

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT W. GAUNT, :
Complainant :
 :
vs. : DOCKET NO. E-18525
MONROE COUNTY COMMISSIONERS, :
MONROE COUNTY JAIL :
CHARLES MOTSON, WARDEN, :
Respondents :

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above captioned case and no further proof thereof shall be required:

1. The Complainant herein is Robert W. Gaunt, an adult male, who resides in Tannersville, Pennsylvania. His mailing address is Box 224, Tannersville, Pennsylvania, 18372.
2. The Respondents herein are: Monroe County Commissioners, Monroe County Court House, 7th Street, Stroudsburg, Pennsylvania, 18360; and Monroe County Jail, Charles Motson, Warden, 34 North 7th Street, Stroudsburg, Pennsylvania, 18360.
3. The Complainant, on or about July 23, 1980, filed a notarized complaint with the Pennsylvania Human Relations Commission (Commission) at Docket No. E-18525. A copy of the formal complaint is attached hereto as Appendix A and is incorporated by reference herein as if fully set forth.

4. In correspondence, dated May 22, 1981, the Commission notified the Respondent that probable cause existed to credit the allegations contained in the above captioned complaint. A copy of this correspondence is attached hereto as Appendix B and is incorporated herein by reference as if fully set forth.

5. Subsequent to the determination of Probable Cause, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion.

6. On January 21, 1980, the Complainant filed an employment application with Respondent for the position of Correction Officer. The application was submitted to Charles E. Motson, Junior, the Jail Administrator.

7. Charles E. Motson, Junior, took over the duties as Jail Administrator on or about October 10, 1977.

8. On or about June 27, 1980, Respondent Charles E. Motson, Junior, advertised for the vacant position of Correction Officer in the want ad employment section of the Pocono Record newspaper.

9. The requirements for the job as indicated in the Pocono Record advertisement of June 27, 1980, specified "mature, reliable person....High School graduate, prior military service desirable."

10. On June 27, 1980, Complainant was unemployed and remained unemployed until August 5, 1980.

11. At Complainant's personal interview, he was asked by the Jail Administrator his age and was told that on occasions a prisoner had to be

wrestled and restrained and that the correctional staff was young.

These Stipulations of Fact together with their appendices will be incorporated into a Prehearing Order which will become a part of the official record of this case and will be incorporated into the transcript prepared during the course of any subsequent public hearing held in this matter.



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Attorney for Complainant

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ROBERT W. GAUNT,

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v.

MONROE COUNTY COMMISSIONERS,
MONROE COUNTY JAIL,
CHARLES MOTSON, WARDEN,

Respondents

DOCKET NO. E-18525

FINDINGS OF FACT*

1. In June of 1980, Complainant Robert Gaunt was fifty-three (53) years old. (N.T. 10)
2. Complainant received no response to his application for a correctional officer's position, submitted to Respondents in January of 1980. (N.T. 18)
3. It is Respondents' normal practice to contact applicants for vacant positions. (N.T. 178)

*The foregoing Stipulations are incorporated herein as if fully set forth. The following abbreviations will be used throughout this opinion:

N.T. Notes of Testimony
S.F. Stipulation of Fact
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
J.E. Joint Exhibit

4. In June of 1980, after seeing a newspaper advertisement for the position of correctional officer, Complainant contacted Mr. Motson and requested an interview. (N.T. 21-22)

5. During the interview, Mr. Motson expressed to Mr. Gaunt his preference for youthful correctional officers. (N.T. 22)

6. Complainant was not hired for the correctional officer position. (S.F. No. 10, N.T. 27)

7. The position for which Mr. Gaunt applied was filled by Mr. Leonard Leskowski. (N.T. 163)

8. Mr. Leskowsky was twenty-six (26) years old at the time he was hired by Respondents. (C.E. 4)

9. Mr. Leskowsky had neither military nor correctional experience at the time he was hired by Respondents. (C.E. 3)

10. Mr. Gaunt is a high school graduate with both military and correctional experience. (N.T. 10-12)

11. Mr. Motson testified that he did not hire Complainant because of Complainant's out-of-shape appearance and overbearing attitude. (N.T. 160-161)

12. The officials responsible for administration of the jail, Mr. Motson, Mr. Shiffer, and Mr. Sebring, consider the physical appearances and attitudes of correctional officers to be of great importance in maintaining control in the jail. (N.T. 135-7, 226-7, 246-7)

13. Episodes of violence occur in the Monroe County Jail from time to time. (N.T. 148-153; R.E. 7; N.T. 249-252)

14. While interviewing Complainant, Mr. Motson indicated that he had a young correctional staff, and inquired about Complainant's age. (S. F. 11)

15. Upon being told that the correctional staff was young, Complainant told Mr. Motson "You'll get a hell of a lot more work out of me than you will out of those kids." This remark lead Mr. Motson to conclude that Complainant was domineering and overbearing. (N. T. 160-1)

16. Asked why he asked Mr. Grant his age, Mr. Motson responded "I guess I was curious to know how old he was." (N. T. 185)

17. Mr. Motson testified that appearances can be deceptive as indications of physical ability. (N.T. 183)

18. Mr. Motson hired Mr. Lightner, a correctional officer who is significantly overweight. Mr. Lightner is in his thirties. (N.T. 183, 185)

19. The persons responsible for the administration of the jail consider age to be a factor in physical appearance. (N. T. 236, 268)

20. Respondent Motson did not attempt to objectively ascertain Complainant's physical capabilities; he made a judgment about them based on Complainant's appearance. (N.T. 182)

21. Thomas Shiffer, Assistant Administrator of the jail, described the escape in 1977 of an inmate named Sanford with specific reference to the ages of the jail personnel who were overcome by Mr. Stanford; the persons overcome were over sixty (60) years of age. (N. T. 227)

22. Mr. Shiffer testified that other inmates who were to have joined in the Stanford escape "didn't have the heart" to overcome the younger officer in charge of another area of the jail. (N. T. 277)

23. Mr. Motson is Mr. Shiffer's immediate supervisor. (N. T. 222)

24. Mr. Shiffer is in charge of the jail in Mr. Motson's absence. (N.T. 237)

25. Sheriff Forrest Sebring is Mr. Motson's immediate supervisor. (N. T. 239)

26. In 1980, Gordon Latzko discussed with Mr. Sebring the possibility of applying for a correctional officer's position; Mr. Sebring indicated a preference for officers younger than Mr. Latzko, who was then fifty-five (55). (N. T. 98)

27. Reginald Nauman is Monroe County's Chief Probation Officer and in that capacity has regular contact with the persons who administer the jail. (N. T. 105-107)

28. An officer named VanAuken was beaten to death by an inmate at the county jail during an escape attempt in 1974. (N. T. 251-2)

29. Mr. VanAuken was in his sixties at the time of his death. (N. T. 113)

30. Mr. Sebring indicated to Mr. Nauman that he had a preference for younger correctional officers as a result of the VanAuken incident. (N. T. 116)

31. Complainant's employment application indicated that he was receiving Veteran's disability benefits. (C. E. 1)

32. In June of 1980, Respondent's employed thirteen (13) correctional officers, none over the age of forty (40). (C. E. 5, 6)

33. Mr. Motson has never hired a correctional officer who was over the age of forty (40). (N. T. 185; C. E. 5, 6)

34. Respondent's proof that older persons are unable to perform safely and efficiently as correctional officers consisted solely of evidence that older officers were on duty at the time of the Stanford escape and the attempted escape resulting in Mr. VanAuken's death. (N. T. 249-251, 113)

35. Mr. Gaunt was unemployed between June 27, 1980, and August 5, 1980; in April of 1981, he obtained a position paying more than he would have received as a correctional officer. The amount that he would have earned as an officer between June of 1980 and April of 1981, less interim earnings, is \$3,480.00. (N. T. 27- 28; S. F. 10; J. E. 1)

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("Act").

2. Respondents are employers within the meaning of the Act.

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

4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.

5. The Complainant at the time of filing this complaint was protected from discrimination in employment on the basis of his age.

6. Complainant has the initial burden in this case of proving a prima facie case of discrimination.

7. Complainant has met his initial burden by proving that:

- a. at the time of the challenged employment decision, he was a member of a protected class;
- b. he applied for a position for which he was qualified;
- c. his application was rejected; and

d. the employer continued to seek other applicants or hired a person not of Complainant's protected class.

8. Once Complainant establishes a prima facie case, Respondents may prevail by showing that their conduct did not violate the Act.

9. Respondents could prevail in this case by establishing that they refused to hire Complainant because of legitimate, non-discriminatory reasons, or because age is a bona fide occupational qualification (BFOQ) for the position of correctional officer.

10. Respondents refused to hire Complainant because of his age.

11. In order to establish that age is a BFOQ for the position of correctional officer, Respondents would have to prove that:

(a) Discrimination on the basis of age in the hiring of correctional officers is reasonably necessary to the essence of the normal operation of their business or enterprise; and

(b) All or substantially all persons within the protected age group are unable to safely and efficiently perform the duties of a correctional officer.

12. Respondents have failed to establish that age is a BFOQ for the position of correctional officer.

13. Respondents have failed to establish that they refused to hire Complainant because of legitimate, non-discriminatory reasons.

14. After a finding of discrimination, the Commission may award relief which includes wages lost as a result of the unlawful discrimination.

O P I N I O N

This case arises on a complaint filed by Robert W. Gaunt ("Complainant") against the Monroe County Commissioners, Monroe County Jail, and Charles Motson, Warden ("Respondents") with the Pennsylvania Human Relations Commission ("Commission") on or about July 23, 1980, at Docket No. E-18525. Commission staff investigated and found probable cause to credit the allegations. When efforts to conciliate were unsuccessful, the case was approved for public hearing. Prior to hearing, the parties stipulated to certain facts which have been incorporated into the foregoing Findings of Fact. The parties waived their rights to a hearing before a panel of three Commissioners. The case was heard by Commissioner Doris M. Leader on March 22, and 23, 1983, in Stroudsburg, Pennsylvania.

Mr. Gaunt alleged a violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("Act"), claiming that Respondents discriminated against him on the basis of his age, fifty-three (53), by refusing to hire him for the position of corrections officer. Respondents deny any violation of the Act.

Complainant bears the initial burden of establishing a prima facie case of discrimination under the Act. General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649 (1976); McDonnell Douglas Corp. v. Green, 411

U.S. 792 (1973). If Complainant meets this burden, Respondents may still prevail by showing that their conduct did not violate the Act. Philadelphia Electric Company v. Pennsylvania Human Relations Commission, Pa. Cmwlth. 448 A.2d 701 (1982).

Complainant in this case can meet his initial burden by showing that he belongs to a protected class, that he applied for a position for which he was qualified, that his application was rejected, and that Respondents continued to seek applicants or hired a person not of Complainant's protected class. We find that Mr. Gaunt has met this burden.

In January of 1980, Mr. Gaunt filed an application at the Monroe County Courthouse for the position of correction officer in the county jail. He received no response to this application, although it is Respondents' normal procedure to contact applicants for vacant positions. In June of 1980, he saw a newspaper advertisement placed by the County, seeking a correctional officer for the jail. He contacted Respondent Motson, indicating his interest in the position and requesting an interview. It has been stipulated that, during this interview, Mr. Motson asked Complainant his age, and informed him that the correctional staff was young. In addition, we find credible Mr. Gaunt's testimony that Mr. Motson indicated his preference during the interview for a younger correctional staff. Complainant was not hired; at that time he was fifty-three (53) years old, and thus protected by the Act against discrimination in employment on the basis of age. The position was subsequently filled

by a twenty-six (26) year old applicant.

The County's advertisement indicated that it sought a "mature, reliable person... High school graduate, prior military service desirable." Mr. Gaunt was a high school graduate and had both a record of military service and prior experience as a correctional officer. We find that he was qualified for the position. Complainant has thus established a prima facie case, raising the inference that Respondents' refusal to hire him was impermissibly based on his age. We must therefore consider Respondents' explanations of events.

Respondent Motson testified that two impressions formed during the interview led him to reject Complainant's application: first, he thought Complainant was overweight and in poor physical condition; second, he felt that Complainant's attitude was overbearing and domineering. Mr. Motson and other Respondent witnesses testified that correctional officers' physical appearances and attitudes are of critical importance. Episodes of violence which have occurred in the jail were described. Great emphasis was placed on the need to control inmates' behavior without firearms, through a combination of firmness and the appearance of physical strength, job-related qualities that Complainant was said to lack.

Unquestionably the jail is a place where there is occasional violence, and where control must be maintained in difficult circumstances by unarmed officers. We do not disagree with Respondents' contention that the officers'

appearance of strength, and their attitude toward inmates are important parts of that process. We find, however, that Respondent also and impermissibly considered youth to be an indispensable part of the process, and for that reason rejected Mr. Gaunt's application. Various facts in addition to Mr. Motson's expression of preference for young officers support this conclusion.

Mr. Motson testified that during his interview with Complainant, he himself stated that "... the majority of my people are young...husky young men, of which I'm quite proud." (N. T. 160) According to Mr. Motson, it was in response to this remark, which in the instant setting we find to be indicative of discriminatory intent, that Mr. Gaunt made the single statement which lead Mr. Motson to conclude that he was overbearing and domineering: "He said, 'You'll get a hell of a lot more work out of me than you will out of those kids'." (N. T. 160). In the context of a job interview, we find that this exchange shows, not Mr. Gaunt's arrogance, but his attempt to convince Mr. Motson that his age was not a disqualifying factor. As noted, we find that Mr. Motson had indicated a preference for younger officers.

Mr. Motson was unable to adequately explain his emphasis on the youth of his correctional staff, or his concern with Complainant's age. As to the closely related issue of Mr. Gaunt's allegedly overweight and out-of-shape appearance, Mr. Motson admitted on cross examination both

that physical appearances can be deceiving and that a young member of his current correctional staff was significantly overweight. Indeed, all officials responsible for administration of the jail testified that they consider the physical appearance of correction officers to be important, and that age is a component of physical appearance. Their use of physical appearance as a hiring criterion, therefore cannot be separated from impermissible considerations of age.

No attempt was made to objectively ascertain Mr. Gaunt's actual physical capabilities. Respondents thus rely on the application of essentially subjective criteria. As the United States Supreme Court has noted, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), use of such criteria makes it difficult to determine whether the criteria actually used were job related. Their application is vulnerable to the operation of conscious or unconscious bias. Dickerson v. United States Steel Corp., 439 F.Supp. 56 at 76 (1977). In this case we find that they have been advanced to mask the operation of conscious and impermissible age bias.

Mr. Motson's emphasis on his youthful staff has been noted. Also directly indicative of bias was an account by one of Respondents' witnesses of a successful escape from the county jail. The escape, which occurred in 1977, was described by Thomas Shiffer, Assistant Administrator of the jail, with specific reference to the ages of the personnel overcome by an inmate named Sanford (both persons overcome were past sixty), as well as to the age (early thirties) of

the officer in charge of the cellblock in a different part of the jail. Supposedly other inmates who were to have joined in the escape "didn't have the heart" to overcome the younger officer. No legitimate reason for this emphasis on the age of the officers was given by Mr. Shiffer. While Mr. Shiffer testified that he was not involved in the decision to reject Mr. Gaunt's application, we find his testimony to reflect an attitude identical to that of the person who did make the decision, Mr. Motson, who is Mr. Shiffer's immediate supervisor. Mr. Motson, as noted, was similarly unable to explain his concern with the ages of Mr. Gaunt and of his correctional staff. Sheriff Forrest Sebring, Mr. Motson's immediate supervisor, testified after Mr. Shiffer. Though his testimony touched upon the Sanford escape, he in no way refuted the emphasis placed on the ages of the involved officers by Mr. Shiffer.

Further, we credit the testimony of two of Complainant's witnesses, Gordon Latzko and Reginald Nauman. Mr. Latzko testified to a conversation with Sheriff Sebring in 1980, during which he told the Sheriff that he was considering applying for a correctional officer's job at the county jail. He testified that Mr. Sebring asked his age, and indicated a preference for correctional officers younger than Mr. Latzko, who was then fifty-five (55). This testimony was not contradicted by Mr. Sebring, who indicated only that he did not recall the conversation.

Mr. Nauman, Monroe County's Chief Probation Officer,

testified that he has regular professional contact with Mr. Motson, Mr. Shiffer, and Mr. Sebring. He described an attempted escape from the jail during which an officer named VanAuken, then in his sixties, was beaten to death by an inmate. Later testimony established that the incident occurred in 1974. Asked if any jail officials had told him the incident inferenced their selection of correctional officers, he answered affirmatively, stating that Mr. Sebring "...thinks he has a better staff right now because he has young, big strong men patrolling the prisoners." (N.T. 116). We find this testimony to be highly persuasive, especially in light of repeated references to the incident by Respondents' witnesses.

Respondents raise additional issues in defense of their actions. They urge that Complainant should have informed Mr. Motson during his interview of certain physical problems which they claim would have limited his ability to perform an officer's duties. The argument is without merit. The critical inquiry in this matter is the nature of the decision that was made, not of decisions that might have been made based on other information which Mr. Motson chose not to request. Complainant's employment application did disclose that he received veterans disability benefits for a condition which would not interfere with his job performance. Mr. Motson, rather than requesting clarification or verification of this information, testified that he made a decision about Mr. Gaunt's physical condition based solely on appearance.

Respondents next point to numerous persons within the protected age group who are employed by the jail. No one in this group, however, is employed as a correctional officer. Respondents' concern with age was clearly limited to correctional officers, making the ages of employees in other capacities irrelevant. Nor could Respondents point to any person within the protected age group who had been hired as a correctional officer.

Finally, while denying that Mr. Gaunt's age played any part in the decision to reject him, Respondents urge us to hold that age in general is a bona fide occupational qualification (BFOQ) for the position of correctional officer. No specific age limit is suggested. It is argued that the use of older officers has in the past attracted jail breaks and other violence, and therefore poses a substantial security risk.

The Commission's regulations provide at 16 Pa. Code §§41.71(b) and (c):

- (b) Discrimination in employment based upon ...age ... is valid as a BFOQ only when it is reasonably necessary to the essence of the normal operation of a particular business or enterprise;
- (c) A BFOQ allowing discrimination in employment is permissible only when the employer can prove a factual basis for believing that all or substantially all members of a class covered by the act would be unable to perform safely and efficiently the duties of the job involved. Absent such a showing, an applicant for a job in issue may be excluded only upon a demonstration of individual incapacity.

In Section (e), the Regulations further state:

(e) The application of the exception is not warranted if based upon reasons such as, but not limited to:

1. assumptions of the comparative general employment characteristics of persons of a particular... age...;
2. stereotyped characteristics of the aforementioned class, such as their mechanical ability or aggressiveness; and
3. customer, client, co-worker or employer preference, or historical usage, tradition or custom...

16 Pa. Code §41.71(e)(1),(2),(3).

Respondents have not met the burden of proof set out above. The fact that "older" officers were involved in the Sanford escape and the attempted escape resulting in Mr. VanAuken's death falls far short of showing that "all or substantially all" persons beyond some unspecified age are unable to perform that job safely and efficiently. Respondents remain free, as the above regulations indicate, to make individual employment decisions based upon individualized determinations of ability. They are prohibited only from relying on stereotypical assumptions about the abilities of a given class of applicants.

Having determined that Respondents unlawfully refused to hire Mr. Gaunt because of his age, we must consider appropriate relief. Section 9 of the Act empowers us to award relief, including back pay, following a finding of discrimination. The purpose of such relief is to restore

Complainant to the economic position he would have achieved absent the unlawful discrimination.

The parties stipulated to the amount that Mr. Gaunt would have earned as a correctional officer between June of 1980 and April 4, 1981 (when he obtained a better paying position), less interim earnings. Respondents argue that this amount should be reduced, since Complainant voluntarily left a position he held between those dates. No authority for this proposition is cited, and we reject it in the absence of any proof that Mr. Gaunt would not have remained in the position of correctional officer, had he been hired in June of 1980. We therefore order relief as described with specificity in the Order which follows.

COMMONWEALTH OF PENNSYLVANIA
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ROBERT W. GAUNT, :
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v. : DOCKET NO. E-18525
MONROE COUNTY COMMISSIONERS, :
MONROE COUNTY JAIL, :
CHARLES MOTSON, WARDEN, :
Respondents :

FINAL ORDER

AND NOW, this 15th day of September, 1983, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Commissioner, pursuant to Section 9 of the Human Relations Act, and therefore

O R D E R S:

1. That the Respondent cease and desist from discriminating on the basis of age in relation to the position of correctional officer in the Monroe County Jail;
2. That Respondents pay to Complainant back pay in the amount of \$3,480.00, plus simple interest of 6% per annum, calculated from the due date of each unpaid portion of salary which would have accrued between June 27, 1980, and the date of this Order.

As of the date of this Order, the lump sum amount and the interest thereon shall be merged into a combined amount. Simple interest of 6% per annum shall accrue on this combined amount and shall be paid to Complainant if Respondent fails to pay the combined lump sum amount within thirty (30) days of the date of this Order.

3. That Respondents furnish to the Commission, within thirty (30) days of the date of this Order, satisfactory written proof of compliance with the terms of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 
JOSEPH X. YAFFE, Chairperson

ATTEST:


ELIZABETH M. SCOTT, Secretary