

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LIONEL H. TOWNSEND,
Complainant

vs.

Docket No. E-12755

ELIZABETH BOROUGH MUNICIPAL
AUTHORITY,

Respondent

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

HISTORY OF THE CASE

This matter involves a complaint filed with the Pennsylvania Human Relations Commission ("Commission") by Lionel H. Townsend ("Complainant") on September 1, 1977, at Docket No. E-12755. The complaint which was timely, verified and in writing alleged that the Elizabeth Borough Municipal Authority ("Respondent") refused to hire Complainant for the position of Sewage Plant Operator because of his age, fifty-one (51) in violation of Section 5 (a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 951 et seq. ("the Act").

An investigation of the allegations of the complaint was conducted by representatives of the Commission pursuant to the statutory mandate of 43 P.S. 959, in which investigation resulted in a determination that probable cause existed to credit the allegations of the complaint.

Thereupon, after notice of probable cause, the Commission endeavored as mandated by the Act to eliminate the acts complained of by conference, conciliation and persuasion. These endeavors were unsuccessful, and on April 30, 1979, the Commission approved the case for Public Hearing. The Panel named to hear the case included: John P. Wisniewski, Chairperson of the Panel, Elizabeth M. Scott, Hearing Commissioner and Doris A. Smith, Esquire, Hearing Commissioner, Sidney V. Blecker, Assistant General Counsel from the Harrisburg Regional Office

of the Commission, served as Legal Advisor to the Hearing Panel.

A Public Hearing conducted at all times pursuant to Section 9 of the Act was held on Tuesday, September 11, 1979, in the Gold Room of the Allegheny County Courthouse, Pittsburgh, Pennsylvania. Caroline Mitchell, Assistant General Counsel from the Pittsburgh Regional Office of the Commission presented the case on behalf of the Complainant. Glenn C. Jones, Esquire appeared on behalf of the Respondent.

Subsequent to receipt of the Notes of Testimony, briefs on behalf of the Complainant and the Respondent were filed with the Commission.

FINDINGS OF FACT

1. Complainant herein is Lionel H. Townsend, an individual 51 years of age as of July 1, 1977, residing at 401 3rd Street, Elizabeth, Pennsylvania within the County of Allegheny. (Stip. of fact; Tr.4)

2. Respondent Elizabeth Borough Municipal Authority, is a political subdivision of the Commonwealth of Pennsylvania which has a place of business within the Commonwealth at 206 3rd Street, Elizabeth, Pennsylvania within the County of Allegheny. (Stip. of fact; Tr. 4)

3. On July 12, 1977, the Complainant applied for the position of Sewage Plant Operator for the Elizabeth Borough Municipal Authority. (Stip. of fact; Tr. 4)

4. Elizabeth Borough Municipal Authority at all times relevant hereto, was the entity of Municipal Government which had the authority for and the responsibility of selecting candidates for employment with the Borough in the capacity of Sewage Plant Operator. (Stip. of fact; Tr. 4)

5. As of July 12, 1977, the Elizabeth Borough Municipal Authority consisted of William Pancoast, Chairman, James B. Wiley, Treasurer and other members. (Stip. of fact; Tr.5)

6. As of July 12, 1977, Mrs. Jean G. Thayer was selected as Secretary to the Elizabeth Borough Municipal Authority and as one of the duties of her employ, transcribed the minutes of their meetings. (Stip. Tr.5)

7. Mrs. Jean Thayer transcribed the notes of the August 12, 1977, Elizabeth Borough Municipal Authority meeting at which the selection of the candidate for Sewage Plant Operator position

was made. (Stip. Tr. 5)

8. Complainant was interviewed on August 4, 1977, for the position of Sewage Plant Operator, at which time the Complainant's application, listing his experience, was considered. (Stip. Tr. 5; Tr. 16)

9. As of July 12, 1977, no job description or list of educational qualifications existed for the job of Sewage Plant Operator. (Stip. Tr. 5)

10. At the time of Complainant's interview, Respondent employed three (3) Sewage Plant Operators: aged 49, 48 and 61 as of July, 1977. (Stip. Tr. 5-6)

11. Complainant and one William Van Fossen were two (2) of six (6) job applicants for the position of Sewage Plant Operator for the Elizabeth Borough Municipal Authority. (Tr. 56)

12. Respondent supplied all other applications for the position of Sewage Plant Operator, which listed the respective educational and job experience of the applicants. (C Ex. 6; Tr. 47)

13. Each applicant was individually and separately interviewed by the three members of Respondent's selection committee. (Tr. 56)

14. On or after August 17, 1977, Complainant received a letter from Respondent stating that he was not selected for the position of Operator at the Sewage Plant, (C Ex. 2; Tr. 21)

15. William Van Fossen, Jr., age 23, was hired for the Sewage Plant Operator position by Respondent at its August 12, 1977, meeting. (Stip. of fact; Tr. 6)

16. Respondent hired Mr. Van Fossen because he was considered "the most experienced and qualified" of the six applicants. (Respondent's Answer)

17. Evidence of record indicates that Mr. Van Fossen had 2 years of college training which included, inter alia, courses in Chemistry, Biology, and Physics and had worked at Respondent's Sewage Treatment Plant during 3 summers prior to the date of hire. (Tr. 57-58; C Ex. 6, Tr. 47)

18. The Commission finds from the testimony and applicable governmental regulations that the duties of Sewage Plant Operators included the performance of chemical analysis and that this specific job duty requires a degree of sophisticated training. (C Ex. 5, Tr. 45; Tr. 57)

19. The Complainant did not have a college education background. (C Ex. 1, Tr. 13)

20. The Commission finds as a matter of fact that Respondent's stated reason for its refusal to hire Complainant was not a mere pretext.

21. The Commission finds William R. Pancoast, Chairman of the Elizabeth Borough Municipal Authority to be eminently qualified. (Tr. 55-56)

22. The Commission finds the testimony of Respondent, Pancoast to be credible. (Tr. 55-64)

23. The Commission finds as a matter of fact that Complainant was not the "best able and most competent" individual to perform the job of Sewage Plant Operator.

24. The Commission finds as a matter of fact that Complainant was not denied the job of Sewage Plant Operator at Respondent's facility because of his age, 51.

CONCLUSIONS OF LAW

1. The Complaint filed in this matter states a cause of action for discrimination in employment under Section 5 of the Pennsylvania Human Relations Act. (43 P.S. 955 (a))

2. The Pennsylvania Human Relations Commission properly has jurisdiction over the parties and subject matter of the Complaint in this action at Docket No. E-12755, pursuant to Sections 4 and 5 of the Act. (43 P.S. 954, 955)

3. The Pennsylvania Human Relations Commission and the parties have fully complied with all the procedural prerequisites to a Public Hearing in accordance with Section 9 of the Act. (43 P.S. 959)

4. Respondent is an "employer" within the meaning of Sections 4(b) and 5(a) of the Act. (43 P.S. 954 (b) and 955 (a))

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

6. Complainant is a member of the protected class of aged persons pursuant to Section 4 (h) of the Act, which includes persons between the ages of forty and sixty-two. (43 P.S. 954 (h))

7. Respondent received timely and proper notice of the Complaint, finding of Probable Cause, Conciliation Meeting and Public Hearing in this matter as required by Section 9 of the Act. (43 P.S. 959; Docket Entries, Pleadings).

8. The credibility of witnesses, the weight of testimony and the inferences to be drawn from the evidence are matters for the determination by the administrative agency.

9. Administrative fact finders are free to draw reasonable inferences from the evidence presented to them.

10. The Commission concludes that as to Lionel H. Townsend Respondent has not engaged in an unlawful discriminatory practice by failing to hire him for the position of Sewage Plant Operator in violation of Section 5(a) of the Act. (43 P.S. 955 (a))

11. The Commission concludes as a matter of law that Complainant's age was not the determinative factor in Respondent's refusal to hire Complainant.

12. Respondent has met its burden of establishing that Complainant was not the "best able and most competent" applicant for the position.

O P I N I O N

This matter arises on the complaint of Lionel H. Townsend, filed with the Pennsylvania Human Relations Commission alleging that Respondent, Elizabeth Borough Municipal Authority, refused to hire him for the position of Sewage Plant Operator because of his age, fifty-one (51).

During July 1977, the position of Sewage Plant Operator for Respondent became vacant. Eventually, six (6) interviews were scheduled, among them the interview of Complainant and the successful applicant William Van Fossen, Jr., age 23 at the time of his hiring. Shortly thereafter the Complainant was informed that he was not chosen for the operator position for which he had applied.

Complainant listed on his application previous work experience including supervisor of industrial maintenance, welding, machinist repairman and laborer; sale and repair of equipment for contractors, and repair and maintenance of compressors and related equipment in oxygen production. At the public hearing convened in this matter, the Complainant testified to the effect that at the interview he had attended for the position in issue, his application was passed around to the three (3) members of Respondent's selection Committee. Further, he took the opportunity to make them aware that he was familiar with the compressor equipment and also his past experience.

The record amply reveals Complainant has met the requirements in a single complainant discrimination case as to the elements and initial burden of proof for making out a prima facie claim under McDonnell Douglas vs. Green, 411 U.S. 792 (1073), cited with approval by the Pennsylvania Supreme Court in General Electric Corporation vs. Pennsylvania Human Relations Commission, 365 A.2d 649 (1976).

However, proof of a prima facie claim cannot be equated with an ultimate finding under the Pennsylvania Human Relations Act. Indeed the two are quite different as stated recently by the United States Supreme Court in Furnco Construction Corporation vs. Waters, _____ U.S. _____ (1978):

The method suggested in McDonnell Douglas for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

The Supreme Court goes on to note that:

(i)t is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration and not an illegitimate one such as race.

The McDonnell Douglas decision established rules for the order and allocation of proof in discrimination cases. These are, of course, procedural rules applicable to the conduct of hearings. Briefly summarized, they provide that:

1. The complainant must initially establish a prima facie case of employment discrimination;
2. The respondent must respond to the prima facie case with a legitimate, nondiscriminatory reason; and
3. The complainant must be afforded an opportunity to show that the respondent's reason is "pretextual".

In General Electric, holding that the Pennsylvania Human Relations Act is analogue to Title VII, the Pennsylvania Court stated:

In McDonnell-Douglas Corp. vs. Green, the United States Supreme Court held that a prima facie case of discrimination under Title VII is made out if the Complainant establishes that he is a member of a protected minority, that he applied for a job for which he was qualified, that his application was rejected, and that the employer continued to seek other applicants of equal qualifications. Once a complainant establishes these elements the burden then shifts to the employer to justify his employee selections on the basis of job related criteria which are necessary for the safety and efficiency of the enterprise.

Clearly, in this case the Respondent has articulated and proven a legitimate reason for failure to hire Complainant, that being, their assessment that William Van Fossen, Jr., was the superior candidate. The Respondent established, during their defense, the bona fide need for a skilled Sewage Plant Operator.

The testimony of Mr. William R. Pancoast, chairman of the Elizabeth Borough Municipal Authority, was persuasive. He related the qualifications of Mr. Van Fossen and the relative needs of the Municipal Authority. Mr. Pancoast described the requirements and the need for chemical analysis at the sewage plant and the fact that chemical analysis requires specialized

training. Specifically, Mr. Pancoast maintained the fact that Mr. Van Fossen had two (2) years formal college educational experience gives him the tools necessary to be trained and understand the method, processes and concepts of chemical analysis. In addition, Mr. Van Fossen's application listed in the space provided for "Special courses": Chemistry (1 year); Biology (2 years); Physics (1 year) and others (3 years) inserting Algebra, Geom., and Trig-Physics. Moreover, the successful applicant actually had three (3) years of summer work experience at the sewage plant in question.

After carefully examining the entire record, we conclude that Respondent has met its burden of establishing by the greater weight of the evidence the fact that Complainant was not the "best able and most competent" applicant for the position of Sewage Plant Operator.

The Respondent, having proven their defense, Complainant is afforded the opportunity to establish that the Respondent's asserted reason for failure to hire him is a mere pretext. We find that the record shows that the Complainant failed to establish that the reason proffered for the failure to hire him was pretextual. Complainant's contentions were unpersuasive.

To the extent that Mr. Pancoast considered age with reference to the timing of employee retirement, this consideration must be analyzed as a legitimate and necessary business consideration. There was no direct evidence that Complainant was singled out for his age. The facts reflect that had Complainant been hired there would have been several years difference in

retirements, thus, Mr. Pancoast's consideration had no effect upon the choice among the applicants.

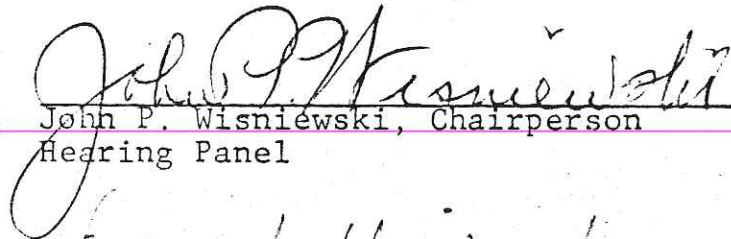
In light of the competent credible testimony presented by the Respondent in support of their legitimate and non-discriminatory refusal to hire Complainant and to chose another more qualified individual, and the concomitant failure of the Complainant to present evidence showing these reasons to be pretexts, the Commission hereby finds that the evidence failed to establish that the Complainant was discriminated against in violation of Section 5(a) of the Pennsylvania Human Relations Act.

RECOMMENDATION OF HEARING COMMISSIONERS

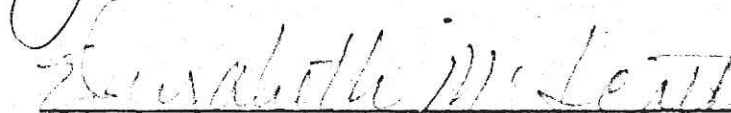
AND NOW, this 24th day of March , 1980, in consideration of the entire record in this matter; including the Complaints, Stipulations of Fact, Exhibits, Record of the Hearing, and briefs filed on behalf of Complainant and Respondent, the Hearing Commissioners hereby adopt the attached as their proposed History of the Case, Findings of Fact, Conclusions of Law, Opinion and Final Order and hereby recommend that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

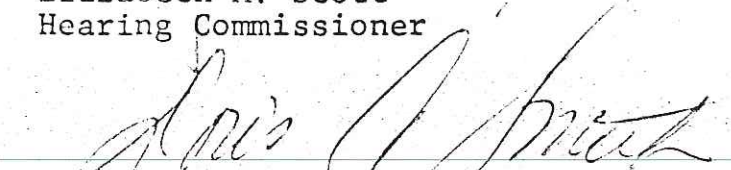
BY:


John P. Wisniewski, Chairperson
Hearing Panel

BY:


Elizabeth M. Scott
Hearing Commissioner

BY:


Doris A. Smith, Esq.
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
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Lionel H. Townsend,
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Docket No. E-12755

Elizabeth Borough Municipal
Authority,

Respondent

COMMISSION'S DECISION AND FINAL ORDER

AND NOW, this 4th day of April, 1980 upon consideration of the full record in this case and of the foregoing Recommendation of the Hearing Commissioners, and pursuant to the provisions of Section 9 of the Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq., the Pennsylvania Human Relations Commission hereby adopts the foregoing History of the Case, Findings of Fact, Conclusions of Law, and Opinion and orders that this case be, and the same hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Joseph H. Yaffe
JOSEPH H. YAFFE, Chairperson

ATTEST:

BY: Elizabeth M. Scott

Elizabeth M. Scott, Secretary