IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

No. 384 C.D. 1974

BEAVER FALLS CITY COUNCIL, NICK L. CAMP,

Mayor, RUSSELL CHIODO, Chief of Police

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA,

PENNSYLVANIA HUMAN RELATIONS COMMISSION

APPELLEE'S SUPPLEMENTAL BRIEF

Appeal from the Order of the Pennsylvania
Human Relations Commission at Docket No. E-4433.

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STATEMENT OF QUESTIONS INVOLVED

I. DOES THE COMMISSION HAVE THE AUTHORITY TO RE-ESTABLISH AS SEX-NEUTRAL "METER PATROL OFFICERS" WITHIN APPELLANTS' POLICE DEPARTMENT THE "METER MAID" POSITIONS OCCUPIED BY COMPLAINANTS AND ACCORD THESE POSITIONS THE PROTECTION OF CIVIL SERVICE STATUS?

II. DOES THE COMMISSION HAVE AUTHORITY TO ORDER THE APPELLANTS TO PAY TO COMPLAINANTS THE BACK PAY, INCLUDING LOSS OF OVER-TIME AND A PAY RAISE, TO WHICH THEY WERE ENTITLED PLUS INTEREST AT 6% PER ANNUM?

COUNTER HISTORY OF THE CASE

On February 21, 1966, the Beaver Falls City Council enacted an Ordinance, No. 1211, "An Ordinance authoriting the employment of two women to assist in the regulation of traffic." Section 1 of the Ordinance provided:

> "The Mayor, with the approval of Council, is hereby authorized to employ two women to assist the police department in patrolling of parking meters and parking stalls whether the same are installed on city streets or on any parking lot operated by the parking authority."

The Complainants were hired to fill the positions, commonly referred to as "meter maids."

Prior to the creation of these positions, the duties performed by meter maids were performed by regular patrolmen of the all-male Beaver Falls Police Department. The meter maids were paid minimum wages and regular pay for a 42 hour week as compared to police officers who received time and a half after 40 hours. The meter maids did not receive a pay raise for 1971 while police officers did. They had no job security in that they were not under Civil Service while police officers were.

The Ordinance of 1966 remained in effect throughout the period in question. On October 14, 1971, the Appellant City Council finally passed and certified Ordinance No. 1305 which would reduce the hours of the two meter maids to 24 hours each and provide for the establishment of four such positions. The Appellants held off in implementing this Ordinance until the instant matter has been resolved.

The two Complainants filed a complaint with the Pennsylvania Human Relations Commission. Following an investigation, a finding of probable cause, and an unsuccessful endeavor to conciliate, the Commission convened a public hearing. The Commission found that the Appellants had engaged in unlawful sex discrimination in violation of §5(a) and (b) of the Pennsylvania Human Relations Act and issued an Order which in essence required Appellants to rescind the unlawful Ordinances and re-establish the positions occupied by Complainants as sex-neutral "meter patrol officers" within the Beaver Falls Police Department and with Civil Service status. The Order further required Appellants to pay the Complainants for the back pay which they had been unlawfully deprived of by Appellants' discriminatory conduct.

The Appellants appealed from this decision and Final Order.

ARGUMENT

I. THE COMMISSION HAS THE AUTHORITY TO RE-ESTABLISH AS SEX-NEUTRAL "METER PATROL OFFICERS" WITHIN APPELLANTS' POLICE DEPARTMENT THE "METER MAID" POSITIONS OCCUPIED BY COMPLAINANTS AND ACCORD THESE POSITIONS THE PROTECTION OF CIVIL SERVICE STATUS.

The Ordinances in question are, of course, patently unlawful unless Appellants had established a bona fide occupational qualification for the positions. Appellants never attempted to do so and of course no grounds for such an exemption exists and the duties were formerly performed solely by males.

The obvious intent and clear result of the Ordinance was to take duties previously performed by Civil Service-covered male police officers, enjoying all the benefits and advantages attendant thereto, and fill them with cheap, unprotected labor, women. The record fully documents the inferior status to which the meter maid positions were relegated.

While Appellants could have created lower-status meter patrol officer positions to perform duties previously perfomed by policemen if the new positions were in fact as well as on their face sex-neutral, once they created the positions in flagrant violation of the law, they must assume the consequences of their unlawful conduct.

The Commission's Final Order clearly relates to this fundamental unlawful conduct. The first four paragraphs of the Order deal with eliminating the unlawful job classification and providing relief to the Complainants.

One might question the need for establishing the new positions within the police department and with Civil Service status.

Where the positions of meter maid had been created to exploit women generally, and operated to in fact exploit the Complainants, the Commission felt that in addition to providing for full back pay, it was appropriate, in order to undo the effects of the past discrimination, to assure that the positions in the future be endowed with reasonable protection. This was all the more necessary in view of the history of these positions -- in their entire history they had been unlawfully filled only by women. Thus, having become identified in the public mind as "female" positions, it might be difficult at the outset to attract male candidates.

Thus, while the Commission's remedy might not be the only appropriate remedy in this case -- or even the best -- it was clearly lawful and within the Commission's judgment. See Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetary Association, 453 Pa. 124 (1973).

The Appellants and the Court strongly question the Commission's power to order affirmative action in apparent disregard of 53 P.S. §39401 which provides:

> No person or persons may be appointed to any position whatever in the police department ... except as otherwise provided by law, ... and having been appointed in the manner and according to the terms and provisions and conditions of this article.

It is submitted that to the extent provisions of the Commission's Order are inconsistent with this statute, the Commission's Order must prevail.

Section 12(a) of the Human Relations Act provides that "the provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof and any law inconsistent with any provisions hereof shall not apply."

Clearly, this means that as to a provision of any state law inconsistent with the subsequently-enacted Human Relations Act, the Human Relations Act prevails. See for example the Attorney General's Opinion No. 9 of February 7, 1974 finding that provisions of the Unemployment Compensation Law of 1937, 43 P.S. §751 et seq., providing inter alia that pregnant women are conclusively presumed ineligible for benefits for a period 30 days before and ending thirty days after birth of her child are impliedly repealed by §12(a) of the Human Relations Act. In the instant case, unlawful discrimination having already been found, 53 P.S. §39401, which preceeded the Human Relations Act, a fortiori must yield to the Human Relations Act when the Commission orders an appropriate remedy.

In its supplemental brief, Appellant cites the "only" case it could find involving the issue whether a "state Human Relations Commission could tamper with state Civil Service

Law requirements" and declared that "that case held that the Commission was powerless to do so." The case Appellant cited -- New York State Division of Human Rights v. City of Schenectady, 7 EPD ¶9389 (New York Supreme Court, Special Term, December 19, 1973), held no such thing. In that case, a woman police officer had filed a complaint with the New York State Division of Human Rights alleging that the City of Schenectady had refused to promote her to Sergeant because of her sex. The Division after a hearing found for the Complainant and ordered the Respondent to offer the Complainant the next available position of Police Sergeant. The Respondent appealed. When a subsequent vacancy occurred, the Division sought to enjoin the City from appointing anyone other than the Complainant to the vacancy until the litigation had been concluded. The Court considered the issue of the apparent conflict between the Human Rights Law and Civil Service Law and stated:

> If the Civil Service Law is controlling as argued by the City, injunctive relief for the Complainant would seem improper. The Court is well aware that under this view of the Civil Service Law and its relationship to the Human Rights Law, if after all the appeals are consummated and the final outcome is a finding the Complainant was discriminated against, and if she does not again pass a promotion exam, her one chance for consideration for appointment to a sergeancy may have disappeared. Such power in the appointing officer can not be considered unrestricted, however, it is circumscribed by the Equal Protection Clause of the New York State Constitution and subject to the provisions of the Human Rights Law and can be viewed as further restricted in the area of the Public Employes' Fair Employment Act.

> It is clear then that there are apparent conflicts between the Civil Service Law and this Order of the Division. Whether the decision of the Appellate Courts or Legislative action will clarify respective rights is not for this Court to determine but simply to hope for devoutly.

It should be noted that the New York State Human Rights Law contains no provision comparable to §12(a) of the Pennsylvania Human Relations Act. Therefore, it indeed remained either for the Appellate Courts or the Legislature to clarify those respective rights. In Pennsylvania, the Legislature has clarified those rights by the inclusion of §12(a) in the Human Relations Act.

Federal Courts routinely have not permitted State Civil Service Laws to impede appropriate relief under Title VII. Appellee, in its first brief cites several of the now numerous and established decisions, usually in the context of a court requiring as a remedy to undo the effects of past discrimination the hiring of minorities by mathematical ratios in disregard of Civil Service procedures. Many of these cases involve unintentional discrimination and the Orders had the effect of appointing minority applicants even at the expense of White applicants who may have finished higher on the examination. In the instant case, involving intentional discrimination, no male would be passed over for the meter patrol positions since Complainants already occupied the positions. Furthermore, Appellee submits that no male person currently employed as a Police Officer for the Appellant would be prejudiced in any way by the Order. The Court suggests that

existing seniority rights of Police Officers would be affected. It is respectfully pointed out that this is not the case, since the Order deals only with the new meter patrol officer position. Occupants of such positions do not accrue seniority with respect to regular Police Officer positions. They can not be promoted from meter patrol officer to patrolman. The intent and effect of paragraph 3 of the Order according Civil Service status to the new positions with rights and privileges equal to those enjoyed by males on the Beaver Falls Police Department is to incorporate fair procedures -- e.g. Civil Service procedure -- into the newly created meter patrol officer position. This deals with such things as the manner in filling the positions, probationary periods, the manner in which discharges may be carried out. Appellant conceded at argument that the Complainants have no job security and could be discharged at Appellant's whim. See 53 P.S. §171 et seq.

II. THE COMMISSION HAS AUTHORITY TO ORDER THE APPELLANTS TO PAY TO COMPLAINANTS THE BACK PAY, INCLUDING LOSS OF OVER-TIME AND A PAY RAISE, TO WHICH THEY WERE ENTITLED, PLUS INTEREST AT 6% PER ANNUM.

Section 9 of the Human Relations Act expressly authorizes the Commission to order back pay as a remedy. Section 2 of the Act contains further indication of Legislative intent that the Commission provide remedies for individuals as well as eliminate the unlawful discriminatory practice.

> The denial of equal employment ... opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living...

Having found that Appellants unlawfully discriminated against Complainants because of their sex, the Commission in its Order sought to redress the Complainants' losses to the extent it was feasible as well as insure that the unlawful practices would be eliminated. Appellants contend that the Commission may not order back pay for a period beyond ninety-days preceeding the filing of the complaint. The ninety-day statute of limitations for filing, of course, has no bearing on the measure of a Complainant's loss. Congress amended Title VII in 1972 to provide that back pay liability shall not accrue from a date more than two years prior to a filing of a charge with the Commission. (§706(g)) Prior to that time, there was no such limitation and courts could provide back pay dating from the effective date of the act, 1964. Our

State Legislature has not seen fit to enact a limitation comparable to the 1972 amendments to Title VII. Courts construing Title VII have generally held that the injured workers must be restored to the economic position in which they would have been but for the discrimination -- their "rightful place." See e.g., Bowe v. Colgate - Palmolive Company, 416 F 2nd 711, 720 (7th Cir. 1969), Pettway v. American Cast Iron Pipe Company, 7 EPD ¶9291 (5th Cir. 1974). As the Court stated in Pettway,

> From the employer's viewpoint back pay may be a punishment. But just as the National Labor Relations Act, Title VII was written to protect the employe. Not only has the Company violated a strong public policy against racial discrimination here, but it has substantially injured this class of Black workers. As between the obviously innocent discriminatee and the employer who may have some equities on his side [good faith], it seems fair to require the employer with his usually superior resources to bear the loss. (120)

It is fair to say that the Human Relations Act also was written to protect the employe. Our public policy against sex discrimination is equally as strong. And in the instant case the employer does not even have the equity of good faith on his side.

The Pettway Court summarized well established principles of back pay as follows:

> Therefore, in computing a back pay award two principles are lucid: (1) Unrealistic exactitude is not required (2) Uncertainties

> in determining what an employe would have earned but for the discrimination should be resolved against the discriminating employer.

Appellant questions the provision for interest on the award. The Order clearly provides for interest on the entire sum due Complainants. Here too, interest on back pay for unlawful discrimination is entrenched in the law:

> To make such employes whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable. Shultz v. Wheaton Glass Company, 3 EPD ¶8270 (D.N.J. 1970).

CONCLUSION

For the reasons stated herein inaddition to those stated in the Appelle's initial Brief, the Pennsylvania Human Relations Commission prays this Honorable Court uphold its Finding of Fact, Conclusions of Law, Decision and Final Order in this case.

Respectfully submitted,

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Commission

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COMMISSION.

Appellee's Brief

BRIEF ~~ON BEHALF OF APPELLEE~~

Appeal from the Order of the Pennsylvania Human Relations Commission at Docket No. E-4433.

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II. Did the Commission correctly exclude the testimony of an investigator as to the work performance of Complainants?

III. Is the Final Order of the Commission within its powers?

II. COUNTER HISTORY OF THE CASE

THIS MATTER ARISES upon a Complaint filed with the Pennsylvania Human Relations Commission against the Beaver Falls City Council, and the Mayor and Police Chief of Beaver Falls, in September, 1971, at Docket E-4433, charging the Appellants herein with discriminating against the female Complainants, Meter Control Officers, and all other women as a class, in the terms, conditions, and privileges of employment because of their sex by (a) restricting their job opportunities solely to the position of meter maid, (b) compensating them at a lower pay rate than male employees assigned to similar job duties, (c) refusing to grant them pay increases similar to that furnished male police officers in line with past practices, and (d) by changing the status of their job assignment from that of full-time employee to part-time employee causing them a loss in wages and denial of vacation, sick and health insurance and all other benefits of employment furnished full-time employees of the Appellants. The Appellants answered the Complaint by denying discriminatory practices.

After an investigation by Commission staff, and attempts at conciliation, the matter proceeded to a public hearing on March 21, 1973. Testimony was taken from the Commission investigator, the Complainants, the City Clerk, a Police Sargeant, and the Respondent Mayor and Police Chief. The two City Ordinances authorizing the hiring of women as meter maids, the newspaper advertisement for the same appearing in the "Female Help Wanted" Section, pay scale and increment chart, a vacation schedule, and Respondent's request for a Bona Fide Occupational Qualification in April, 1972 to permit the hiring of men only for the City's Police Department, were introduced and presented as evidence.

Testimony of the Commission's investigator and the Complainants disclosed the working hours, duties, pay scale, increments, and vacation time of Complainants. Respondents testified as to the workings of the Police Department, the salary scale, and increments of police officers, the method of obtaining raises, the hiring of Complainants, the Complainants' duties, job performance and ability.

After a review of evidence, the Commission issued 55 Findings of Fact and 7 Conclusions of Law, finding that the Appellants engaged in unlawful discriminatory practices in violation of Sections 5(a) and 5(b) of the Pennsylvania Human Relations Act, in that they discriminated on the basis of sex with respect to the Complainants' compensation, terms, conditions and privileges of employment; also, by treating Complainants as de facto members of the Beaver Falls Police Department while failing to create positions on the Police Department with duties and responsibilities similar to those performed by Complainants, and to provide Complainants with an opportunity to secure said positions; and by purposefully restricting the hiring and advertising for the positions held by Complainants to females only.

The Commission's Final Order directed the Appellants to, among other things, "create" two positions on the Police Department for Meter Patrol Officers and appoint Complainants to the positions; to pay Complainants "damages" in the form of back pay which amounted to the difference between the salary and benefits they received and that which they would have received if afforded the rights and privileges equal to those enjoyed by males on the Beaver Falls Police Department.

From this Final Order Appellants bring this appeal.

III. ARGUMENT

I. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS OF FACT ISSUED BY THE PENNSYLVANIA HUMAN RELATIONS COMMISSION.

This Court is limited in its review of the Commission's Finding of Facts and Conclusions of Law to whether the Commission's adjudication is not "in accordance with the law" or whether "any Finding of Fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." Straw v. Commonwealth, Human Relations Commission, 10 Pa. Commonwealth Ct. 99, 308 A. 2d 619 (1973). This Court reiterated the test for determining the existence of substantial evidence in St. Andrews Development Co., Inc. v. Commonwealth, Human Relations Commission, 10 Pa. Commonwealth Ct. 123, 308 A. 2d. 623 (1973) as follows:

> " '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; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside." 308 A. 2d at 625. (Emphasis in original.)

In the case now before this Court the Commission strongly maintains that the record does, in fact, show substantial evidence to support its Findings of Fact.

Appellants' contention of error in the Findings can be refuted by looking at the entire record. Appellants challenge Finding No. 14, "Complainants have occasionally performed police duties other than their normal duties, including searching of female prisoners, aiding in the escort of female prisoners to prison or female patients to hospitals, directing of traffic, observing for stolen cars, and apprehending runaway children." However, evidence from Complainants' testimony clearly supports this finding. (R. 45a, 58a, 60a.)

Finding No. 17 which states that Complainants are de facto members of the Beaver Falls Police Department is challenged in Arguments I and III of Appellants' Brief.

"A de facto officer is one who is in possession of an office and discharging its duties under color of authority; by 'color of authority' is meant authority derived "from an election or appointment, however irregular or informal"." Commonwealth ex rel Palermo v. Pittsburgh, 339 Pa. 173, 13A 2d 24 (1940). The record shows that the meter control personnel performed their duties under color of authority of the Police Department - they were appointed and sworn in by the Mayor after taking a test. (R. 70a) They performed duties previously performed by male police officers (R. 129a); they wore uniforms bearing a "Beaver Falls Police Department" patch (R. 56a); they were placed in a precarious position by virtue of wearing the uniform (R. 50a, 58a); they were under the direction of the Police Department and any comments concerning them made by the public were directed to the Police Department (R. 60a, 103a, 107a, 108a, 110a, 139a).

Appellants' quote Commonwealth ex rel, Appellant v. Snyder 294 Pa. 555, 559, 144 A 748 (1929) for the law as to de facto public officers. However, Appellants omit the most important part of the cited quotation, that is - ". . . it is equally well settled that attacks upon the rights of such imcumbents (de facto officials) to serve must be made by the Commonwealth in a direct proceeding for that purpose, and cannot be made collaterally." Snyder (supra) at Pa. 559. Cases using Snyder for authority use it for situations involving attacks on the right of an individual to hold office and the effect of the individual's status on the acts performed pursuant to that office. Commonwealth ex rel palermo v. Pittsburgh op cit., Pleasant Hills Boro v. Jefferson Township op. cit., Still v. Bucks County Board of Health, 11 Bucks Co. 178 (1961), Commonwealth v. Avery 50 Wash. Co., 195 (1970).

Snyder is not analogous to the matter before us. It deals with the acts performed by a de facto officer, not the status of a de facto officer. An analogous situation

applying the facts here would be a citizen challenging the authority of the meter control personnel to apprehend runaway or truant juveniles, or challenging the fine levied on a ticket issued by the Beaver Falls Police Department but written by Complainants. Using Appellants' own authority, it is clear that it is the acts of de facto officers which cannot be claimed for their own benefit, not the status of the de facto officer.

Appellants challenge the Fact Finding No. 34 which states that the Chief of Police is not within the police bargaining unit. This Finding, however, was based upon Chief Chiodo's own testimony. He stated, referring to the negotiating process between the police officers and the city, "Each year the membership of the Police Department, excluding the brass, officers, the patrolmen that make up the complements of the Police Department hold an election." (R. 117a). He again stated ,". . .the negotiating procedure, three members of the Police Department are selected by the

Department as a whole, and when I say 'Department as a whole' I make reference to patrolmen only. . ." (R. 134a).

As to Findings of Fact No. 41 that the meter control personnel were required to take a vacation at Christmas time, it is true that because of the policy of the Beaver Falls Police Department the Complainants were not needed the two weeks before Christmas. However, there is evidence of coercion with regard to taking a vacation at that time in that loss of pay for taking it at any other time is strong economic coercion. (R. 26a, 27a, 47a, 53a, 62a, 58a, 101a.)

The Finding of Fact No. 47 that "neither of the Complainants was ever disciplined concerning her work product, nor were Respondents dissatisfied with Complainants work product" is not palpably indifferent to the hearing testimony. The Complainants were never disciplined; there is no record of disciplinary action against them; there were no complaints as to their productivity; when citizen

complaints came in, the Police Chief discussed the matters with Complainants and received explanations which were satisfactorily accepted. (R. 83a, 106a, 110a, 126a) The record also supports the findings that procedures exist or could easily be formulated to provide supervision over Complainants' work activity - the use of call boxes both by the Police Department to contact Complainants and by the Complainants to check in periodically; directions given to check in with patrol cars in the area; providing them with a walkie-talkie. (R. 45a-46a)

Finally, the Commission does not brush aside the Finding of Fact that the Third Class City Code, 53 P.S. §37001, regulating the manner of appointment to a position in the Police Department would prevent Complainants from receiving adequate relief to redress the effects of Appellants' discrimination; on the contrary, it makes it a major consideration in the fashioning of its remedial Order.

Appellants contend that "the Commission has elected to accept as gospel every allegation of Complainants and to draw inferences therefrom that are wholly unwarranted.". Appellee submits that the Commission exercised its fact-finding responsibility with integrity and further that the inferences which the Commission has drawn from the evidence are warranted. It is established that the weight and credibility given to the witnesses' testimony are matters to be determined by the Commission. "The Commission's findings, when supported by testimony, have the force and effect of a verdict and are binding upon the Court." Pennsylvania Human Relations Commission v. Brucker 51 D&C 2d 269, 93 Daup 8, 12 (1970). The inferences drawn from examining the entire record are such "that a reasonable man, acting reasonably, might have reached the decision." St. Andrew's Development Co., Inc., v. Pennsylvania Human Relations Commission, 10 Comm Ct. 123, 308 A 2d 623 (1973).

It is true that no mention is made in the Conclusions of Law and Final Order of the fact that the city's advertisement for the police department did not specify sex, and that a female took the test for police officer. These facts are irrelevant to the issues brought

before the Commission, since they occurred at much later dates than the period covered in the allegation, and only after Appellants tried unsuccessfully, months after Complainants filed their Complaint, to get a Bona Fide Occupational Qualification for the Beaver Falls Police Department in order to limit its membership to males. (R. Exhibit E.)

There is ample evidence in the record to substantiate the Commission's decision that Appellants engaged in unlawful discriminatory practices with respect to the Complainants' compensation, terms, conditions and privileges of employment; by treating them as de facto members of the Police Department while failing to create positions in the Department with duties and responsibilities similar to those performed by the Complainants and to provide them with an opportunity to secure said positions; and by purposefully restricting the hiring and advertising for the positions held by Complainants to females only.

II. THE COMMISSION RULED PROPERLY IN EXCLUDING THE TESTIMONY OF AN INVESTIGATOR AS TO THE WORK PERFORMANCE OF THE COMPLAINANTS

The Commission did not err in excluding offered testimony of an investigator as to the work performance of the Complainants. The investigation dealt with job performance, whereas the relevant and material issues before the Commission at the hearing were the allegations of discrimination concerning the Complainants' terms and conditions of employment. Helwig v. Rockwell Mfg. Co. 390 Pa. 21, 131 A. 2d 622 (1957). It should be noted that Appellants' Answer to the Complaint did not cite the Complainants' job performance as a defense to the charges. (R. 4a)

The investigation was made not only approximately 9 months after the Complaint was filed, but also after a conciliation meeting between Appellants and the Pennsylvania Human Relations Commission, and after the Commission approved the public hearing. (R. 130a)

Therefore, the proferred testimony was not relevant, neither as to its subject matter nor as to time.

III. THE FINAL ORDER REQUIRING APPELLANTS TO "CREATE" TWO POSITIONS IN THE POLICE DEPARTMENT FOR METER PATROL OFFICERS AND APPOINT THE COMPLAINANTS TO THEM AND AWARD THEM BACK COMPENSATION IS WITHIN THE COMMISSION'S STATUTORY AUTHORITY

Appellants' Ordinance No. 1211, "an ordinance authorizing the employment of two women to assist in the regulation of traffic," is, of course, on its face, in violation of the Pennsylvania Human Relations Act. It is also clear that the ordinance was used to, and had the effect, of circumventing the very statute -- 53 P.S. §39401, "according Civil Service status to Police Officers and prescribing the manner of their appointment"-- which Appellants now seek to rely on to prevent a fair and appropriate remedy.

In this ordinance, Appellants created two positions, intended to and in fact exclusively filled by women, performing duties formerly performed by all male Police Officers with Civil Service status and attendant benefits. In addition to meter control duties, which had formerly been performed by the male Police Officers, the women, including Complainants, who occupied the new positions performed other essentially police duties, without enjoying Civil Service status and the attendant benefits (Findings of Fact No. 14, R. 164a).

Under §9 of its Act, the Commission, after a finding of unlawful discrimination, shall order the Respondent to cease and desist from such discriminatory practices. Paragraphs 11, 12 and 13 of the Final Order are directed to the elimination of such practices.

In addition to the cease and desist provision, §9 provides for the Commission to order the Respondent to take such affirmative action "including but not limited to hiring, reinstatement or upgrading of employes, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgement of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance."

Thus, it is clear that the Act requires the Commission to seek to provide a remedy for individuals aggrieved by the unlawful practices, as well as causing the abandonment of the practices. The provisions of the Order here under consideration were, of course, directed to and necessary in order to afford the individual complainants fair and appropriate relief.

In PHRC v. Alto Reste Park Cemetery Association, 453 Pa. 124, 306 A 2d. 881 (1973), the Court, relying on §9 as well as other provisions of the Act, including §12a -- "The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply" -- set forth in the strongest terms its view of the very broad remedial powers of the Commission.

> "The Legislature recognized that only an administrative agency with broad remedial power exercising particular expertise could cope effectively with the pervasive problem of unlawful discrimination. Accordingly, the Legislature vested in the Commission quite properly maximum flexibility to remedy and hopefully eradicate the 'Evils' of discrimination."

This Court adopted as its own, the United States Supreme Court's statement in Fibreboard Paper Products Corporation v. N.L.R.B. et al., 379 U.S. 203, 216, 85 S. Ct. 398, 405-06 (1964) dealing with a provision of the Taft-Hartley Act:

> "The Board's power is a broad discretionary one, subject to limited judicial review. 'The relation of remedy to policy is peculiarly a matter for administrative competence' ...'In fashioning remedies to undo the effects of violation of the Act, the Board must draw on enlightenment gained from experience'... The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act'..."

What does the Commission's Final Order do? First, it does the obvious and declares invalid as inconsistent with the Human Relations Act the patently discriminatory ordinance. As to Complainants, who performed work previously performed by male Police Officers with Civil Service advantages, and also performed purely police duties, it requires that this inequity be eliminated and that the Complainants be given the loss of pay and benefits they were unlawfully deprived of.

As noted, it is ironic that Appellant seeks to rely on the very Civil Service provisions it circumvented to Complainants' disadvantage.

The Commission's Order, in the first instance, requires Appellants to comply with the basic provisions of 53 PS. §39401 that police positions are Civil Service positions. The Appellants were not actually required to create new positions, but rather to convert the two existing positions occupied by the Complainants to Civil Service positions, which by law they were required to be in any event. Surely, having been hired and having satisfactorily performed the duties, the Complainants are in a superior position to an applicant as to whom a Civil Service test can only predict the likelihood of satisfactory job performance. And once the Complainants leave the positions, their successors would, of course, be selected in accordance with Civil Service procedures.

Courts routinely temporarily suspend Civil Service procedures to remedy the effects of past discrimination. See e.g., Erie Human Relations Commission v. Tullio, 357 F. Supp. 422 (W.D. Pa., 1973) Commonwealth of Pennsylvania v. O'Neille, 473 F. 2d. 1029 (3rd Cir., 1973), and Carter v. Gallagher, 452 F. 2d. 315 (8th Cir. 1972). These cases dealt with a Court requiring the hiring of minorities by mathematical ratios in disregard of Civil Service procedures. In Tullio, the Court pointed out that,

> There is nothing new, unusual or unique in the remedy which plaintiff seeks. It has been applied many times. It is apparent that remedies to overcome the effects of past discrimination may suspend valid state laws. United States v. Duke, 332 F. 2d. 679 (5th Cir. 1964).

In the above cases, the Courts acted as they did even after a finding that the discrimination being remedied had not

been intentional and their orders had the effect of appointing minority applicants at the expense of White applicants who had finished higher on the examination. In the instant case, it is submitted that the Commission's Order is a fortiori proper in that the discrimination was indeed intentional and no other person would be passed over since the Complainants already occupied the positions in question.

Finally, although referred to as "damages" in the Final Order, the provisions in question deal solely with "back pay" and benefits which clearly fall within that category.

CONCLUSION

For the reasons stated herein, the Pennsylvania Human Relations Commission prays this Honorable Court uphold its findings of fact, conclusions of law, decision, and final order in this case.

Respectfully submitted,

Sanford Kahn
General Counsel,
Attorney for Appellee

On the Brief:

Paulette Balogh

IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

No. 384 C.D. 1974

BEAVER FALLS CITY COUNCIL, NICK L. CAMP,

Mayor, RUSSELL CHIODO, Chief of Police

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA,

PENNSYLVANIA HUMAN RELATIONS COMMISSION

APPELLEE'S SUPPLEMENTAL BRIEF

Appeal from the Order of the Pennsylvania
Human Relations Commission at Docket No. E-4433.

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General Counsel,
Attorney for Appellee

STATEMENT OF QUESTIONS INVOLVED

I. DOES THE COMMISSION HAVE THE AUTHORITY TO RE-ESTABLISH AS SEX-NEUTRAL "METER PATROL OFFICERS" WITHIN APPELLANTS' POLICE DEPARTMENT THE "METER MAID" POSITIONS OCCUPIED BY COMPLAINANTS AND ACCORD THESE POSITIONS THE PROTECTION OF CIVIL SERVICE STATUS?

II. DOES THE COMMISSION HAVE AUTHORITY TO ORDER THE APPELLANTS TO PAY TO COMPLAINANTS THE BACK PAY, INCLUDING LOSS OF OVER-TIME AND A PAY RAISE, TO WHICH THEY WERE ENTITLED PLUS INTEREST AT 6% PER ANNUM?

COUNTER HISTORY OF THE CASE

On February 21, 1966, the Beaver Falls City Council enacted an Ordinance, No. 1211, "An Ordinance authoriting the employment of two women to assist in the regulation of traffic." Section 1 of the Ordinance provided:

> "The Mayor, with the approval of Council, is hereby authorized to employ two women to assist the police department in patrolling of parking meters and parking stalls whether the same are installed on city streets or on any parking lot operated by the parking authority."

The Complainants were hired to fill the positions, commonly referred to as "meter maids."

Prior to the creation of these positions, the duties performed by meter maids were performed by regular patrolmen of the all-male Beaver Falls Police Department. The meter maids were paid minimum wages and regular pay for a 42 hour week as compared to police officers who received time and a half after 40 hours. The meter maids did not receive a pay raise for 1971 while police officers did. They had no job security in that they were not under Civil Service while police officers were.

The Ordinance of 1966 remained in effect throughout the period in question. On October 14, 1971, the Appellant City Council finally passed and certified Ordinance No. 1305 which would reduce the hours of the two meter maids to 24 hours each and provide for the establishment of four such positions. The Appellants held off in implementing this Ordinance until the instant matter has been resolved.

The two Complainants filed a complaint with the Pennsylvania Human Relations Commission. Following an investigation, a finding of probable cause, and an unsuccessful endeavor to conciliate, the Commission convened a public hearing. The Commission found that the Appellants had engaged in unlawful sex discrimination in violation of §5(a) and (b) of the Pennsylvania Human Relations Act and issued an Order which in essence required Appellants to rescind the unlawful Ordinances and re-establish the positions occupied by Complainants as sex-neutral "meter patrol officers" within the Beaver Falls Police Department and with Civil Service status. The Order further required Appellants to pay the Complainants for the back pay which they had been unlawfully deprived of by Appellants' discriminatory conduct.

The Appellants appealed from this decision and Final Order.

ARGUMENT

I. THE COMMISSION HAS THE AUTHORITY TO RE-ESTABLISH AS SEX-NEUTRAL "METER PATROL OFFICERS" WITHIN APPELLANTS' POLICE DEPARTMENT THE "METER MAID" POSITIONS OCCUPIED BY COMPLAINANTS AND ACCORD THESE POSITIONS THE PROTECTION OF CIVIL SERVICE STATUS.

The Ordinances in question are, of course, patently unlawful unless Appellants had established a bona fide occupational qualification for the positions. Appellants never attempted to do so and of course no grounds for such an exemption exists and the duties were formerly performed solely by males.

The obvious intent and clear result of the Ordinance was to take duties previously performed by Civil Service-covered male police officers, enjoying all the benefits and advantages attendant thereto, and fill them with cheap, unprotected labor, women. The record fully documents the inferior status to which the meter maid positions were relegated.

While Appellants could have created lower-status meter patrol officer positions to perform duties previously perfomed by policemen if the new positions were in fact as well as on their face sex-neutral, once they created the positions in flagrant violation of the law, they must assume the consequences of their unlawful conduct.

The Commission's Final Order clearly relates to this fundamental unlawful conduct. The first four paragraphs of the Order deal with eliminating the unlawful job classification and providing relief to the Complainants.

One might question the need for establishing the new positions within the police department and with Civil Service status.

Where the positions of meter maid had been created to exploit women generally, and operated to in fact exploit the Complainants, the Commission felt that in addition to providing for full back pay, it was appropriate, in order to undo the effects of the past discrimination, to assure that the positions in the future be endowed with reasonable protection. This was all the more necessary in view of the history of these positions -- in their entire history they had been unlawfully filled only by women. Thus, having become identified in the public mind as "female" positions, it might be difficult at the outset to attract male candidates.

Thus, while the Commission's remedy might not be the only appropriate remedy in this case -- or even the best -- it was clearly lawful and within the Commission's judgment. See Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetary Association, 453 Pa. 124 (1973).

The Appellants and the Court strongly question the Commission's power to order affirmative action in apparent disregard of 53 P.S. §39401 which provides:

> No person or persons may be appointed to any position whatever in the police department ... except as otherwise provided by law, ... and having been appointed in the manner and according to the terms and provisions and conditions of this article.

It is submitted that to the extent provisions of the Commission's Order are inconsistent with this statute, the Commission's Order must prevail.

Section 12(a) of the Human Relations Act provides that "the provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof and any law inconsistent with any provisions hereof shall not apply."

Clearly, this means that as to a provision of any state law inconsistent with the subsequently-enacted Human Relations Act, the Human Relations Act prevails. See for example the Attorney General's Opinion No. 9 of February 7, 1974 finding that provisions of the Unemployment Compensation Law of 1937, 43 P.S. §751 et seq., providing inter alia that pregnant women are conclusively presumed ineligible for benefits for a period 30 days before and ending thirty days after birth of her child are impliedly repealed by §12(a) of the Human Relations Act. In the instant case, unlawful discrimination having already been found, 53 P.S. §39401, which preceeded the Human Relations Act, a fortiori must yield to the Human Relations Act when the Commission orders an appropriate remedy.

In its supplemental brief, Appellant cites the "only" case it could find involving the issue whether a "state Human Relations Commission could tamper with state Civil Service

Law requirements" and declared that "that case held that the Commission was powerless to do so." The case Appellant cited -- New York State Division of Human Rights v. City of Schenectady, 7 EPD ¶9389 (New York Supreme Court, Special Term, December 19, 1973), held no such thing. In that case, a woman police officer had filed a complaint with the New York State Division of Human Rights alleging that the City of Schenectady had refused to promote her to Sergeant because of her sex. The Division after a hearing found for the Complainant and ordered the Respondent to offer the Complainant the next available position of Police Sergeant. The Respondent appealed. When a subsequent vacancy occurred, the Division sought to enjoin the City from appointing anyone other than the Complainant to the vacancy until the litigation had been concluded. The Court considered the issue of the apparent conflict between the Human Rights Law and Civil Service Law and stated:

> If the Civil Service Law is controlling as argued by the City, injunctive relief for the Complainant would seem improper. The Court is well aware that under this view of the Civil Service Law and its relationship to the Human Rights Law, if after all the appeals are consummated and the final outcome is a finding the Complainant was discriminated against, and if she does not again pass a promotion exam, her one chance for consideration for appointment to a sergeancy may have disappeared. Such power in the appointing officer can not be considered unrestricted, however, it is circumscribed by the Equal Protection Clause of the New York State Constitution and subject to the provisions of the Human Rights Law and can be viewed as further restricted in the area of the Public Employes' Fair Employment Act.

> It is clear then that there are apparent conflicts between the Civil Service Law and this Order of the Division. Whether the decision of the Appellate Courts or Legislative action will clarify respective rights is not for this Court to determine but simply to hope for devoutly.

It should be noted that the New York State Human Rights Law contains no provision comparable to §12(a) of the Pennsylvania Human Relations Act. Therefore, it indeed remained either for the Appellate Courts or the Legislature to clarify those respective rights. In Pennsylvania, the Legislature has clarified those rights by the inclusion of §12(a) in the Human Relations Act.

Federal Courts routinely have not permitted State Civil Service Laws to impede appropriate relief under Title VII. Appellee, in its first brief cites several of the now numerous and established decisions, usually in the context of a court requiring as a remedy to undo the effects of past discrimination the hiring of minorities by mathematical ratios in disregard of Civil Service procedures. Many of these cases involve unintentional discrimination and the Orders had the effect of appointing minority applicants even at the expense of White applicants who may have finished higher on the examination. In the instant case, involving intentional discrimination, no male would be passed over for the meter patrol positions since Complainants already occupied the positions. Furthermore, Appellee submits that no male person currently employed as a Police Officer for the Appellant would be prejudiced in any way by the Order. The Court suggests that

existing seniority rights of Police Officers would be affected. It is respectfully pointed out that this is not the case, since the Order deals only with the new meter patrol officer position. Occupants of such positions do not accrue seniority with respect to regular Police Officer positions. They can not be promoted from meter patrol officer to patrolman. The intent and effect of paragraph 3 of the Order according Civil Service status to the new positions with rights and privileges equal to those enjoyed by males on the Beaver Falls Police Department is to incorporate fair procedures -- e.g. Civil Service procedure -- into the newly created meter patrol officer position. This deals with such things as the manner in filling the positions, probationary periods, the manner in which discharges may be carried out. Appellant conceded at argument that the Complainants have no job security and could be discharged at Appellant's whim. See 53 P.S. §171 et seq.

II. THE COMMISSION HAS AUTHORITY TO ORDER THE APPELLANTS TO PAY TO COMPLAINANTS THE BACK PAY, INCLUDING LOSS OF OVER-TIME AND A PAY RAISE, TO WHICH THEY WERE ENTITLED, PLUS INTEREST AT 6% PER ANNUM.

Section 9 of the Human Relations Act expressly authorizes the Commission to order back pay as a remedy. Section 2 of the Act contains further indication of Legislative intent that the Commission provide remedies for individuals as well as eliminate the unlawful discriminatory practice.

> The denial of equal employment ... opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living...

Having found that Appellants unlawfully discriminated against Complainants because of their sex, the Commission in its Order sought to redress the Complainants' losses to the extent it was feasible as well as insure that the unlawful practices would be eliminated. Appellants contend that the Commission may not order back pay for a period beyond ninety-days preceeding the filing of the complaint. The ninety-day statute of limitations for filing, of course, has no bearing on the measure of a Complainant's loss. Congress amended Title VII in 1972 to provide that back pay liability shall not accrue from a date more than two years prior to a filing of a charge with the Commission. (§706(g)) Prior to that time, there was no such limitation and courts could provide back pay dating from the effective date of the act, 1964. Our

State Legislature has not seen fit to enact a limitation comparable to the 1972 amendments to Title VII. Courts construing Title VII have generally held that the injured workers must be restored to the economic position in which they would have been but for the discrimination -- their "rightful place." See e.g., Bowe v. Colgate - Palmolive Company, 416 F 2nd 711, 720 (7th Cir. 1969), Pettway v. American Cast Iron Pipe Company, 7 EPD ¶9291 (5th Cir. 1974). As the Court stated in Pettway,

> From the employer's viewpoint back pay may be a punishment. But just as the National Labor Relations Act, Title VII was written to protect the employe. Not only has the Company violated a strong public policy against racial discrimination here, but it has substantially injured this class of Black workers. As between the obviously innocent discriminatee and the employer who may have some equities on his side [good faith], it seems fair to require the employer with his usually superior resources to bear the loss. (120)

It is fair to say that the Human Relations Act also was written to protect the employe. Our public policy against sex discrimination is equally as strong. And in the instant case the employer does not even have the equity of good faith on his side.

The Pettway Court summarized well established principles of back pay as follows:

> Therefore, in computing a back pay award two principles are lucid: (1) Unrealistic exactitude is not required (2) Uncertainties

in determining what an employe would have earned but for the discrimination should be resolved against the discriminating employer.

Appellant questions the provision for interest on the award. The Order clearly provides for interest on the entire sum due Complainants. Here too, interest on back pay for unlawful discrimination is entrenched in the law:

> To make such employes whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable. Shultz v. Wheaton Glass Company, 3 EPD ¶8270 (D.N.J. 1970).

CONCLUSION

For the reasons stated herein inaddition to those stated in the Appelle's initial Brief, the Pennsylvania Human Relations Commission prays this Honorable Court uphold its Finding of Fact, Conclusions of Law, Decision and Final Order in this case.

Respectfully submitted,

SANFORD KAHN
General Counsel
Pennsylvania Human Relations
Commission

IN THE

SUPREME COURT

OF PENNSYLVANIA

NO. 173 March Term, 1975

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA HUMAN RELATIONS COMMISSION

vs

BEAVER FALLS CITY COUNCIL, et al.,

Appellants

BRIEF ON BEHALF OF THE CITY OF BEAVER FALLS COUNCIL

Appeal of the Pennsylvania Human Relations Commission from the Final Order of the Commonwealth Court of Pennsylvania at No. 384 C. D. 1974

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Commonwealth Court of Pennsylvania in this matter by virtue of the Administrative Agency Law, as amended, and the Appellate Court Jurisdiction Act of 1970.

STATEMENT OF QUESTIONS INVOLVED

I. Whether the findings of fact and conclusions of law in this case were made by a proper quorum of the Commission?

II. Whether the record of the pleadings and the evidence presented adequately supports the findings of fact and conclusions of law found in the Commission's adjudication?

III. Whether the final Orders entered in this case by the Commission are beyond the statutory powers of the Commission?

HISTORY OF THE CASE

This matter arisesupon a Complaint filed with the Pennsylvania Human Relations Commission by Marie A. Morrell and Lauretta C. McConahy, "meter maids" in the City of Beaver Falls, Pennsylvania, which charged appellants, city officials of that municipality, with violating § 5a of the Pennsylvania Human Relations Act, in the following ways: (a) by restricting complainants' job opportunities solely to the position of meter maid; (b) by compensating them at a lower pay rate than male employees assigned to similar job duties (c) by refusing to grant them pay increases similar to that furnished male police officers in line with past practices, and (d) by changing the status of their job assignment from that of full-time employees to part-time employees, causing the complainants a loss in wages and denial of vacation and other benefits of employment furnished full-time employees of the appellants. All these actions were alleged to have been taken against complainants because of their sex.

Appellants answered, generally denying the allegations, denying that complainants were police officers, denying that any police officers performed job duties similar to those of complainants, denying a refusal to grant increases in pay to appellants admitting passage of an ordinance

making complainants' positions part-time ones, and denying any discriminatory intent therein.

After investigation and attempted conciliation by the Commission, a public hearing was held on March 21, 1973, at which a Commission investigator, the Complainants, and several city officials testified. Appellants sought unsuccessfully to introduce evidence of misconduct by complainants at a time subsequent to the filing of the Complaint.

The three commissioners who presided at the hearing then issued 55 findings of fact, seven conclusions of law, and a recommendation that the Commission enter an order requiring the appellants to cease and desist their discriminatory practices in violation of Sections 5a and b of the Act.

These findings of fact included findings that the complainants were not de jure members of the police department, but were employed as non-civil-service personnel pursuant to a "meter maid" ordinance; that complainants had numerous contacts with, and were supervised by, the police department; that complainants were "de facto members" of that department, that policemen collectively negotiated pay increases for themselves which were not extended to complainants, that the ordinance reducing complainants' work hours to part-time was unnecessary and without any legitimate "reason"; that police officers' duties were not generally

the same as those of Complainants.

The Commission's Decision found appellants guilty of violations of Sections 5a and b of the Act, by discriminating against complainants on the basis of sex in regard to compensation, terms, conditions and privileges of employment; also, by treating complainants as de facto police officers while failing to create civil service positions in the Police Department with duties similar to those of complainants present positions.

The Commission's Final Order required appellants to create two civil service positions within the police department for complainants, to raise complainants' pay in compensation for pay increases previously denied to complainants but granted to policemen; to award back pay "damages" in the amount of such pay increases and to cease and desist from single-sex job advertising and from violating the Act. The Final Order also declared the meter maid ordinances null and void, and required appellants to employ complainants in the newly-created civil service positions without administering any examination to them.

From this order appellants prosecute this appeal.

ARGUMENT

I. A PROPER QUORUM OF THE PHRC DID NOT ADOPT THE SPECIFIC FINDINGS OF FACT MADE BY THE HEARING PANEL, AS REQUIRED BY THE PENNSYLVANIA HUMAN RELATIONS ACT, 43 P.S. § 951 et seq. (1955).

The Pennsylvania Human Relations Commission (hereinafter PHRC) made a decision in the present case "in consideration of" the findings of fact and conclusions of law made by the trial panel of three commissioners. (R. 172a; R. 162a-171a). The decision does not, however, specifically incorporate, ratify or adopt the detailed and specific findings of fact made by the hearing panel. (See full text of Decision at R. 172a). Instead, it contains only a summary and conclusory recital of appellants' violation of the Act. (Id.).

This procedure is apparently in accord with standard PHRC practice. (See PHRC Rules of Procedure § 105.23, 105.24, set out in 3 CCH Employment Practices Guide, § 27, 281 at 9058; 16 Pa. Code § 41.49). Nevertheless, appellants believe that it amounts to an abdication of the full PHRC's statutory responsibility to vote upon findings of fact in each case decided by it.

According to statute:

> Six members of the Commission shall constitute a quorum for transacting business, and a majority vote of those present at any meeting shall be sufficient for any official action taken by the Commission.

43 P.S. § 956 (as amended).

Of course, it is true that:

> Three or more members of the Commission shall constitute the Commission for any hearing required to be held by the Commission. ...

43 P.S. § 959 (as amended 1974). However appellants submit that the making of findings of fact is not a part of a "hearing," but is something done after a hearing and "upon all the evidence at the hearing." See 43 P.S. § 959.

That this distinction is generally recognized may be seen by the provisions of the Administrative Agency Law, which define "adjudication" as a "final order...by an agency" (not by a hearing officer) 71 P.S. § 1710.2a (1945), and require that "all adjudications...shall contain findings..." 71 P.S. § 1710.34 (1945). Cf. 2 K. Davis, Administrative Law Treatise, § 10.03 at 11 (1958).

Each of the specific findings of fact in this case may thus have won the approval of as few as two commissioners, instead of the minimum of four Commission

members (a majority of a quorum of six) contemplated by the Act.

Appellants have no reason to believe that a reversal of the PHRC order in this case, with a reward to allow the full Commission to vote to adopt the findings of fact, would produce any difference in the result already reached.

Nevertheless, as this Court said in a similar situation:

> Were we to countenance such a procedure, it would simply mean that orders of the Commission may issue which have not been the subject of legislatively ordained deliberation...by it....
> ...In effect, the Court requires full compliance with the procedure notwithstanding the unlikelihood of a change in the result.

Alto-Reste Park Cemetery Association v. PHRC, 7 Pa. Cmwlth. 203, 298 A.2d 619 at 622 (1972), modified on other grounds, 453 Pa. 124, 306 A.2d 881 (1973).

This Court's enforcement of the full Commission's duty to make findings of fact would not unduly burden the Commission, which could still rely heavily on the recommendations of the hearing panel, and could, further, adopt the procedures set out in 1 Pa. Code § 35.201 et seq.,

to simplify the task of reviewing those recommendations. The PHRC can, of course, adopt the above-cited procedures. See 43 P.S. §§ 956, 957 d (1955).

II. THE RECORD OF THE PLEADINGS AND THE EVIDENCE PRESENTED DO NOT ADEQUATELY SUPPORT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOUND IN THE COMMISSION'S ADJUDICATION.

IIA. FINDING OF FACT # 17 IS NOT A "FINDING" AS REQUIRED BY THE ACT; ALTERNATIVELY, IT IS WITHOUT SUBSTANTIAL EVIDENCE TO SUSTAIN IT.

In this finding the hearing commissioners conclude that "Complainants are de facto members of the Beaver Falls Police Dept." (R. 164a).

It must be readily apparent that the Complainants were not de facto police officers, as the term "de facto officer" is usually used. Thus, Black's Law Dictionary (3d ed.) at 1286 states:

> As distinguished from an officer de jure, this is the designation of one who is in the actual possession of the office, under some colorable or apparent authority, although his title to the same, whether by election or appointment, is in reality invalid or at least formally questioned...

The above definition implies that there exists a certain de jure office, possession of which is being successfully maintained by one whose legal title to the post is questionable. See Commonwealth ex rel. Palermo v. City of Pittsburgh, 339 Pa. 173, 13 A.2d 24 at 26 (1940).

In the instant case, there was simply no de jure position in the police department which Complainants were "possessing." Complainants were simply - both de jure and de facto - possessing the jobs created under Beaver Falls Ordinance 1211 (Commission Exhibit A R. 156a), namely, the office of meter maid. As a matter of law, one cannot be a de facto police officer by occupying a de jure post not within the police department. (Finding of Fact 24, R. 165a).

But finding of Fact # 17 may not be an attempt to maintain that the Complainants were de facto police officers, in the sense above discussed. It would appear, from consulting the portions of the record cited by the Finding, that the latter may merely be the hearing Commissioners' short-hand way of summarizing a body of evidence - undoubtedly worthy of credit - which revealed that Complainants did (rarely) aid police officers in transporting or searching female prisoners, were indeed requested to look out for stolen license plates, etc. The specific facts thus referred to, if set out as findings, would not be objected to by appellants. Appellants do, however, object to the short-hand fashion in which the hearing commissioners summarize those facts. The reason for a statutory requirement of findings by an agency is to expose to a reviewing court "The considerations underlying the action under review." SEC v. Chenery, 318 U.S. 80 at 94 (1943).

A finding which recites merely that "Complainants sometimes did various things that patrolmen also do, and in various ways were linked to the police department" is obviously an improper finding, because it is too vague and general to permit intelligent review on appeal. Cf. State Board of Private Business Schools v. Thomassen, 66 Dauph. 110 at 119 (Comm. Pleas 1954). Thus, if Finding # 17 means that Complainants were de facto officers, it is without support in the record. But if Finding # 17 means "Complainants did several jobs that policemen have done, aid policemen, etc.," then Finding # 17 is too general and vague to be a "finding" as the word is used in administrative law generally, and in 43 P.S. § 959 in particular. In either case, the Finding is defective and entitled to no weight.

11B. FINDING OF FACT # 31 IS AN ERRONEOUS CONCLUSION OF LAW, NOT A STATEMENT OF FACT, AND MUST BE MODIFIED.

This finding states that the provisions of 43 P.S. §§ 217.1 et seq. (1968) "do not preclude Complainants from membership in the same bargaining unit as police personnel nor from securing the same benefits as police personnel from the bargaining process." (R. 166a).

Apparently, the hearing commissioners determined that, inasmuch as Complainants wear a blue uniform and an arm patch (Finding # 10, R. 163a), they are "policeman" within the meaning of 43 P.S. § 217.1. This is false.

A "policeman," in this state, has always meant a person who has the duty to risk his or her life and limb in order to preserve the public peace against any and all infractions. See Smith v. City of Philadelphia, 305 Pa. 503, 158 A. 150 (1931); McNitt v. City of Philadelphia, 325 Pa. 73, 189 A. 300 (1937). In keeping with this, the legislative purpose behind 43 P.S. § 217.1 was

> ...to insure appropriate pay increases and additional fringe benefits...while guaranteeing...that these critical employees would not find it necessary to resort to strikes. The resultant danger to the health and safety of the community is obvious.

Allegheny County v. Hartshorn, 9 Pa. Cmwlth. 132 at 136, 304 A.2d 716 (1973). (emphasis supplied).

Since policemen have a "right to bargain collectively" under 43 P.S. 217.1, it seems dubious at best that any individual policeman could be required to bargain by means of a unit which included municipal employees other than policemen. Surely the municipal employer could not insist on a bargaining unit which includes non-policemen (such as meter people) against the objection of even a minority of policemen!

Finding # 31, then, is seriously misleading if it suggests that respondents could have required inclusion of meter maids in the Beaver Falls policemen's bargaining unit, over the opposition of the policemen themselves.

But the Finding may be even more misleading, by ignoring the impact which the Public Employee Relations Act, 43 P.S. §§ 1101.201 et seq., had on the prior legal options of municipal employers and employees to form bargaining units embracing both policemen and other workers.

The 1970 statute defines "employee" so as to exclude policemen, 43 P.S. § 1101.301 (3), and insofar as the police are "guards" of city property - it even seems to bar the membership of policemen and other employees in the same bargaining unit. 43 P.S.§ 1101.604(3). It also seems to violate the statutory scheme to combine both "policemen" and other employees in the same unit, because - as this court has already noted, Venneri v. County of Allegheny, _____Pa. Cmwlth._____, 316 A.2d 120 at 123 (1974) -

policemen cannot strike, while other employees can, and policemen can require compulsory arbitration, while other employees cannot.

The resulting legal picture is perhaps confusing. In any event, there is no clear basis in existing law for the statement of "fact" put forth so confidently in Finding # 31, and certainly there is no room for the innuendo of that Finding, namely, that respondents could have put Complainants in the policemen's bargaining unit, if Respondents had so desired.

IIC FINDING OF FACT # 32, INSOFAR AS IT IMPLIES THE EXISTENCE OF A CONTINUING ORGANIZATION OF POLICEMEN IN A BARGAINING UNIT, IN BEAVER FALLS, IS WITHOUT SUBSTANTIAL EVIDENCE TO SUSTAIN IT.

The hearing Commissioners are certainly correct in observing, in Finding # 32, that policemen, approached individually, told Complainants that they would not be included in any collective bargaining those policemen undertook. (R. 62a-63a). But there is nothing in the record to suggest any enduring employee organization of policemen, as the Finding seems to imply. Rather, the record suggests that the patrolmen form an ad hoc bargaining committee at budget time. (R. 134a-135a).

This point has little importance; appellants wish, however, to dispel any suggestion the Finding may carry with it, that the respondents gave any sort of official blessing or recognition upon any formal and enduring structure of police department members. The record has nothing in it to such effect.

IID. FINDING OF FACT # 46 IS WITHOUT SUBSTANTIAL BASIS IN THE EVIDENCE.

This finding states that:

> The alleged basis for irdinance No. 1305 was to receive a more productive work product from meter maids and to facilitate closer Police Department supervision over "meter maids' " daily work activities.

(R. 168a).

This "finding" does not purport to state the true "basis" for the ordinance, but merely the "alleged" basis. The finding does not bother to say who alleged this. Reference to the parts of the record cited in support of the finding show that Police Chief Chido desired such an ordinance, according to the hearsay of witnesses Pagan (R. 32a) and Camp (R. 97a), and so did Mayor Camp himself. (R. 97a).

Of course, the "basis" for a piece of legislation is not shown by revealing the subjective motivation of one person. 2 A T. Sutherland, Statutes & Statutory Construction, § 48.16 (4th ed. 1973). This is particularly so where the record fails to disclose that the witness (Camp) even voted for the ordinance in question.

Appellants object to this finding as being a mere recital of evidence [i.e., "Camp said..."] and not a finding

at all. Even as a recital of evidence, it is objectionable in failing to state who alleged the matters set out in it. Moreover, if treated - despite its wording - as a finding of legislative intent (or "bad-faith legislative intent"), it is improper, in that witness Camp's testimony as to his own motives, or those of the police chief, have nothing to do with the Council's motives, as a body, for passing the ordinance. The actual statement by the Council, of its reasons for passing the ordinance, is merely that "the employment of four (4) women for four hours a day for six days per week...will be more efficient and result in economy for the city." (R. 157a). This - the only true "basis" for the ordinance - is not even similar to the statement made in the Finding. If the Finding is deemed to refer to Council's purpose in passing the ordinance, then to the extent that it varies the above statement by Council, it is without any evidence to sustain it.

IIE. THERE IS NO SUBSTANTIAL EVIDENCE TO SUSTAIN THAT PART OF FINDING OF FACT # 47 WHICH STATES THAT RESPONDENTS WERE SATISFIED WITH COMPLAINANTS' WORK.

Initially, it should be noted that the printed Finding states that respondents were dissatisfied, not satisfied, with complainants' work. (R. 168a). Appellants concede that this is a mere typographical error, and that the true finding # 47 was, that

> Neither of Complainants was ever disciplined concerning her work product, nor were respondents dissatisfied with complainants' work products.

(R. 168a).

A consultation of the portions of the record cited by the hearing commissioners in support of their finding discloses that one witness disavowed any knowledge of the issue (R. 83a), while another witness stated that the ticket productivity of the Complainants was adequate (R. 110a). If this Finding imports no more than that Complainants had no ticket quotas to fill and so never failed to meet a quota (R. 110a), then appellants do not object to it. But if this Finding is deemed to mean that any of the respondents were content with the Complainants' performance of their duties, then appellants object to it, and contend that it is without a basis in the record.

The Commission itself, in its case-in-chief, elicited no testimony germane to the adequacy of Complainants' performance of their duties. Respondents' witness Camp did testify that he received numerous complaints about the meter maids, (R. 92a l. 18-R. 98a 1.6; R. 106a-107a), but that the Complainants preempted any action against themselves by filing their complaint with the PHRC (R 106a-107a), just as complaints about their job performance were intensifying (R. 115a l. 22- R. 116a l. 3). This testimony was generally corroborated by respondents' witness Chido. (R. 125a l. 17-R. 127a l. 13; R. 138a-R. 139a).

Respondents are at a loss to see how the above record can possibly sustain the finding that any of the respondents was not dissatisfied with complainants' work. And once again, respondents object to the vague form of this Finding, which does not clearly state which of the respondents it refers to, if it does not refer to all of them.

IIF. THERE IS NO SUBSTANTIAL EVIDENCE TO SUSTAIN FINDING OF FACT # 49 (THAT COMPLAINANTS SATISFACTORILY PERFORMED THEIR DUTIES); FURTHER, IT WAS LEGALLY ERRONEOUS TO MAKE SUCH A FINDING, AFTER REFUSING TO ADMIT RESPONDENTS' EVIDENCE ON THIS POINT.

The Commission, in its case-in-chief, elicited no testimony relevant to this finding. The portions of the record which the hearing commissioners cite in support of their finding go no further than to show that no formal disciplinary procedures had been instituted against complainants by the time the complaint in this case was filed. (R. 83a, 106a, 110a, 126a, 140a). These citations certainly support Finding 48 (R. 168a). However, to appellants, they do not give even a scintilla of support to Finding # 49. Appellants have searched the record and found nothing else to support this Finding. Perhaps the Finding is true. Appellants contend that the PHRC must rest its findings not on a conviction of their truth, but on the record itself, because the burden is on the Commission to prove its case. City of Philadelphia v. PHRC, 4 Pa. Cmwlth. 506, 287 A.2d 703 (1972).

Secondly, respondents object to this finding because they believe it goes to an issue on which they were denied the right to introduce evidence. The Act gives them the right to "submit testimony," 43 P.S. § 959.

In the present case, appellants offered to introduce testimony of an investigator, concerning the results of several days of close observation of complainants in May of 1972 after the filing of the complaint in this cause in Sept. of 1971. (R. 127a-R.133a). Evidence of people's habitual conduct at a later time is relevant to establish their habitual conduct at an earlier one: 3A C.J.S. "Evidence" §§ 585, 124(2), as is clearly to be seen by the admission into evidence, in divorce proceedings, of testimony concerning post-libel misconduct. Barker v. Barker, 61 Montg. 323 at 327-8 (1945), following Hewitt v. Hewitt, 136 Pa. Super. 266 at 275, 7 A.2d 45 (1939).

It is true that, in a court of law, an offer of such evidence must be accompanied by proofs that the thing to be testified about remained unchanged in the time interval between the legally-significant event and the later observation. Semet v. Andorra Nurseries, Inc., 421 Pa. 484, 219 A.2d 357 (1966).

In the present case, a showing of continuity had been made by the testimony that the citizen complaints about Complainants' conduct had continued steadily from a time in 1970 up through the period of surveillance. (R. 125a l. 17-R. 127a l. 24; R. 115a l.22-R. 116a l.3), as counsel for respondents pointed out to the hearing commissioners (R. 131a). Nevertheless, the commissioners refused to admit this testimony on the sole ground that it pertained to an investigation done after the complaint was filed. (R. 132a).

Considering that "the Commission shall not be bound by the strict rules of evidence prevailing in courts of law and equity" 43 P.S. § 959, appellants feel that the Commission's refusal to admit the surveillance testimony, coupled with the making of Finding # 49, covering the very issue the offered testimony was to deal with, denied appellants a fair hearing as well as the right to "submit testimony guaranteed to them by 43 P.S.§ 959.

11G. FINDING OF FACT #50 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

This finding states that:

> Adequate procedures exist or could easily be formulated for maintaining close Police Department supervision over Complainants' daily work activities.

(R. 168a).

Apparently, the hearing commissioners reached this finding on the basis of witness Morrell's testimony that she could be reached "within a half hour or so" by police cars that went looking for her, (R. 45a-46a), a procedure apparently made necessary by the difficulties of contacting the meter maids by police phone. (R. 46a ll. 8-21). Presumably, the relevance of this finding to the Commission's business is that it somehow justifies the declaractory judgment of Order # 13, (R. 175a), which declares "null and void" the ordinance creating part-time meter maids (Commission Exhibit B, R. 157a).

Appellants do not believe that witness Morrell's testimony sustains this finding, and appellants have found no other testimony in the record which does so. There is testimony directly counter to this finding, which the hearing commissioners apparently did not credit. (See R. 97a-98a; R. 106a-108a; R. 125a-126a).

In any case, if the thrust of Finding #50 is to suggest that passage of the part-time meter maid ordinance was in bad faith, or just unnecessary, then (a) the

finding should have dealt with matters as they stood when the ordinance was passed in 1971 (R. 157a), rather than with things as they stood in 1973 (the time of the hearing), and (b) the finding should have dealt with the good faith or bad faith of the City Council, rather than with the hearing commissioners' own assessment of its pros and cons, which is surely without any relevance whatsoever to any issue properly before the Commission.

11H. FINDING OF FACT #51 IS NOT SUPPORTED BY THE EVIDENCE, NOR IS IT SUCH A FINDING AS THE ACT AUTHORIZES THE PHRC TO MAKE, BECAUSE IT IS IRRELEVANT TO THE ISSUES RAISED BY THE COMPLAINT, IN THE ABSENCE OF ANY FINDING THAT THE ORDINANCE IN QUESTION WAS ENACTED BECAUSE OF COMPLAINANTS' SEX, OR FOR A RETALIATORY MOTIVE.

This finding states that

> There is no legitimate administrative or other reason for hiring "four women" to perform complainants' jobs and shortening Complainants' work week.

(R. 168a-169a).

The hearing examiners cite in support of this finding evidence that the Complainants were never formally disciplined (R. 140a, 126a, 106a, 83a), that they could be reached "in a half hour or so" by police cruisers (R. 45a-46a), and that the police department gets a copy of the traffic tickets written by complainants. (R. 110a).

None of the evidence so cited can, by any stretch of imagination, be said to sustain the finding made. The burden is, after all, on the Commission to put into the record sufficient evidence to support its findings. City of Philadelphia v. PHRC, 4 Pa. Cmwlth. 506, 287 A.2d 703 (1972).

But, putting aside the question of the sufficiency of the evidence to sustain the finding, appellants contend that this finding is not relevant to this case, and so, is not such a "finding" as the Act authorizes the Commission to make. Appellants do not understand how even a foolish change by Beaver Falls from fulltime meter people to part-time meter people, such as is effected by Ordinance 1305 (R. 157a), can properly be the subject of a PHRC finding, if it is not also found that the change was done because of complainants' sex, or in retailiation for their appeal to the Commission. (43 P.S. § 955a).

It is true that Ordinance 1305, by referring to "four women," probably discriminates against men, in violation of the Act. And Finding # 51 is pro tanto accurate, in that an illegal hiring of "four women" can never be "legitimate." But anti-male discrimination is not a part of the complaint in this case, which alleges only a discrimination against women, (R. 3a), and consequently this objection to Ordinance 1305 is not a proper part of the Finding. Straw v. PHRC, 10 Pa. Cmwlth. 99, 308 A.2d 619 at 623 (1973); St. Andrews Development Co. v. PHRC, 10 Pa. Cmwlth. 123, 308 A.2d 623 at 626 (1973).

II(i) FINDING OF FACT #52 IS WITHOUT SUBSTANTIAL EVIDENCE TO SUSTAIN IT, FURTHER, THIS FINDING IS NOT SUCH A ONE AS THE ACT EMPOWERS THE PHRC TO MAKE, IN THE ABSENCE OF ANY OTHER FINDING THAT THE DIFFERENCE IN TREATMENT WAS BECAUSE OF THE SEX OF COMPLAINANTS.

Finding # 52 states that:

There is no legitimate administrative or other reason for distinguishing between Complainants and members of the Police Department by shortening the work week of the former while maintaining the work week of the latter.

(R. 169a).

The simple and precise reason for making the meter-people's job a part-time one was to be able to forbid the taking of any coffee or lunch breaks during each part-time worker's daily 4-hour stint. (R. 97a l. 15-R. 98a l. 5). Obviously, no one on an eight-hour shift could be subjected to such an order.

Policemen, even when on 8-hour shifts, can always be reached by radio and, therefore, excess coffee-breaks can be to some extent controlled. (R. 104a-105a). More importantly, policemen have collective bargaining rights, and civil service protection (whether the City likes it or not): Findings 19, 30. Consequently, the City is not

free to treat them as it might treat its non-unionized, non-civil service personnel. Even more importantly, the burden is not on the City to justify each and every difference in treatment among widely disparate job categories. Rather, the burden is on the Commission, as moving party, to put into the record adequate evidence to sustain its findings. This it just has not done, with respect to Finding #52. The Finding's citations to supporting parts of the record prove no more than that it is possible that the finding is correct. This is not enough. J. Howard Braudt, Inc. v. PHRC, _____Pa. Cmwlth._____, 324 A.2d 840 at 845 (1974).

In the second place, however, let us assume that this Finding is sustained by the evidence. What conceivable purpose does it serve in this case? To what issue is it material? There is no legal significance to the fact that a city treats Worker A differently from Worker B, unless such difference in treatment is "because of" the different sex, age, race or creed of the two workers. 43 P.S. §955(a). In the present case the hearing commissioners did not so find.

IIJ FINDING OF FACT #53 IS WITHOUT ANY SUBSTANTIAL EVIDENCE TO SUSTAIN IT; FURTHER, IT IS IMPROPERLY PHRASED TO CONTAIN AN INNUENDO OF DISCRIMINATION AGAINST WOMEN CANDIDATES FOR POLICEMAN THAT IS OUTSIDE THE ISSUES FRAMED BY THE COMPLAINT AND DEVOID OF ANY EVIDENCE TO SUSTAIN IT.

This finding states that:

> There has never been a female in the Police Department, Responsible City Officials including Respondents believing the work to be too arduous and difficult for a woman.

(R. 169a).

This finding rests upon the information given the Commission's investigator, by unnamed third persons, that women had never been "assigned as patrolmen" in the police department. (R. 19a). In addition to this anonymous hearsay, there is only the statement of Mayor Camp that there have been no "women police officers" in Beaver Falls since 1952. (R. 103a; R. 99a).

Appellants do not see how the above evidence can be deemed "such relevant evidence as a reasonable mind might accept as adequate" to support the conclusion that there has never been a female in the Police Department, in the capacity of patrolman, or in any other capacity. Cf. J. Howard Brandt, Inc. v. PHRC, _____Pa. Cmwlth._____,

324 A.2d 840 at 843 (1974).

More importantly, however, Finding # 53 contains an innuendo that the cause of the lack of a policewoman on the force is discrimination practiced by "responsible city officials, including Respondents."

This innuendo is clearly baseless. No woman has ever taken and passed the Civil Service Exam which must be given to all candidates for the police force, even though women are, of course, permitted to take this test (R. 147a-R. 149a). There is not a scrap of evidence in the record to show any causal link whatsoever between the personal views on policewomen held by individual city officials, and the failure of women to take and pass the city's Civil Service Examination for police officer.

IIK. FINDING OF FACT # 54 IS TOO GENERAL AND VAGUE TO BE A "FINDING" AS THAT WORD IS USED IN THE ACT.

This so-called "finding" says that: Respondents have discriminated against complainants on the basis of their sex with respect to compensation, terms, conditions and privileges of employment, including salary increases, hours of work, overtime pay, and vacation leave.

Appellants submit that a "finding of fact" such as this is so hopelessly vague and indefinite, that it cannot reasonably be treated as a "finding" at all.

One may suspect that the hearing commissioners intend to find that the differences in "compensation, etc." between police officers and meter maids were created by respondents solely because the meter maids were women, and the police officers men.

There is, of course, not a single scrap of evidence in the record to suggest that this is so. The burden is on the Commission to put the evidence there. Since the hearing commissioners themselves found that the work performed by the meter maids was not comparable to that of the police officers (Finding #26), and that this difference in duties justified a difference in pay (Finding #27), how can these same commissioners tell us that the Complainants were

discriminated against on the basis of salary or of any other difference in their prerequisites and those of the policemen who do a different job?

III. FINDING OF FACT # 55 IS LEGALLY ERRONEOUS IN ASSUMING THAT "ADEQUATE" RELIEF MEANS EXTRA-LEGAL RELIEF.

> This finding states, that:
> Application in the instant case of the law of the Commonwealth regulating the manner of appointment to a position in the police department of a third class city, and Civil Service status related thereto, would prevent Complainants from receiving adequate relief to redress the effects of Respondents' discrimination.

(R. 169a).

Appellants do not understand how relief consistent with the laws of the Commonwealth can properly be deemed "inadequate," if that word is to mean "less than one's legal due."

Of course, if the hearing commissioners mean "inadequate to satisfy our moral sentiments, as people, not as lawyers," then their finding makes sense. But then it belongs in a pulpit, not in a legal document.

Advocates of legal guarantees against the oppression of women should not reject legal rules that they may happen to find inconvenient in a particular case of such oppression. You can't have your cake and eat it too!

II M: CONCLUSION OF LAW #4 IS LEGALLY ERRONEOUS, IN THAT THE DIFFERENT TREATMENT ACCORDED COMPLAINANTS WAS NOT FOUND TO BE BECAUSE OF THEIR SEX, AS REQUIRED BY THE ACT.

Appellants sympathize with the feeling of the hearing commissioners that Beaver Falls somehow treated Complainants and all other women badly, by reserving for them a dead-end, low-pay, no-benefits job.

However, this "bad treatment," (if it is such) is not necessarily and ipso facto such "discrimination" as is prohibited by 43 P.S. § 955q.

First of all, while it is true that to replace a male employee with a female doing the same work at less pay may be discrimination, see Hodgson v. Behreus Drug Co., 475 F.2d 1041 (5th Cir 1973) cert. denied 414 U.S. 825, there can be no finding of discrimination on this basis in the current case, because the replacement of policemen-ticket writers by meter maids antedated the statute forbidding sexual discrimination. (R. 156a).

Secondly, the reserving of meter maid jobs for women, in the city's ordinances, is obviously not a discrimination against women, but a discrimination against men, which women have no standing to challenge. Feinerman v. Jones, 356 F.

Supp. 252 (M.D. Pa. 1973). In any event, no such challenge could be made in this case, because no charge of anti-male discrimination appears in the Complaint (R. 3a): Straw v. PHRC, 10 Pa. Cmwlth. 99, 308 A.2d 619 at 621 (1973).

Can reserving a menial job for women constitute discrimination against them in violation of 43 P.S. § 955a? The Act, in said section, provides that it shall be unlawful for any employer "because of the...sex...of any individual":

(1) — to refuse to hire or employ him,

(2) — to bar or discharge him from employment,

(3) — "or 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 COMPETANT TO PERFORM THE SERVICES REQUIRED." (Emphasis added).

Applying these words to the present case, we can say that (1) and (2) can only apply to the enactment of ordinance #1305 (R. 157a), which might conceivably be said to amount to a partial refusal to hire, or a partial discharge, of the Complainants.

However, the hearing commissioners, though they questioned the motives for this ordinance (R. 114a), failed to make any finding that it was passed, or Complainants' work-day, ordered to be reduced, "because of the...sex" of complainants. Hence, the Findings do not support a determination that (1) or (2) were isolated.

As for (3), appellants submit, first of all, that to reserve a menial job for women, and to pay them little to do it, is not to "discriminate against" the individual women who take the job, but to discriminate against the excluded male candidates for the job.

Such a job classification can be said to "insult" women, generally, by suggesting that they are "more fit" for menial work than men are. But 43 P.S. § 955a has no "anti-insult" clause. Furthermore, the Act does not purport to proscribe acts of discrimination against a class, but only those against an individual. Finally, and most important, the language of (3) clearly reveals a legislative intent to limit the scope of the statute to employers' actions which select unfairly among the applicants for a given job in a given job-structure. The language of (3) would have to be read out of the statute, before a court could be free to give the statute the effect that the Commissioners would give to it: To reserve a dead-end job for women, and pay them too little to make up for the resulting insult is discrimination.

In this respect the Pennsylvania legislation is narrower than the comparable federal law, as this court has already noted. G.C. Murphy Co. v. PHRC, 12 Pa. Cmwlth. 20, 314 A.2d 356 (1974). Compare Schultz v. Wheaton Glass Co., 421 F.2d 259 at 266 (3d Cir. 1970), cert. denied 398 U.S. 905 (1970)(discussing the broader scope of the federal law).

II N: CONCLUSION OF LAW #5 IS LEGALLY ERRONEOUS, IN THAT (A) THE DIFFERENT TREATMENT ACCORDED COMPLAINANTS WAS NOT FOUND TO BE BECAUSE OF THEIR SEX, AND (B) IN ANY EVENT, BECAUSE THE FAILURE TO PUT AN EMPLOYEE WITHIN A CERTAIN DEPARTMENT IS NOT PROHIBITED BY § 5a OF THE ACT.

This conclusion of law states that:

> Treatment of Complainants as de facto members of the Beaver Falls Police Department, while failing to create positions on the Police Department with duties and responsibilities similar to those performed by Complainants and providing Complainants with an opportunity to secure said positions, constitutes an unlawful discriminatory practice in violation of Section 5(a) of the Pennsylvania Human Relations Act.

(R. 170a).

Simplified, this amounts to saying that, if a city hires women to do a menial job so closely connected with the Police Department that they could just as easily be put into it and given Civil Service Status, then it is a violation of 43 P.S. § 955a not to do so.

Appellants have two objections to this conclusion. First, there is no finding that the Complainants

would have been given Civil Service Status if, instead of being females, they had been males hired under a "meter man" ordinance otherwise comparable to Ordinance 1211 (R. 156a). There is no finding in this case that the failure to let Complainants into the Department was "because of the sex" of complainants. This is, however, a finding that must be made and supported in the record if a violation of § 5a of the Act is to be made out. J. Howard Brandt, Inc. v. PHRC, _____ Pa. Cmwlth. _____, 324 A.2d 840 (1974).

Secondly, even assuming that such a finding were made, and were sustainable appellants submit that a sexually-motivated classification of jobs within a job-structure is outside the scope of § 5a of the Act.

Appellants submit that this is true because the words "if the individual is the best able and most competant to perform the services required," which appear in § 5a and modify the words "otherwise discriminate..." therein, clearly apply only to discrimination among people holding or securing a given job. These words would have to be disregarded as gibberish in order to apply § 5a to a discrimination among job categories.

II O: CONCLUSION OF LAW #6 IS LEGALLY ERRONEOUS.

This conclusion says that the PHRC can give relief in violation of the Civil Service Law, whenever, in the Commission's own judgment, adherence to the Civil Service Law "would prevent Complainants from receiving adequate relief." (R. 170a-171a).

Appellants cannot understand whence PHRC derives the power to abrogate the Civil Service laws. Federal courts, of course, may do so pursuant to federal laws which, because of the Supremacy Clause of the United States Constitution, take precedence over inconsistent state statutes. See Carter v. Gallagher, 452 F.2d 315 at 328 (8th Cir. 1971)(en banc), cert denied, 406 U.S. 950.

So far as appellants are aware, there is no "supremacy clause" in the Human Relations Act. True, § 12a of the Act provides that "(A)ny law inconsistent with any provisions hereof shall not apply." But this manifestly applies only to laws inconsistent with the "provisions" of the Act itself—not those inconsistent with any harebrained provisions contained in any order which may hereafter be issued pursuant to the Act.

To hold otherwise would leave th PHRC subject to no restraints short of the constitutional or federal ones. It is hard to imagine that § 12a—which looks like a mere attempt to

shift the presumption against implied repeals—was enacted with any such revolutionary purpose in mind.

Appellants have found only one case involving the issues whether a state human relations commission could tamper with state civil service law requirements. That case held that the commission was powerless to do so. New York State Division of Human Rights v. City of Schenectady, 7 C.C.H.E.P.D.H. 9389 (N.Y. Sup. Ct. 1973).

Appellants urge this court to do the same.

II P: CONCLUSION OF LAW #7, INSOFAR AS IT ASSERTS VIOLATIONS OF MEN'S RIGHTS, IS BEYOND THE ISSUES FRAMED BY THE COMPLAINT; INSOFAR AS IT ASSERTS VIOLATIONS OF WOMEN'S RIGHTS, IS LEGALLY ERRONEOUS; INSOFAR AS IT ASSERTS VIOLATIONS OF § 5b OF THE ACT, IS BEYOND THE ISSUES FRAMED BY THE COMPLAINT, IS A VIOLATION OF THE ACT, AND IS A DENIAL OF DUE PROCESS OF LAW.

This finding states that:

> Restricting the hiring for positions held by Complainants to females only and advertising for applicants for said positions accordingly, whether done pursuant to ordinance or otherwise, constitute unlawful discriminatory practices in violation of Sections 5a and 5b of The Pennsylvania Human Relations Act.

(R. 171a).

It is indeed highly probable that respondents have violated the Act by discriminating against men, in creating all-woman positions and in advertising accordingly. Cf. Hailes v. United Air Lines, 464 F.2d 1006 (5th Cir. 1972). But it would be impossible for the female Complainants herein to complain of this, since they are not aggrieved by such discrimination against men: Feinerman v. Jones, 356 F. Supp. 252 (M.D., Pa. 1973).

Even more to the point, the Complaint herein contains

no mention of anti-male actions. (R. 3a). Yet the act requires that the Complaint "set forth the particulars" of the practices complained of. 43 P.S. § 959. Consequently, no type of discrimination not set out in the Complaint can be acted on. PHRC v. United States Steel Corp., _____ Pa. _____, 325 A.2d 910 (October 16, 1974). To do so would be a denial of due process. Straw v. PHRC, 10 Pa. Cmwlth. 99, 308 A.2d 619 at 621 (1973); St. Andrews Development Co. v. PHRC, 10 Pa. Cmwlth. 123, 308 A.2d 623 at 626 (1973).

Passing, then, to alleged discrimination against women, appellants have found no case which held that restricting a job to women amounted to discrimination against them. The language of § 5a of the Act clearly does not permit such a construction.

It is true that Section 5[6]2 of the Act—barring single-sex want ads—is not stated in terms of "discrimination against" anyone, and so Complainants might have standing to raise this issue if they can show themselves to be "aggrieved" by the ads, 43 P.S. § 959. Whether or not they could do so is moot, however, since the Complaint in this case does not mention any § 562 charge. Consequently, no conclusion finding such a charge to be warranted may be made in this case. See Straw, supra; U.S. Steel Corp., supra.

II Q: THE PHRC'S 'DECISION,' WHICH RECAPITULATES CONCLUSIONS OF LAW NO.'S 4, 5 AND 7, IS LEGALLY ERRONEOUS FOR THE REASONS STATED IN II M, II N AND II P, SUPRA.

Clearly this point is governed by the above discussion.

III. THE FINAL ORDERS ENTERED IN THIS CASE BY THE COMMISSION ARE BEYOND THAT BODY'S STATUTORY POWERS.

III A: ORDERS # 1-4, WHICH REQUIRE RESPONDENTS TO VIOLATE STATE CIVIL SERVICE LAWS, ARE FOR THAT REASON LEGALLY ERRONEOUS.

Discussion of this point is contained at II O, supra.

III B: ORDERS # 3, 5 AND 6 ARE NOT "AFFIRMATIVE ACTION" OF THE SORT WHICH THE PHRC IS EMPOWERED TO ORDER, IN THE ABSENCE OF ANY FINDING THAT THE PRIOR FAILURE TO PERFORM SUCH ACTS WAS BECAUSE OF THE SEX OF COMPLAINANTS.

These orders require respondents to:

— Give full Civil Service status to Complainants, with rights and privileges equal to those enjoyed by males on the Beaver Falls Police Dept;

— Conform Complainants' salary increases, hours of work, over-time pay, vacation leave and other rights and privileges to those enjoyed by males on the Beaver Falls Police Dept;

— Give Complainants a salary rise to equal the salary they would have been getting had they received the same percentage raises in 1971-3 that the lowest-paid patrolmen received.

Appellants submit that they can be ordered to take only such affirmative action as "in the judgment of the Commission, will effectuate the purposes of this act" 43 P.S. § 959, and that they cannot legally be required to take action to "achieve ends other than those which can fairly be said to effectuate" the Act's policies. PHRC v. Alto-Reste Park Cemetary Ass'n, 453 Pa. 124, 306 A.2d 881 at 887 (1973).

Appellants submit that the items of relief awarded in Orders # 3, 5 and 6 are not an attempt to end discrimination in the treatment of any individual holders or seekers of any given job. Instead, these orders are an effort to punish

respondents for having insulted womankind in general by reserving a menial job for them. The punishment makes no sense at all in light of the Act's purposes, which are "to assure equal opportunities" 43 P.S. § 952a, not to avenge insults. Appellants cannot see how paying complainants a higher wage and giving them extra benefits can effectuate the purposes of the Act, when the record is totally barren of any evidence whatever that male meter men, had there been any, would have received such higher wages or such benefits.

Furthermore, these orders seem to presuppose that had Complainants been enrolled in the police department, they would have received raises and other benefits comparable to those the policemen won for themselves. But the record is entrirely barren of any basis for this supposition. The forces that produced the raises for patrolmen simply would not have produced them for the Complainants. (Cf. II B, supra).

III C: ORDERS # 7-9 ARE NOT BACK-PAY ORDERS AUTHORIZED BY THE ACT, BUT GENERAL DAMAGE AWARDS OF A SORT THE PHRC IS NOT AUTHORIZED TO MAKE.

These orders require respondents to pay, as "damages," to the complainants, these amounts:

> — a sum equal to the difference between compensation actually received and the compensation which would have been received had complainants been given percentage increases in salary, in 1971-3, equivalent to that given to the lowest paid patrolman on the Force;
> — two hours of overtime per week, July 6, 1969 to date, based on the higher, hypothetical wage given in prior paragraph;
> — two weeks pay, on the high hypothetical base salary given above, for every two week umpaid vacation taken by Complainants.

It is well-established that the PHRC has no authority to impose general damage awards, see e.g., Zamantakis v. PHRC, 10 Pa. Cmwlth. 107, 308 A.2d 612 (1973), even though it does, indubitably, have the authority to award back wages, in an appropriate case. 43 P.S. § 959.

So far as appellants are aware, no judicial authority exists to determine whether back wages of more than three months prior to the filing of the Complaint may be awarded, in view of the fact that any complaint must be filed within 90 days of

the offense alleged, 43 P.S. § 959. Appellants believe this limitation is reasonable, especially in view of the total absence, otherwise, of any limitations period on back wage claims via complaint to the Commission. But cf. 43 P.S. § 336.5b.

The relief ordered in the instant case gives to the Complainants the maximum award constitutionally possible, by going back to the effective date of the Act.

Appellants submit, first of all, that this award is not "back pay" within the intendment of the Act, because there is no showing whatever that anyone ever was paid at this scale, or that a male meter man ever would have been so paid, had the City used male meter men.

The pay increases won by policemen do not—at least to appellants—afford any factual basis whatever for a surmise as to what the City would or might have been willing to pay to male meter men. Hence, there is no rational basis whatever for using policemen's benefits and wages for calculating what meter maids might have earned, but for the alleged discrimination against them by the City.

Clearly then, this award is not back pay but punitive damages.

In the second palce, appellants feel that since the PHRC has discretion on whether or not to grant back pay, it should have to exercise its discretion when it makes such an order, and put into its decision some statement indicating

that its discretion was indeed exercised. Compare Kopp v. Salt Lake City, 29 Utah 2d 170, 506 P.2d 809 (1973), in which an award of back pay over many years was reversed as an unreasonable abuse of discretion, in light of the essentially equitable nature of the remedy and the laches of the employe in bringing her action.

III D: THIS COURT SHOULD MODIFY ORDER # 10 BY SPECIFYING THAT ANY INTEREST ON AN AWARD SHOULD RUN FROM THE DATE OF AWARD ONLY.

The PHRC, in its Order, failed to specify the date as of which the interest awarded should run. Inasmuch as the giving of back pay is discretionary, and inasmuch as the amount to be paid in this case was wholly unliquidated prior to the award, appellants submit that no prejudgment interest would be proper.

III E: ORDERS # 11 AND 12 ARE NOT WITHIN THE ISSUES FRAMED BY THE COMPLAINT, AND THEIR PROVISIONS THEREFORE VIOLATE DUE PROCESS, AND THE ACT ITSELF.

These Orders require that men be allowed to become "meter men," (# 11), that Respondents cease to advertise any position for which there is no BFOQ as limited to one sex, and that Respondents "state in all future advertisements that they are an equal opportunity employer" (# 12).

Appellants do not believe the Commission may properly give relief for discrimination against men in want ads without having included in the Complaint some mention of advertising, or of discrimination against men. (See Complaint, R. 3a). Appellants' reasons are those stated at length in II P, supra.

It seems apparent that the Commission's purposes, in requiring a statement in advertising that respondents are an equal-opportunity employer, are to remedy the wrong done to male readers of the "female help wanted" ad for meter maids. (R. 158a). If so, this too would be improper, as stated in II P, supra.

Appellants further find Order # 12 to be overbroad, in requiring employment of "the best qualified applicant," apparently for all jobs without exception. Surely it is no business of the Commission's if an applicant other than the

"best" is picked, provided, that the grounds for choosing mediocrity are not those made illegal by 43 P.S. § 955a.

Again, an Order should be drafted with some care, and the requirement that "all future advertisements" state that the City is an equal opportunity employer is not, in its terms, limited to employment advertisements placed by the City or its agents. If this relief is proper, it should, at least, be so limited.

III F: ORDER # 13 IS A DECLARATORY JUDGMENT WHICH IT IS OUTSIDE THE STATUTORY AUTHORITY OF PHRC TO GIVE.

This order simply declares municipal ordinances to be null and void. Appellants have inspected the Human Relations Act and failed to find therein any power in the Commission to issue declaratory judgments. Hence, this part of the Order should be stricken.

III G: IT WAS LEGALLY ERRONEOUS TO GRANT RELIEF WHICH REQUIRED RESPONDENTS TO KEEP COMPLAINANTS ON AS FULL-TIME EMPLOYEES, WHILE EXCLUDING EVIDENCE BEARING UPON COMPLAINANTS' FITNESS FOR SUCH EMPLOYMENT.

Orders 1-6 require respondents to maintain complainants as full time employees, pay them high wages and award them civil-service status.

The Complaint in this case does not specifically discuss any item of relief (R. 2a-4a). During the hearing, respondents offered testimony concerning post-complaint misconduct by the Complainants, and such evidence was ruled inadmissable by the hearing commissioners. (R. 127a - 133a; R. 142a - 144a).

Appellants submit that once the hearing commissioners decided that they would require civil service status and full-time employment to be awarded to the Complainants, they abused their discretion in failing to reopen the hearing to allow the admission of testimony which would obviously have a great bearing on how their remedial discretion ought to be exercised. Appellants submit that the failure to reopen the hearing deprived appellants of a chance to "submit testimony" on a key aspect of the case, in violation of 43 P.S. § 959.

CONCLUSION

The Commission's decision in this case is based upon Findings of Fact made by only three members of that body, in violation of the requirements of the Human Relations Act.

Many of these findings are without sufficient support in the record, while others are too general or otherwise formally defective.

Serious error permeates the Conclusions of Law, and the Orders based thereon, which in certain instances prescribe relief beyond the Commission's power to grant.

The Decision must therefore be reversed, and the Complaint herein dismissed.

Respectfully submitted,

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