religions represented in our contemporary, pluralistic society. A school holiday, even if scheduled by chance, is likely to fall on a day of observance for some religious sect, thus disparately impacting non-members of that sect. But to schedule a school holiday on every holy day of every religion would render it impossible to maintain a school calendar - certainly impossible to meet the state mandated 180 days of instruction.

Thus, the hard facts of scheduling a school year, a business necessity, coupled with the vagaries of the calendar, make it absurd to impose any greater obligation upon Respondent than that it establish a schedule based upon neutral, non-invidious considerations.

Interestingly, if this analysis properly leads to a search for invidiousness in Respondent's scheduling there is a suggestion that, as applied in this case, there is no difference between disparate treatment and disparate impact analysis. On the other hand, proper application of the latter mode of analysis, in light of Complainant's prima facie case of disparate impact discrimination, shifts the burden of proof to Respondent to show that its scheduling is just a non-invidious and neutral effort to deal with the vagaries of the calendar.

We believe that Respondent has made this showing. It has acceded, in the course of negotiating a collective bargaining agreement, to the tradition of scheduling Good Friday as a school holiday. And while neither tradition nor the collective bargaining process are defenses to discriminatory acts, we believe that, in this case, proof of the process by which Good

Friday became a school holiday sufficiently disassociates the day from its Christian roots so as to establish the present non-invidiousness of the schedule.

This approach is supported by the analysis applied in California School Employees Association v. Sequoia Union High School District, 67 C.A. 3d 157, 136 Cal Rptr. 594 (1977). There a school district and teachers' union had negotiated Good Friday as a paid holiday. Subsequently, concerned about the constitutionality of this aspect of its schedule because of Mandel v. Hodges, discussed infra, the school district unilaterally changed the schedule so that another day, not Good Friday, was given as a holiday. The union sought to compel restoration of the Good Friday holiday and its position was sustained by the Court of Appeals which noted that primary discretionary authority for choosing school holidays rested with the union, a non-governmental entity not subject to First Amendment constraints. The Court also noted that secular considerations, such as the fact that a holiday on Good Friday, which immediately preceded the week designated for the employees' spring vacation, would increase the length of that vacation, may have entered into the choice.

We see no inconsistency between the result we reach this day and our earlier decision in the nearly identical case of Lipner v. Bellefonte Area School District, PHRC Docket No. E-5260 (1974). The complaint in Lipner pleaded a violation of §5.1(b) and we treated §5.1(b) as controlling. Regardless of the correctness of that treatment Lipner was plainly distinguishable

on the facts in that the Respondent school district in that case refused to permit Complainant to use contractual emergency leave days to celebrate the Jewish holidays. In the case at bar Complainant has been permitted to use the only non-sick leave form of contractual leave available.

We also find this case to be distinguishable from Ebler v. City of Newark, 54 N.J. 487, 256 A.2d 44 (N.J. Sup. Ct. 1969), relied upon by Complainant in his brief. In Ebler, all city police officers were permitted to take off 6 days with pay for religious holidays. The court found the extra benefit for Jewish officers unreasonable. But, of course, the nature of the benefit was very different from that in the present case where all of Respondent's employees are entitled to the same number of days off with pay and it is only the scheduling of certain days off without pay that is an issue.

Mandel v. Hodges, 54 Cal App. 3d 596, 127 Cal. Rptr. 244, 11 EPD ¶10891 (1976), cited in Complainant's brief also fails to persuade us. That case found violative of the First Amendment an order by the Governor of California allowing paid time off for state employees between the hours of noon and 3 o'clock P.M. on Good Friday with no similar time off provision for Yom Kippur. However, the result in Mandel was based not on a finding of unlawful discrimination but rather on the ground that the Governor's edict violated the Establishment Clause of the First Amendment which prohibits undue entanglement of church and state. The Establishment Clause argument was never made in this case and seems largely irrelevant in light of the determination made

by this Commission that Respondent's alleged unlawful scheduling practices were benign in purpose and intent.

Finally, the Commission regards this decision as consistent with present judicial trends in the area of religious discrimination law as manifest in the U.S. Supreme Court case of Trans World Airlines, Inc. v. Hardison, ____ U.S. ____, 97 S. Ct. 2264 (1977). That case held that an employer's obligation of reasonable accommodation to the religious needs of an employee is not such as to require the employer to violate seniority terms of a bona fide union contract or to incur more than minimal expense.

For all of the above reasons we thus hold that Respondent's holiday scheduling policies do not unlawfully discriminate against Complainant in violation of §5(a) of the Act. Therefore, we find for Respondent and the complaint is dismissed with prejudice.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this 28th day of August, 1978, upon consideration of all the evidence presented at the public hearing in the above-captioned matter, the Hearing Commissioners recommend to the entire Commission that an Order be entered dismissing the complaint.

Alvin E. Echols, Jr., Esq., Commissioner

Everett E. Smith, Commissioner

Mary Donovan, Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
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SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

COMMISSION'S DECISION

AND NOW, this 28th day of August, 1978, upon consideration of the record in this case and upon consideration of the recommendation of the Hearing Commissioners, the Pennsylvania Human Relations Commission hereby adopts the attached History of the Case, Findings of Fact, Conclusions of Law, and Opinion and enters the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Joseph X. Yaffee, Esq., Chairperson

ATTEST:

By: Elizabeth M. Scott
Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID E. HOWELL,
Complainant :

v. : DOCKET NO. E-8174

SCHOOL DISTRICT OF THE CITY
OF ERIE, BOARD OF DIRECTORS, :
Respondent

FINAL ORDER

AND NOW, this 12th day of September, 1978, pursuant to Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959, the Pennsylvania Human Relations Commission hereby

ORDERS:

that the Complaint in the above-docketed matter be dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Joseph X. Yaffe, Esq., Chairperson

ATTEST:

By: _____
Elizabeth M. Scott, Secretary