

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

STEPHEN BOMBEROWICH,
Complainant

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Respondent

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Docket No. E-33600

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant herein is Stephen Bomberowich, (hereinafter either "Complainant" or "Bomberowich"). (C.E. 6 & 7)

2. The Respondent herein is the Southeastern Pennsylvania Transportation Authority, (hereinafter either "Respondent" or "SEPTA"). (C.E. 6 & 7)

3. At all times relevant to this matter, SEPTA has employed four or more individuals in the Commonwealth of Pennsylvania. (C.E. 6 & 7)

4. In August 1980, Bomberowich began to experience heart problems for which he was hospitalized on several occasions. (N.T. 112)

5. While hospitalized for the period September 30, 1980 to October 2, 1980, Bomberowich was informed that he had clogged arteries. (N.T. 112)

6. On November 13, 1981, Bomberowich was given a triple coronary bypass. (N.T. 117)

* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainants' Exhibit
R.E. Respondent's Exhibit
R.D. Ranga A. Rao, M.D., Deposition

7. Coronary bypass is a surgical procedure to reroute blood beyond obstructed arteries by implanting alternative channels in an effort to improve blood flow to the heart muscle. (N.T. 207, R.D. 7)

8. On June 14, 1983, in response to a newspaper advertisement for a first class welder, Bomberowich sent SEPTA his resume. (N.T. 88-89, C.E. 2b)

9. On September 16, 1983, Bomberowich completed SEPTA's employment application. (N.T. 88, C.E. 2d)

10. On October 4, 1983, SEPTA administered 4 written tests for the position of Facilities/Bldgs. Structural Welder First Class to Bomberowich. (N.T. 92-93, C.E. 2e)

11. Bomberowich passed these tests. (N.T. 93, C.E. 2e)

12. Subsequently, in 1985, Bomberowich called SEPTA to inquire whether there were any welding job openings. (N.T. 99)

13. Bomberowich was told SEPTA did have openings and was instructed to come visit Mr. Quinn. (N.T. 99)

14. On May 30, 1985, Bomberowich met with Mr. Quinn who sent Bomberowich to speak with Mr. Trower, SEPTA's then structural welder foreman. (N.T. 100, 231, 235, 238)

15. Trower interviewed Bomberowich and approved him for a structural welder first class position - SEPTA's job #1161. (N.T. 238, 240)

16. Trower discussed the job duties of a structural welder first class with Bomberowich and decided he was qualified to perform the duties of the position. (N.T. 101, 238, C.E. 2f)

17. The only condition left before Bomberowich's hire was that he pass SEPTA's physical. (N.T. 238)

18. On June 10, 1985, Bomberowich presented himself to SEPTA's medical department, at which time, he completed a medical questionnaire. (N.T. 170, C.E. 4)

19. On the questionnaire Bomberowich indicated that he had had a bypass operation in 1981. (C.E. 4)

20. On June 11, 1985, Bomberowich returned to SEPTA's medical department at which time he spoke to Dr. Gares, a staff physician for SEPTA, who interviewed Bomberowich and who then in effect informed Bomberowich that he could not work for SEPTA because he had a disqualifying heart disease. (N.T. 176, 177, 204, 215, 216; C.E. 6, 7)

21. Dr. Gares had SEPTA's authority to reject an applicant for medical reasons. (N.T. 204)

22. SEPTA's medical department had developed medical guidelines, portions of which were applied in this case and resulted in Bomberowich's rejection. (N.T. 196-198, 204, 206, 215; R.E. 3 & 4)

23. Under the section of SEPTA's medical guidelines entitled Cardiovascular conditions, SEPTA's medical department applied the following provisions to disqualify Bomberowich:

Ischemic Heart Disease: . . . Myocardial Insufficiency. . .

New Applicants: . . . rejects. . . and

Addendum: The performance of cardiac surgery for correction of any heart condition will not preclude the disqualification of any employee, if applicable, when the underlying condition has already disqualified. (R.E. 3; N.T. 200)

24. Dr. Press, SEPTA's then Medical Director, testified that Bomberowich's underlying condition was perceived as both a continual accumulation of cholesterol and already accumulated blockages in veins and arteries throughout the body not replaced by alternative channels implanted at the time of Bomberowich's triple bypass surgery. (N.T. 206, 207, 209)

25. Dr. Press further indicated that SEPTA's concern was that because of the underlying condition, Bomberowich carried an increased risk of heart attack and this increased risk would be unacceptable to SEPTA with regard to an employee driving a 10-ton utility vehicle on public streets and roads. (N.T. 209, 211)

26. At the time of Bomberowich's rejection SEPTA was seeking to increase the compliment of building structural welder first class positions from 4 to 8 welders. (N.T. 240)

27. The open positions were for positions in SEPTA's Regional High Speed Line ("RHSL"), the name of which has been changed to Regional Rail Division ("RRD"). (N.T. 242)

28. SEPTA's then RHSL encompassed SEPTA's commuter rail operations which provided service to a very large area extending from West Trenton, N.J.; to Marcus Hook, Pa., and Paoli, Pa., to Lansdale, Pa. (R.E. 6; N.T. 251-256)

29. Welders worked from a central facility located in Philadelphia from which welders traveled each day by truck to points anywhere within the service area to which they might be assigned. (N.T. 250-256)

30. Generally, two welders were assigned to each truck. (N.T. 258, 275)

31. Trower testified that a welding crew's time between the central facility to a job site and after completion of a days duties the return trip could take up to 2 hours of an 8 hour workday. (N.T. 265-266)

32. SEPTA generally allowed the welders to make arrangements among themselves regarding who drove when. (N.T. 257-258)

33. However, if no agreement could be reached, the supervisor had to assign driving duties: usually a week on and a week off. (N.T. 258, 259)

34. SEPTA rarely assigned only one welder to drive a truck. (N.T. 260)

35. Such instances include:

(a) When a welder was doing a job and if that person ran out of something, the welder would drive to SEPTA's centrally located storeroom to get materials; (N.T. 261)

(b) In the winter, one welder might be assigned to drive to SEPTA's numerous train station platforms, stops, and parking areas, to check on the status of snow removal which was done by an independent contractor hired by SEPTA; (N.T. 261)

(c) In the event of injury to one of the crew members. (N.T. 263-264). However, this need never arose. (N.T. 264)

(d) Finally, SEPTA occasionally called a welder at home and asked that person to go straight to a job site to begin to address a repair which needed immediate attention. The remaining crew member then traveled from SEPTA's central location with the service truck and met up with his co-worker at the assigned job site. (N.T. 263)

36. SEPTA's foreman made welder crew assignments. (N.T. 275)

37. A person who has had triple coronary bypass surgery has a higher risk of a cardiac event than individuals who have not had such surgery. (N.T. 209-210; R.D. 9)

38. If a welder had a heart attack while operating a 10 ton SEPTA service vehicle, that operator could lose control of the vehicle. (N.T. 210, 211)

39. Such a loss of control of such a vehicle could result in injury or death of many people and additionally result in great property damage. (N.T. 210, 211)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (PHRC) has jurisdiction over the parties and the subject matter of this case.

2. The parties and the PHRC have fully complied with the procedural pre-requisites to a public hearing in this matter.

3. Respondent is an "employer" within the meaning of the PHRA.

4. Complainant is an "individual" within the meaning of the PHRA.

5. Complainant has established a prima facie case by proving that:

a. He is handicapped within the meaning of the PHRA and applicable regulations;

b. He applied for an available position for which he was otherwise qualified; and

c. His application was rejected because of his handicap.

6. The Respondent failed to reasonably accommodate the Complainant's handicap/disability.

7. It would not have been an undue hardship for the Respondent to modify the Complainant's duties to exclude driving responsibilities had the Respondent hired the Complainant.

8. Section 9 of the PHRA gives the PHRC broad discretion to order relief including hiring with backpay after a finding of discrimination.

OPINION

This case arises on a complaint filed by Stephen Bomberowich, ("Bomberowich" or "Complainant") against the Southeastern Pennsylvania Transportation Authority ("Respondent" or "SEPTA") with the Pennsylvania Human Relations Commission ("PHRC") on or about June 20, 1985, at Docket No. E-33600. The Complainant alleged that SEPTA discriminated against him on the basis of his non-job related handicap/disability, coronary bypass surgery, by refusing to hire him for the position of first class welder, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("PHRA").

Following an investigation, PHRC staff found probable cause to credit the allegations of discrimination. The PHRC then attempted to resolve the situation through conference, conciliation and persuasion. When these efforts were not successful, the case was approved for public hearing. The hearing was held in Philadelphia on March 29, and 30, 1989, before Hearing Examiner Carl H. Summerson. Additionally, the record was held open to receive the May 19, 1989 deposition testimony of Dr. Ranga Rao, submitted in lieu of testimony at the Public Hearing.

The case on behalf of SEPTA was presented by Nicholas J. Staffieri, Esquire, and the PHRC interest in the complaint was presented by Cynthia M. Williams, Esquire. Ms. William's post-hearing brief was received on September 1, 1989, and SEPTA's brief was received on September 5, 1989.

Repeatedly, during the Public Hearing and again in SEPTA's brief, SEPTA's attorney argued that it was a denial of due process for the hearing examiner to ask any questions of any witness. SEPTA's attorney generally submits that such an activity improperly commingles the prosecutorial and adjudicatory functions present at a Public Hearing.

On the contrary, from the outset of SEPTA's attorney's first objection, the hearing examiner clearly articulated to SEPTA's attorney that it is the obligation of a hearing examiner to reach the facts in a case and that when there was a need for clarity, the hearing examiner was obligated to dispel the lack of clarity. (N.T. 16). Mr. Staffieri's first objection came just after the first witness was sworn in and the hearing examiner, as is customarily done with every witness, was simply asking the witness his name and address before turning the witness over for direct examination. At that time the nature of Mr. Staffieri's objection was not only clearly articulated but Mr. Staffieri specifically noted his objection "to any time the hearing examiner asks questions of any witness." It was at that point the hearing examiner instructed Mr. Staffieri that he need not raise that objection again and that the issue was duly preserved for appeal purposes. The hearing examiner also relayed to Mr. Staffieri that PHRC rules specifically provide that a hearing examiner can even call his own witness if that is deemed necessary. Mr. Staffieri again emphasized his strenuous objection and it was duly noted.

Despite being instructed that the objection had been noted, Mr. Staffieri continually raised this same objection on each occasion the hearing examiner exercised his right to seek clarification of some aspect of

a witnesses' testimony. In addition, Mr. Staffieri's approach eventually changed from repeatedly lodging the same objection to assailing the fundamental integrity of the hearing examiner in a most disrespectful manner. An example of Mr. Staffieri's appalling conduct can be seen from the following discourse extracted from the Public Hearing transcript which occurred after a SEPTA witness had finished on both direct and cross examination:

"MR. SUMMERSON: I find there to be a lack of evidence on an issue and under one Pennsylvania Code Section 35128 I will ask you, Mr. Staffieri, to inquire of this witness with respect to the rotating of the crew, whether that is practicable.

MR. STAFFIERI: That I have raised with my witness and he was subject to cross-examination. That was not explored in cross-examination.

MR. SUMMERSON: Under the authority given to me under One Pennsylvania Code Section 35128 I am instructing you to ask in that area.

MR. STAFFIERI: I am not going to do the complainant's work.

MR. SUMMERSON: I'm not asking you to. I'm asking you to inquire into an area I find lacking in evidence.

MR. STAFFIERI: You are directing me to ask a series of questions on what issue?

MR. SUMMERSON: The issue of this rotating of the crew.

MR. STAFFIERI: For what purpose?

MR. SUMMERSON: I would like to know.

MR. STAFFIERI: For what purpose? Do you want to know because you are a railroad buff or you want to know because you want to structure something?

MR. SUMMERSON: No, I want to know because it's an issue I find lacking here. If you don't ask it, I will.

MR. STAFFIERI: I have presented my witness. I have directly examined him and the complainant's attorney did cross-examine him. That is the end of the presentation of that witness.

MR. SUMMERSON: If you won't do it, I'll do it.

MR. STAFFIERI: I want to ask you what is the purpose of your exploring an issue through me of the rotation of the crews? Is it because you like railroads, you want to hear people talk about railroads? Is it because you want to know about union policy? Because I want to know whether it's even relevant.

MR. SUMMERSON: I find it relevant.

MR. STAFFIERI: In what way?

MR. SUMMERSON: It's incomplete information with respect to this crew arrangement.

MR. STAFFIERI: But why?

MR. SUMMERSON: Because I deem it so. I don't have to answer your question, Mr. Staffieri, I deem it so.

MR. STAFFIERI: Mr. Hearing Examiner, if you are planning to explore things that are Federal policy, you don't have jurisdiction.

MR. SUMMERSON: Well, I'm going to ask the question if you don't.

MR. STAFFIERI: If you are going to deal with issues that deal with Workers' Compensation, you don't have jurisdiction. Now, if you want to in some way look into the issue of reasonable accommodation, I defer to the complainant's attorney. And she didn't deem it necessary to raise that issue.

MR. SUMMERSON: Well, I'll extend that opportunity. Do you wish to inquire in this matter?

MR. STAFFIERI: No, I am finished with this witness.

MR. SUMMERSON: I am not, Mr. Staffieri.

MR. STAFFIERI: She cannot reopen cross-examination.

MR. SUMMERSON: I'm not.

MR. STAFFIERI: Then you therefore are pursuing this case with your co-counsel, Ms. Williams.

MR. SUMMERSON: That is an incorrect assumption. And I once again reject that idea. I am interested in the facts of this case on which I must make a judgment and submit findings of fact and conclusions of law and an opinion to my full eleven member Commission. And I want complete information upon which to do that and I am pursuing that either through you and I will extend that opportunity to her. If she doesn't elect to I will.

MR. STAFFIERI: Under an adversary system, and we are still under an adversary system I believe, at least that is what it purports to be, she cannot subject him to cross-examination now. It's finished.

MR. SUMMERSON: I can extend that opportunity under One Pennsylvania Code 35128 which I will do. Do you wish to afford yourself of that opportunity?

MR. STAFFIERI: Do you want to give her the questions, too, Mr. Hearing Examiner?

MR. SUMMERSON: If you don't stop it, Mr. Staffieri, I'm going to be very perturbed with you.

MR. STAFFIERI: What difference does it make, Mr. Hearing Examiner?

MR. SUMMERSON: I'm really getting tired of your attitude this afternoon. Actually it's still morning. I told you I'm looking at this objectively, I have these rights and responsibilities more importantly under our regulations, both the general regulations and the specific regulations for this Commission.

MR. STAFFIERI: Mr. Hearing Examiner, what is Ms. Williams doing here. If she is the complainant's lawyer and representing PHRC in this case why isn't she exploring this issue? She has done discovery, not you. She knows what this case is about. And she has deemed not to ask questions about it.

MR. SUMMERSON: I deem it necessary. I deem it necessary. I have this right and obligation under our rules. I am going to take advantage of that particular right so that I can be fully appraised of information I deem necessary to make a judgment in this case.

MR. STAFFIERI: Even if Ms. Williams didn't deem it necessary?

MR. SUMMERSON: That is correct.

MR. STAFFIERI: Are you therefore saying you are not satisfied with Ms. Williams' cross-examination of this witness?

MR. SUMMERSON: I am saying I'm not satisfied with both of your examinations of this witness.

MR. STAFFIERI: I have presented my evidence as I deemed it necessary for this case.

MR. SUMMERSON: And I'm telling you that if I find that insufficient I can demand that you submit further information. You rejected that. I'll ask her if she wants to. If she doesn't want to, I will. Do you wish to ask questions in this area?

MS. WILLIAMS: Yes, sir."

Astoundingly, the information sought was information regarding whether a reasonable accommodation could have been afforded to Bomberowich. The burden of producing such information falls squarely on the Respondent as once a prima facie showing has been made, the burden of proof is on the Respondent to show that the handicap or disability is job-related. See National Railroad Passenger Corp. v. PHRC, 70 Pa. Cmwlth. Ct. 62, 452 A.2d 301 (1982). A factor for consideration regarding the job-relatedness issue clearly is whether a reasonable accommodation could have been made. See Dept. of Transportation v. PHRC, 480 A.2d 342, 346 (Pa. Cmwlth. Ct. 1984). Accordingly, the hearing examiner was not only asking the Respondent's attorney to make a further inquiry, the hearing examiner was providing the Respondent's attorney with an opportunity to address factors which were part of the Respondent's burden in this case. See ie Prewitt v. U.S.P.S., 27 FEP 1043 (5th Cir. 1981).

Furthermore, this opportunity was not extended out of a predilection favoring one side over another, but instead designed simply to elicit relevant information which was sorely lacking after the witness had been questioned by both sides. Furthermore, it was quite clear at the time that this witness was to be the last witness called, with the exception of Dr. Rao's deposition testimony yet to be taken.

Interestingly, the Pennsylvania Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), noted that the Public Hearing transcript in that case "displays a kind of gamesmanship played out between the parties (more precisely, their counsel), with a primary objective being the presentation of the bare minimum of evidence necessary to meet the burdens of proof. . ."

The court went on to describe the record as "woefully inadequate" and articulate this concern as a factor which led to a remand for further proceedings. In the present case, the hearing examiner noted that either a bare minimum of evidence was being introduced on certain issues as well as almost no evidence on other factual areas; a better understanding of which would be necessary to make complete findings of facts.

Even more interesting is the fact that SEPTA's brief cites the case of Dayoub v. State Dental Council, 70 Pa. Cmwlth. Ct. 621, 453 A.2d 751 (1982). In effect, SEPTA's brief argues that a hearing examiner violates a party's due process by asking any questions during a Public Hearing. Dayoub articulates a fundamental principle of law which says, ". . .the Board. . . has the power, indeed the duty, to ask questions to clarify matters and to elicit relevant information not presented by the attorneys . . ."

Finally, Mr. Staffieri surely was aware that recently in SEPTA v. PHRC, Pa. Cmwlth. Ct. , A.2d (1988), the Commonwealth Court's analysis relied in part on testimony elicited during a PHRC Public Hearing in response to hearing examiner questions regarding a similar issue of whether a reasonable accommodation was practical. Accordingly, questions by a hearing examiner are not only within a hearing examiner's power, but more significantly part of a hearing examiner's duty to insure a searching inquiry into the facts is sufficient upon which to base findings of facts.

Regarding the remaining inferred allegation of bias, the ultimate test of procedural due process is whether the hearing was conducted with

fundamental fairness. See Beck v. Quicktrip Corp., 27 EPD .32,373 (D.C. Kan. 1981) citing Watson v. Patterson, 358 F.2d 297 (10th Cir.), cert. denied, 385 U.S. 876 (1966). Here, looking at the hearing procedure as a whole, the hearing was conducted in such a manner as to provide the parties with a full and fair opportunity to present their respective cases. Further, the hearing examiner conducted the hearing in a manner which gave the clear impression that the hearing is not a contest for advantage by use of technicalities, but rather a searching inquiry into the facts and law of the case. The hearing examiner's participation neither commingled the prosecutorial and adjudicatory functions nor presented the appearance of bias. Instead, the hearing examiner actively avoided such an appearance by the constant reinforcement of the purpose of his questions and the emphasis placed on the hearing examiner's objective obligation. Accordingly, SEPTA's contention that it was denied due process is wholly rejected.

Turning to the general issue arising from the substance of Bomerowich's allegation, we note that the ultimate question for resolution here is whether SEPTA's rejection of Bomerowich's application to be a first class welder violated the PHRA.

Section 5(a) of the Act provides in relevant part:

It shall be an unlawful discriminatory practice. . . for any employer because of the. . . non-job related handicap or disability of any individual to refuse to hire or employ. . . such individual, 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 competent to perform the services required.

43 P.S. 955(a).

Section 4(p) provides the Act's only clarification of the reach of the cited portion of Section 5(a):

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in.

43 P.S. 954(p).

Applicable regulations promulgated by the Commission provide:

Handicapped or disabled person -- Includes the following:

(i) A person who:

- (A) has a physical or mental impairment which substantially limits one or more major life activities;
- (B) has a record of such an impairment; or
- (C) is regarded as having such an impairment.

(ii) As used in subparagraph (i) of this paragraph, the phrase:

- (A) "physical or mental impairment" means a physiological disorder or condition, cosmetic, disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.
- (B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- (C) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.
- (D) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life

activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i) (A) of this paragraph but is treated by an employer or owner, operator or provider of a public accommodation as having such an impairment.

16 Pa. Code §44.4.

Non-job related handicap or disability -- Includes the following:

- (i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job-related.
- (ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.
- (iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

16 Pa. Code §44.4.

These definitions have been upheld as a valid exercise of the Commission's legislative rule-making authority. Pennsylvania State Police v. PHRC, 457 A.2d 584 (1983); and See Pennsylvania State Police v. PHRC, 483 A.2d 1039 (1984), reversed on other grounds 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

The burden of proof applicable to this case was set forth by Pennsylvania's Commonwealth Court in National Railroad Passenger Corp. (Amtrak) v. PHRC, 452 A.2d 301 (1982). Complainant must first make out a prima facie case, which he has done here by proving:

1. That he was handicapped within the meaning of the PHRA and applicable regulations at the time of the action he challenges;
2. That he applied for a position for which he was otherwise qualified; and
3. That his application was rejected solely because of his handicap.

While a Complainant in a case of refusal to hire must generally also prove that the employer continued to seek other qualified applicants, such proof is unnecessary here where there is no dispute as to the reason for the Complainant's rejection. See McDonnell-Douglas Corp. v. Green, 411 U. S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U. S. 248 (1981).

As to the other elements there is no particular dispute on this record. SEPTA does not dispute that the Complainant had triple coronary bypass surgery in 1981, that he applied for a first class welder's position, that the position was available, that he was informed that he would be accepted for employment contingent upon passing a physical examination, and that he was rejected when SEPTA's medical department applied SEPTA's medical guidelines to Bomberowich's indication to them that he had undergone coronary bypass surgery in 1981.

Unquestionably, the Complainant is handicapped within the meaning of the PHRA and applicable regulations. The fact that he was rejected by an employer for medical reasons renders him handicapped because of the impairment of the major life activity of working. Pennsylvania State Police v. PHRC, Supra. Because Complainant has made out a prima facie case, we must consider Respondent's explanation for its refusal to hire him.

The Pennsylvania Commonwealth Court in National Railroad Passenger Corp. v. PHRC, Supra, held that a Respondent who defends a charge of handicap discrimination by asserting that the handicap in question is job related, bears the burden of establishing that assertion. Respondent here argues that the Complainant's handicap is job related. Resolution of this question requires careful analysis of both the duties of a first class welder and the Complainant's ability to perform those duties. In addition, the heart of this matter requires a further inquiry into whether SEPTA could have made a reasonable accommodation of the Complainant's handicap under the circumstances presented here.

In 1985, SEPTA's Regional High Speed Line ("RHSL") was expanding the compliment of building structural welder first class positions from 4 to 8 welders. Had Bomberowich been hired he would have been 1 of 8 welders working on SEPTA's RHSL. The RHSL welders worked out of a central location from which they were assigned in teams of two welders per service vehicle. Each day, teams of welders drove their assigned service vehicle from the central location to a designated location somewhere within the RHSL's vast service area. The RHSL service area extended to West Trenton, N. J., to Marcus Hook, Pa., and from Paoli, Pa., to Lansdale, Pa.

Depending on the assignment, a crew might spend up to 25% of its 8 hour shift driving to and from an assigned area. The service vehicles were quite large and weighed approximately 10 tons. A loss of control of heavy equipment of this nature on the public streets would clearly pose a substantial hazard.

In an effort to establish job-relatedness, SEPTA presented the testimony of its medical director, Dr. Richard Press, Jr., and the expert testimony of Dr. Ranga A. Rao, a cardiovascular disease specialist.

The two doctors testified persuasively that coronary bypass surgery is a medical procedure which revascularizes a portion of a patient's heart muscle. Blood flow is rerouted beyond arteries which are partially obstructed by cholesterol buildup. However, bypass surgery only treats the consequences of an underlying condition. Both doctors agreed that after bypass surgery, the risk of a cardiac event is greater in that patient than the risk of a cardiac event occurring in a person who never had bypass surgery. The cardiac event consequences could range from a heart attack, sudden death, collapse or simply loss of consciousness. Additionally, both doctors, in effect, agreed that SEPTA's medical guidelines which restrict persons who have had bypass surgery from driving SEPTA vehicles are reasonable as a precautionary measure to insure the public safety.

For these reasons, SEPTA argues that its medical guidelines in effect in 1985, which restricted persons who had had coronary bypass surgery from driving SEPTA vehicles, was not discriminatory. At least insofar as the applicable guidelines were applied to prevent Bomberowich from driving a 10-ton service truck, we agree. Specifically, we find that the Complainant's bypass surgery and underlying condition posed an increased and demonstrable risk to the health and safety of others because of an increased likelihood that he could experience a cardiac event with attendant loss of ability to safely drive a 10-ton truck. See ie Hite v. Consolidated Rail Corp., Docket No. E-21418 (Pa. Human Relations Commission, July 31, 1985).

However, our inquiry must not stop here. Further inquiry must now explore the question of whether SEPTA could have made a reasonable accommodation which would have provided Bomberowich with an opportunity to work without posing an undue hardship on SEPTA.

The PHRA itself, Jenks v. Auco Corp., 340 Pa. Super. 542, 490 A.2d 912 (1985), and 16 Pa. Code §44.14, impose a duty upon employers to reasonably accommodate a handicapped individual. Section 44.14 provides that:

- (a) An employer shall make reasonable accommodations by modifying a job, including but not limited to modification of duties, scheduling, amount or nature of training, assistance provided, and the like, provided that such modification shall not impose an undue hardship.
- (b) Nothing in this section shall be construed to require application of different production, attendance, or disciplinary standards for the handicapped or disabled worker.

Recently in SEPTA v. PHRC, Supra, the Commonwealth Court upheld a PHRC decision in which the PHRC had ruled that SEPTA could have accommodated an employment applicant whose insulin dependent diabetic condition prevented that applicant from driving SEPTA vehicles. Like the necessary accommodation required in this case, the accommodation which was determined to have been reasonable in SEPTA v. PHRC, Id., also dealt with the modification of a position's job duties to delete driving responsibilities.

Here, SEPTA argues that it would be unduly burdensome to SEPTA to hire an employee as a non-driving welder. SEPTA contends that driving is an important part of the duties of a welder. Unquestionably, welding crews must, on a daily basis, drive from SEPTA's centrally located RHSL facility to just about anywhere within the large service area. SEPTA's brief indicates that "between 30% and 40% of a welder's time is spent driving a truck." Clearly this does not accurately depict the reality of the situation. On direct examination, Trower's testimony suggested a welder

spends 30 to 40 percent of the time behind the wheel of a vehicle. (N.T. 257). However, on cross-examination, Trower then suggested that on a given day, a crew might be on the road one or two hours, depending on where they were assigned. (N.T. 266). Although not entirely clear, this general timeframe appears to represent the maximum time a crew might have to drive if assigned to a location on the distant fringe of the RHSL service area. Accordingly, the driving time would often be much less if an assignment were made to work at a location closer to the central facility.

Furthermore, only one member of a two-member crew can drive at a time. Thus, whatever percentage of an 8 hour day is assigned to a crew's driving time, the percentage of an individual crew member is reduced. On average, daily crew driving time would likely be approximately 1 hour total. Thus, approximately 12.5% of a crew's average day is spent in a truck enroute both to an assignment and the return. Using this percentage, on average, each welder drives approximately 6.25% of the time.

Given this factor, the question of crew rotation is a logical area to explore whether such a measure would impose an undue hardship on SEPTA. If SEPTA were to hire a non-driving welder, and assign that welder on a rotating basis with the other seven welders, overall, each of the seven driving welders would end up with less than a 1% increase in their existing driving duties.

SEPTA's brief cites Jenks, Supra, suggesting that it supports SEPTA's assertion that the PHRA does not require an employer to substantially rewrite reasonable job duties to accommodate a handicapped job applicant. However, the factual issues in Jenks simply do not deal with

either the modification of job requirements, or the creation of a new job description. Accordingly, the Jenks opinion does not constitute basic support for SEPTA's assertion. Instead, a case more on point would be Department of Transportation v. PHRC, 84 Pa. Cmwlth. Ct. 98; 480 A.2d 342 (1984), remanded on other grounds, 508 A.2d 1187 (1986). Both the Commonwealth Court and the Pa. Supreme Court in Dept. of Transportation specifically addressed the regulatory provision requiring job modification, and assistance providing. Both courts approved such accommodation methods, provided an undue hardship was not created.

In this case, SEPTA made some effort to suggest there would be a hardship created if a non-driving welder were hired. First, there was some effort made to suggest that SEPTA periodically sends only one welder out. However, Trower's testimony indicates that welders are rarely sent out alone. (N.T. 260). Next, there was some speculation that if one crew member were to be injured, the other crew member might be called upon to drive the injured person to a treatment area. Trower's testimony again minimized this concern by indicating, this never happened.

SEPTA did raise two concerns which might be classified as an inconvenience but certainly, the evidence presented did not amount to a showing of an undue hardship. First, although SEPTA's foreman can and does make crew reassignments, welders would have to switch their personal tools from one vehicle to another. SEPTA suggests time would be lost by the tool transfer. Second, SEPTA's evidence suggests that other welders could file union grievances if one welder would be excluded from driving duties.

Unions too are responsible to avoid discriminatory action in the workplace. See ie Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974). Employer avoidance of union pressures cannot detract from SEPTA's obligation to reasonably accommodate a handicapped applicant. See ie Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.); cert. dismissed, 404 U.S. 1006 (1971).

One very important purpose of the PHRA is to, "foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . handicap." 43 P.S. §952(b) (Emphasis added). The reason for this is because 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, and necessitates their resort to public relief." 43 P.S. §952(a) (Emphasis added).

Neither at the Public Hearing nor in the parties' briefs, was there any serious contention that Bomberowich could not perform the remaining duties of a first class welder. The predominant focus was on whether the driving aspect of a welder's duties either disqualified Bomberowich or could there be an accommodation made which did not impose an undue hardship on SEPTA.

Here, at the time of Bomberowich's rejection, SEPTA literally made no attempt to even consider whether an accommodation would be possible. Instead, SEPTA rigidly applied inflexible medical guidelines so as to automatically disqualify Bomberowich.

Although the record could be more thorough on the accommodation issue, there is sufficient information, when considered as a whole, from which to conclude that a reasonable accommodation was possible and that by accommodating Bomberowich's driving disqualification, SEPTA would not have been unduly burdened. Accordingly, consideration of an appropriate remedy is necessary.

Section 9 of the PHRA provides that hiring, with or without backpay, may be ordered after a finding of discrimination. The function of backpay relief is to put the victim of discrimination in the position he would have attained absent the discrimination. Albermarle Paper Company v. Moody, 422 U.S. 405, 418-423 (1975); PHRC v. Transit Casualty Insurance Company, 478 Pa. 430, 387 A.2d 58 (1978). Further, the Pa. Supreme Court has declared that the PHRC has broad discretion when fashioning an award. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985).

Here, Bomberowich is entitled to be offered the next available structural welder first class position modified consistent with this opinion with retroactive seniority back to June 11, 1985. Additionally, Bomberowich should receive any and all benefits to which he would have been entitled had he been hired on June 11, 1985.

Bomberowich is also entitled to be awarded lost backpay between June 11, 1985 and the date of the Public Hearing of this case. On this issue, a fundamental principle of law requires the backpay award to be reduced by interim wages earned by Bomerowich. Transit Casualty, *Supra*.

In the Proposed Findings of Fact, Appendix A, of the PHRC regional attorney's brief, wage calculations have been made. A review of these

calculations reflects that they accurately summarize the damage evidence presented except for one factor. Bomberowich was temporarily disabled for a 9 week period sometime between SEPTA's rejection and 1987. This period of disability is not accounted for in Ms. William's brief. Accordingly, wages for the period 6/11/86-7/4/87 must be reduced by 9 weeks; or \$4,382.24. Therefore, the difference between what Bomberowich would have made and what he did make for the entire period at issue would be \$25,461.35. Furthermore, the PHRC is authorized to award interest on the backpay award at the rate of 6%. Goetz v. Norristown Area School District, 16 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1975).

Accordingly, relief is ordered as described with specificity in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

STEPHEN BOMBEROWICH,
Complainant

v.

Docket No. E-33600

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Respondent

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Respondent failed to reasonably accommodate the Complainant's handicap/disability. Accordingly, the Complainant has proven discrimination in violation of §5 (a) of the Pennsylvania Human Relations Act. It is therefore the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion, be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the Attached Final Order.



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

STEPHEN BOMBEROWICH, :
Complainant :
 :
v. : Docket No. E-33600
 :
 :
SOUTHEASTERN PENNSYLVANIA :
TRANSPORTATION AUTHORITY, :
Respondent :

FINAL ORDER

AND NOW, this 2nd day of November, 1989, after a review of the entire record in this matter, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the PHRA, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the PHRC adopts said Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

O R D E R S

1. That the Respondent cease and desist from its failure to consider reasonable accommodations of the handicap/disabilities of employment applicants.

2. That the Respondent shall pay to the Complainant within 30 days of the effective date of this Order, the lump sum of \$25,461.35, which

amount represents backpay lost for the period between June 11, 1985, and March, 1989, the month during which the Public Hearing of this matter was held.

3. That the Respondent shall pay additional interest of 6% per annum calculated from June 11, 1985 until payment is made.

4. That the Respondent shall offer the Complainant the next available Building Structural Welder-first class position with SEPTA's Regional Rail Division, and should the Complainant accept such employment, reasonably accommodate the Complainant's handicap by modifying the position in a manner consistent with this opinion.

5. That the Respondent's offer of employment shall include retroactive seniority back to June 11, 1985, together with all benefits to which such retroactive seniority would have entitled the Complainant.

6. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Cynthia M. Williams, Esquire, in the PHRC Philadelphia Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

Gregory J. Celja, Jr.
Gregory J. Celja, Jr.
Assistant Secretary