

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**DAWN MARSHALL, Complainant**

**v.**

**NEWPORT TOWNSHIP, Respondent**

**DOCKET NO. E-26120D**

**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING EXAMINER**

**FINAL ORDER**

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**DAWN MARSHALL, Complainant**

**v.**

**NEWPORT TOWNSHIP, Respondent**

**DOCKET NO. E-26120D**

**STIPULATIONS OF FACT**

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

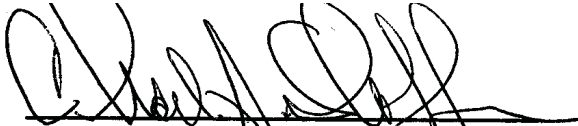
1. The Complainant herein is Dawn Marshall, an adult female residing at 161 West Main Street, Glen Lyon, PA 18634.
2. The Respondent herein is Newport Township, Municipal Building, Center Street, Wanamie, PA 18634.
3. The Respondent is an employer within the meaning of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, 43 P.S. §955(a).
4. On or about June 3, 1983 the Complainant filed a notarized complaint, Docket No. E-26120-D, with the Pennsylvania Human Relations Commission ("Commission").
5. On or about August 1, 1983 the Complainant filed a notarized amended complaint with the Commission.
6. On or about August 8, 1983 Commission staff duly served the Respondent with a copy of the complaint described in item 4 above and the amended complaint described in item 5 above in a manner which satisfies the requisites of 1 Pa. Code §33.31 (relating to service by an agency).
7. In correspondence dated June 27, 1984 the Commission notified the Respondent that the investigation had resulted in a finding of probable cause to credit the allegations of the complaint and enclosed a copy of this finding.
8. Subsequent to the determination of probable cause, the Commission and the Respondent attempted to resolve this matter through conference, conciliation and persuasion, but were unable to do so.
9. By correspondence dated October 30, 1984 the Commission notified the Respondent that a public hearing had been approved in the above captioned case.
10. In the fall of 1982 the Respondent announced a job vacancy for a full time police officer position.
11. Under the First Class Township Code, in order to hire police officers, the Respondent had to notify the Civil Service Commission of the vacancy and then request the certification of a list of eligibles from the Civil Service Commission.

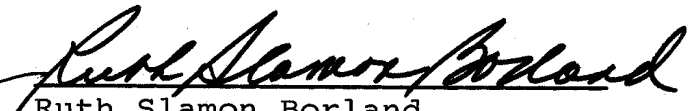
12. The First Class Township Code requires the Civil Service Commission to certify from the eligible list the names of the three persons with the highest average from the Civil Service examination.
13. Under the First Class Township Code, the township commissioners could then appoint any of the three certified candidates.
14. In order to apply for the police officer position, applicants had to take a civil service examination and had to be at least 18 (eighteen) years of age.
15. The Civil Service examination consisted of three parts: a written test, an oral test or interview, and a medical examination. All parts of the examination were administered by the Civil Service Commission and Respondent played no role in the administration of any part of the examination.
16. In November 1982, the Complainant was at least 18 (eighteen) years of age and completed all parts of the Civil Service examination.
17. Complainant was and is the wife of Michael G. Marshall, who was one of the other applicants for the police officer position.
18. In February 1983, the Civil Service Commission published the list of candidates who passed the Civil Service test.
19. This list contained the names of the following four candidates: the Complainant, Phillip J. Roke, Michael G. Marshall, and Norman W. Bodek.
20. The Complainant was the only female on this list of eligibles.
21. The Complainant had the highest total score for the Civil Service examination.
22. Phillip Roke received the second highest total score for Civil Service examination.
23. The members of Respondent's Board of Commissioners did not conduct interviews of any of the candidates from the list of eligibles nor did they have the candidates' applications available for their review.
24. On or about March 7, 1983, at a township meeting, Respondent's Board of Commissioners voted to award the position to Phillip J. Roke, an adult male.
25. At that time, the Respondent did not have any residency requirements for its police officers.
26. Prior to the hiring of Roke, the last police officer hired was in August 1979.
27. Phillip J. Roke had taken the Civil Service test and had applied for the position of police officer in August 1979.
28. The Civil Service Test Score Summary for the top three applicants in the Civil Service test was as follows:

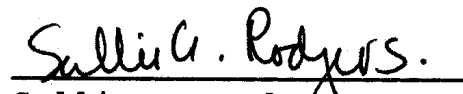
Rank	Name	Score
1	Materewicz, Walter A.	96.1
2	Vandermark, Edward	93.3
3	Roke, Phillip J.	86.3

29. The test score of 96.1 for Materewicz and the test score of 93.3 for Vandermark included ten (10) points for military service.
30. The First Class Township Code required additional credit and preference be given those who have successfully passed the Civil Service examination and who have been honorably discharged from the military service of the United States.

31. In August 1979, Walter A. Materewicz, an adult male, was hired as a police officer by the Respondent.
32. After adding points for a veteran's preference, Materewicz had the highest total score for the Civil Service examination.
33. When the Complainant applied for the position of police officer in the fall of 1982, no job description for the police officer position existed.
34. The Complainant had been employed as an assistant during the summer of 1982.

  
 Charles A. Shaffer  
 Attorney for the Respondent

  
 Ruth Slamon Borland  
 Attorney for the Complainant

  
 Sallie A. Rodgers  
 Attorney for the Human  
 Relations Commission  
 6

#### FINDINGS OF FACT

The foregoing "Stipulations of Facts" are hereby incorporated herein as if fully set forth. 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. Complainant's Exhibit  
 S.F. Stipulations of Fact

1. In 1983, Newport Township, (hereinafter the "Respondent"), had a general populations of under 5,000 people. (N.T. 111).
2. The villages of Glen Lyon, Alden, Sheatown , and Wanamie make up Newport Township. (N.T. 262).
3. In 1982-1983, the Respondent was run by five Township Commissioners who were elected under the ward system of elections. (N.T. 100, 125).
4. The all male Commissioners were: Joseph A. Hillan, Chairman; John Zyla, from the 4th ward, Sheatown; Daniel A. Dule, from the 2nd ward, Glen Lyon; William Eckrot, from Alden; and Henry Vance. (N.T. 99, 100, 164, 208-9, 226, 255).
5. In 1982, the Chief of Police retired and when a new Chief was selected, another police officer, Officer Benson from Sheatown, also left the force, leaving a force of 3 officers. (N.T. 114, 131, 166, 262).
6. Financial considerations led the Respondent's Commissioners to replace the vacancies with only one full time officer and to fill the remaining township police needs with part-time officers. (N.T. 102, 132, 161, 165).

7. In November 1982, the Respondent put an ad in the newspaper and published a notice advising of the police officer position vacancy and instructing interested persons where to apply for testing. (N.T. 15, 54; C.E. 1; S.F. 10).
8. The formal selection procedure consisted of: (a) completing an application; (b) undergoing a physical examination; (c) passing a three part Civil Service Examination; and (d) selection by the Respondent's Commissioners. (N.T. 15, 102).
9. In the Fall of 1982, Dawn Marshall, (hereinafter the "Complainant"), applied for the vacant police officer position. (N.T. 15).
10. Questions asked at the Civil Service interview were designed to inquire into an applicant's work history and community activities. (N.T. 264, 280).
11. The Civil Service interview was scored and was part of an applicant's overall Civil Service Score. (N.T. 151, 283, C.E. 5).
12. After publication of the Civil Service eligibility list in February 1983, and prior to the March 7, 1983 meeting at which the Commissioners voted to award Philip Roke the vacant police officer position, the Respondent's Commissioners met at a work session to discuss the eligible applicants. (N.T. 105, 120, 122, 134, 137, 149, 150, 171, 199, 210, 244, 283).
13. The Respondent did not have a job description for the police officer position. (N.T. 82, 144; S.F. 33).
14. The only objective job criteria for the police officer position were that applicants be at least 18 years of age and passing of the civil service examination. (N.T. 144, 152, 183; C.E. 1; S.F. 14).
15. The only objective information used by the Commissioners to aid them to assess the eligible candidates was the Civil Service list. (N.T.134).
16. The Respondent's Commissioners neither interviewed the eligible candidates nor reviewed their applications. (N.T. 17, 134, 151, 162, 178-9, 220, 237).
17. The Complainant was interested in and actively sought the position of police officer. (N.T. 16, 43, 48, 271).
18. During the March 3, 1983, Commissioner's work session, the Complainant received far less consideration than the eligible male candidates. Also, positive information regarding the Complainant which was known by several Commissioners was not shared with all the Commissioners. (N.T. 105-112, 120-124, 140-143, 150, 171, 179-182, 199-200, 217, 238-239, 244, 283).
19. Several Commissioners haphazardly sought and collected nonspecific information in the form of innuendos, idle talk, and murmurings regarding the eligible male candidates. (N.T. 108, 122, 138-140, 180-181).
20. Philip Roke's selection was based in part on a consideration that he was married and had two young children. (N.T. 80, 143, 190).
21. At the March 7, 1983 meeting of the Respondent's Commissioners, Commissioner Eckrot moved for the appointment of the third place candidate, Michael G. Marshall, but the vote was two for him, and three against. (N.T. 126, 171, 232).
22. Subsequently, Commissioner Dule moved for the appointment of the second place candidate, Philip Roke, and this motion carried - three to two: Hillan, Zyla, and Dule for Roke; Vance and Eckrot against. (N.T. 125, 129, 233).
23. Three of the five Commissioners involved in the 1983 hiring of Roke were also involved in the closest preceding hiring of a prior police officer in 1979. (C.E. 3).

24. Of the top three eligible candidates for the 1979 hiring, the Respondent's Commissioners selected the applicant listed number one on the civil service list. (N.T. 178, 268; C.E. 3).
25. Following the Complainant's rejection by the Respondent, in addition to seeking other employment, the Complainant took tests in an effort to become a police officer with either the PA State Police or the Wilkes-Barre Area Police. (N.T. 21, 30, 40, 43).
26. The Complainant graduated from college in 1984. (N.T. 31).

### **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 prerequisites to a public hearing.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The Respondent is an employer within the meaning of the PHRA.
5. The Complainant has met her burden of establishing a prima facie case by proving that:
  - a. She is a female;
  - b. She applied for and was qualified for a job for which the Respondent was seeking applicants;
  - c. She was rejected; and
  - d. The Complainant's rejection was under circumstances which give rise to an inference of discrimination.
6. The Respondent has met its burden of producing evidence of a legitimate, non-discriminatory reason for its failure to hire the Complainant.
7. The Complainant has met her ultimate burden of persuasion by establishing both pretext and that much of the Respondent's proffered explanation is unworthy of credence.
8. Once a finding of discrimination has been made, the PHRC may order the Respondent to cease and desist from the discriminatory practice and grant backpay for wages and other benefits lost by the Complainant.
9. The PHRC is permitted to award interest on backpay awards at the rate of 6%.
10. The Complainant is entitled to installment in the next available full-time police officer position with seniority retroactive back to March, 1983.

### **OPINION**

This case arises on a complaint filed by Dawn Marshall, ("Complainant"), against Newport Township, ("Respondent"), with the Pennsylvania Human Relations Commission. In her complaint, filed on or about June 3, 1983, the Complainant alleged that the Respondent failed to hire her because of her sex, female, 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. (PHRA). On or about July 19, 1983, the Complainant's complaint was amended to add more particulars regarding her sex-based discrimination allegation.

PHRC staff conducted an investigation of the allegation and found probable cause to credit the allegation of sex-based discrimination. Thereafter, the Commission endeavored to eliminate the practice complained of by conference, conciliation, and persuasion. These efforts were unsuccessful. Accordingly, a Public Hearing was approved.

The Public Hearing was held on October 21, 1987, in Kingston, PA, before Hearing Examiner Carl H. Summerson. The case on behalf of the Complainant was presented by Ruth Borland, Esquire. Charles Shaffer, Esquire, appeared on behalf of the Respondent, and the PHRC interest in this matter was overseen by Sallie A. Rodgers, Esquire, Assistant Chief Counsel, PHRC.

Post-hearing briefs were simultaneously submitted by the parties in December, 1987. However, the Respondent's attorney requested and was granted an opportunity to submit a reply brief. The Respondent's reply brief was received in January, 1988.

At the Public Hearing and in the Complainant's brief, the focus was appropriately placed on a disparate treatment analysis of the allegation made and the evidence received. The order and allocation of proof in a disparate treatment case was first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and recently clarified by the PA Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, \_\_\_ Pa. 2d \_\_\_ (1987) No. 32 W.D. Appeal Docket 1986. The PA Supreme Court's guidance indicates that the Complainant must first establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, the burden of production then shifts to the Respondent to "simply... produce evidence of a 'legitimate, non-discriminatory reason' for...[its action]. Id. at 6. If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. Id. at 7.

A Complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In order to do so, the Complainant need not necessarily offer evidence beyond that offered to establish a prima facie case. Id. at 255 n.10. The trier of fact may consider the same evidence that a Complainant has introduced to establish a prima facie case in determining whether a Respondent's explanation for the employment decision is pretextual. Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1358-59 (9th Cir. 1985).

In McDonnell Douglas the Court noted that a Complainant in a race-based refusal to hire case could establish a prima facie case by showing:

- (1) That the Complainant belongs to a racial minority;
- (2) That the Complainant applied for a job for which the Respondent was seeking applicants;
- (3) That, despite the Complainant's qualifications, he was rejected; and
- (4) That, after the rejection, the position remained open and the Respondent continued to seek applicants from persons of Complainant's qualifications.

This general four step process was later adopted for use by Pennsylvania Courts in General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976).

The present matter differs slightly from the refusal to hire circumstances in McDonnell Douglas. In McDonnell Douglas the allegation was race-based, the Complainant's application was rejected

and the Respondent continued to seek applicants of equal qualifications. In the present matter, the allegation is sex-based and the Respondent's Commissioners ostensibly selected Phillip Roke from an applicant pool while simultaneously rejecting the Complainant. Obviously, the Complainant cannot show that the Respondent "continued to seek applicants. "

The McDonnell Douglas Court wisely anticipated that facts of different cases will necessarily vary and that the four prong prima facie requirement articulated will not be applicable to differing factual situations. McDonnell Douglas at 802 n. 13. The Court made it clear that the general process it was creating would appropriately need adaptations to adjust the process to the facts presented. Accordingly, some adaptation of the required prima facie showing must be done in this instance.

At the outset, several things should be noted. First, in Burdine at 250. the U.S. Supreme Courts declared. "The burden of establishing a prima facie case of disparate treatment is not onerous." The PA Supreme Court has adopted this standard in Allegheny Housing Rehab. Corp., Supra. at 8. Second, it is apparent that the U. S. Supreme Court intended that the four parts of the prima facie showing are non-subjective and susceptible to objective proof.

Reviewing the McDonnell Douglas prima facie formula it becomes readily apparent that the only portions in need of adjustment here are the first and fourth elements. In a refusal to hire case. the first three factors will invariably remain fairly similar. The first element simply changes here to be that the Complainant is a female. Then, in my opinion, because of the pool hiring process presented here, the fourth element should simply become: was the rejection under circumstances which give rise to an inference of discrimination. See Burdine.

Therefore, having established what the complaint must first show, we readily see that the Complainant has met her initial burden. There is no question that she is a female. and there is no doubt that she applied for an open position. The Respondent also concedes that the Complainant met the qualifications of the job. Equally clear is the fact that the Complainant was rejected.

The fourth element of the prima facie showing has been met since the Complainant presented evidence that she was number one on the civil service eligibility list while the individual hired was number two on the list. This singular factor has been noted to constitute circumstantial evidence of discrimination. See McCarthy v. Griffin-Spalding Cty. Bd. of Ed., 41 FEP 245 (11th Cir. 1986).

Also considered at this stage was testimony by the Complainant that during the meeting at which the selection was made, Commissioner Zyla pointed at the Complainant and allegedly stated, "can we get her off the list?" Additionally, all the Commissioners making the final selection were men. Courts have considered as suspect, selection committees made up entirely of members not in the protected class of a Complainant. See Love v. Ala. Institute for Deaf and Blind, 41 FEP 1655 (N.D. Ala. 1984); Page v. Bolger, 25 FEP 593 (4th Cir. 1981); and EEOC v. American Nat'l. Bank, 26 FEP 472 (4th Cir. 1981) reversing in part 21 FEP 1532 (E.D. Va. 1979).



Lastly, there is relevance in the Complainant's testimony that the Respondent has never had a woman police officer. A Respondent's general policy and practice with respect to minority employment has some bearing on a Respondent's motive. McDonnell Douglas, Id. at 804-05.

An employer's true motive in an employment decision is rarely easy to discern. Without a searching inquiry into a Respondent's motives, a Respondent acting for impermissible motives could easily mask their behavior beyond a complex web of after the fact rationalizations. See Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982).

Clearly, under the present occurrences, the Complainant's initial evidence constitutes sufficient objective circumstances which give rise to an inference of discrimination.

By establishing a prima facie case, the Complainant has created a mandatory rebuttable presumption that discrimination has occurred. The presumption of discrimination arises because the facts as stated, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. The obligation to make out a prima facie case serves an important function in a case: it eliminates the most common non-discriminatory reasons for a Complainant's rejection. See Burdine citing Teamsters v. United States, 431 U.S. 324 (1977).

To rebut this presumption "the Respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the Respondent's rejection." Burdine at 255. In short, the Respondent must produce "evidence that the Complainant was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." Burdine at 254. See generally United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983).

In response to its burden to produce evidence of a non-discriminatory reason for rejecting the Complainant, the Respondent generally asserts that each of the five Commissioners had their own reasons for voting for a candidate other than the Complainant. A summary of the Respondent's specific arguments is as follows: (a) Joseph Hillan: voted for Phillip Roke because he thought he was most qualified; (b) John Zyla: thought Mike Marshall was most qualified, but voted for Roke after a dispute with Mike Marshall's father; (c) Daniel Dule: voted for Roke simply because Roke was from his ward; (d) William Eckrote: voted for Mike Marshall thinking him most qualified; and (e) Henry Vance: also voted for Mike Marshall because he believed there should be a police officer appointed from his village of Glen Lyon and between Mike Marshall and the Complainant, Mike Marshall was more qualified.

The evidence produced by the Respondent, which has been summarized, was sufficient to meet the burden of production which shifted to the Respondent once a prima facie case was established. Under Burdin, although Respondent need not convince the trier of fact that it chose the better applicant, it must present an explanation that is not only "clear and reasonably specific," but also sufficient to allow "the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." See, St. Peter v. Alexander, 26 FEP 93 (D.C. D.C, 1979), citing Burdine. In the present matter considering only the Respondent's stated reasons for its actions, the Respondent has satisfied that burden.

However, we now turn our focus on the final stage of analysis. At this point, the burden shifts back to the Complainant to show by a preponderance of the evidence that the Respondent's reasons are either pretextual or not credible. Even though the parties bear particular evidentiary responsibilities, the burden of persuasion throughout the case remains with the Complainant. Burdine at 253.

At this point, consideration of all the evidence presented overwhelmingly supports a finding that the Complainant's gender significantly disadvantaged her during the perfunctory selection process used by the Respondent's Commissioners and ultimately was a determinative factor in the Respondent's failure to hire her. The central focus of the inquiry in a case like this is whether, when the evidence is evaluated in the light of common experience, it shows that a Respondent has treated one applicant less favorable because of her sex. See Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

Initially, it is noted that the selection process used by the Commissioners for this important position was extremely inefficient and arbitrary. This is mentioned to highlight an understanding that such obvious defects in a selection process are not in and of themselves the primary subject for redress at a Public Hearing before the PHRC. Instead, we are interested in such personnel problems only when they are associated with the curtailment of an applicant's right to be free from unlawful discrimination. See Bishop v. Wood, 426 U.S. 341 (1976).

A second general observation with regard to the selection process is also appropriate here. It became abundantly clear that the selection made in this case could best be described as an old-fashioned

"seat-of-the-pants" decision. Although the overall selection procedure consisted of a mixture of subjective and objective components, the objective information, reflected by applicant scores on the civil service eligibility list, was in effect ignored by each Commissioner and a purely subjective "process" was substituted. Beyond the formal civil service process, absolutely no standards were available to the Respondent's Commissioners. There was not even a job description in place against which applicants for this entry level police officer position could be evaluated.

Several courts have declared that use of inherently subjective procedures should be strictly scrutinized, particularly where evaluations of a female applicant are made by an all male selection committee. See Page v. Bolger, 25 FEP 594 (4th Cir. 1981); Vanguard Justice Society v. Hughes, 471 F. Supp. 670 (D. Md. 1979). Composition of a selection committee is relevant to the complainant's burden of showing pretext. See Page v. Bolger, supra. Here of course, all five selection Commissioners were male, and an almost entirely subjective process was used to make the final decision regarding which eligible candidate would be selected.

Numerous indicators cumulatively enable the Complainant to meet her ultimate burden. Although some considerations impact greater than others on the question of pretext, taken as a whole, the following factors inescapably reach the conclusion that nearly all of the reasons articulated by the Respondent are either pretextual or unworthy of credence.

First, the Respondent's Commissioners did not interview any of the eligible candidates. At first, this might give the appearance of effecting each applicant equally. However, this was not the effect here. Clearly, several Commissioners independently sought out information on Phillip Roke. Both Hillan and Zyla testified that they spoke with several people about Rake. Hillan indicated he know Roke and his family all his life. In fact, the Roke family was Hillan's neighbor. Hillan admitted he made no inquiries regarding the Complainant. On direct examination Hillan testified that he "heard" Roke was qualified. Hillan further indicated that Roke was a private investigator, that he worked at Jewelcor, that he had a permit to carry a gun, and that he was a black belt in karate. However, on cross examination when asked to elaborate on Roke's experiences, Hillan did not even know Roke's title. He knew nothing of his duties, and knew nothing about how he was doing at Jewelcor. Remarkably, Hillan did not even know how long Roke had been employed. On this "information" Hillan would have us believe he thought Roke was more qualified than the number one candidate on the civil service list.

Clearly, the interview portion of the 3 part civil service test was designed to inquire into each applicant's work experiences and community involvement. Such information was then scored and became a part of an applicant's overall score. Here is where the only real comparison was ever made regarding relative experiences of the applicants. Hillan and other Commissioners simply ignored this vital information. Instead, Hillan submits he obtained some sketchy picture of Roke from who knows where and ostensibly relied on it to conclude Roke was better qualified for the police officer position.

Hillan's true motives can be extracted from information which finds Hillan at a PHRC fact finding conference declaring that one consideration why Roke was selected over the Complainant was because Roke was the sole support of two young children. Also of note were Hillan's continued testimonial references at Public Hearing to the vacant position as a "policeman" opening. Startling enough, Hillan testified that he told other Commissioners "from what [he] found out" he thought Roke was the most qualified "man". This may have been true. However, the only reasonably dependable information available to the selection Commissioners revealed that the best qualified candidate was the Complainant, a woman.

Portions of Hillan's testimony can only be described as either inconsistent or reflective of a sexist attitude, especially in the area of the March 3, 1983 Commissioner work session discussion of the candidates. At one point, Hillan says they went over the applicants. A short while later, Hillan says that there was no discussion regarding the Complainant. It would appear that Commissioner Hillan never considered the Complainant as a viable applicant.

Another factor which points to illegal stereotyping by Hillan can be found in Hillan's expressed concern regarding the Complainant and her husband, Mike Marshall, applying for the one vacancy. Hillan stated, "there was only one job and how could two people go for one job." Such a statement is absurd leaving one to conclude it was born out of a stereotyped impression about the characteristics of males and females.

Finally, with respect to Hillan he testified that he was not only aware that the Complainant had worked the summer of 1982 for the township but was aware that the Complainant did her work. Although Hillan knew who the Complainant's supervisor had been, Hillan never bothered to

contact that person regarding the Complainant's qualifications. In summary, Hillan ignored the Complainant from the moment the civil service list came out through Roke's selection at the March 7, 1983 Commission Meeting.

Turning our attention away from Hillan and onto Zyla, we find another witness, whose testimony considered as a whole, leads to the conclusion that the reasons given by Zyla for the Respondent's actions were also less than credible and pretextual.

Zyla's role in the selection process reflects outright resistance to change with regard to women's roles in law enforcement. Historically, such changes have occurred slowly over the last several decades. However, many barriers to the hiring of women as police officers are being removed.

Many available fragments can ultimately be pieced together to tell the story regarding Zyla's motives. Most blatant of the available indicators was Zyla's unconscionable statement at the March 3, 1988, work session during which he tells us he said "as far as he was concerned the Complainant didn't have any [qualifications]." That is simply outrageous. Zyla specifically testified that everything he knew was left up to the Civil Service Commission and the only qualifications for the position were the Civil Service Guidelines, and the Complainant was number one on the list of eligible applicants.

Another blatant example of disparate consideration can easily be seen from Zyla's explanation of why he was wondering if the Complainant was very interested in the job. Zyla tells us that he questioned the Complainant's interest because no one approached him regarding the Complainant. Astonishingly, Zyla revealed that no one approached him regarding Roke either. This factor did not appear to phase Zyla regarding the level of Roke's interest.

Zyla indicated that with respect to the Complainant, he in effect asked others why they felt the Complainant took the police test. Zyla not only submits that he was told others felt the Complainant only took the test to see how well she could do, but went on to indicate that he was persuaded by others' presumptions. When asked to explain why Zyla adopted such unwarranted conjecture, Zyla could give no rationale either why someone else might have believed the way they did, or more importantly, why Zyla joined in the supposition. However, Zyla did agree that upon present consideration, the reason for such tenuous beliefs may have been because the Complainant is a woman.

It is interesting to note that in the Summer of 1982, when the Complainant originally picked up her application for the position, Zyla spoke with Ms. Vassia, the Complainant's supervisor. Later in Zyla's testimony, Zyla tells us that he did not share Vassia's report on the Complainant with other Commissioners because the recommendation was of "secretarial work". Obviously, Zyla made no correlation at all with respect to qualifications even though much information may have existed regarding such general matters as diligence, relationship with people, quality of work, dependability, initiative, to name only a few.

Also, three specific areas of Zyla's testimony raise a substantial credibility issue. First, Zyla testified that he spoke with two firemen regarding Roke and later changed his testimony to indicate he had spoken

with many people about Roke. Next, Zyla was not credible when he testified that he felt the Complainant was under 18 years of age. Zyla knew the Complainant was in college and in fact, she was 20. It would appear that Zyla was trying to ease the impact of having previously confirmed that at the March 7, 1983 meeting he pointed towards the Complainant and in effect stated, "how can we get her off the list."

The final area where Zyla's credibility was shaky can be found in Zyla's testimony about why he voted for Roke. Zyla would have us believe that as a Township Commissioner and Police Commissioner, the stares of a candidate's father intimidated him into changing his position at the last second. Throughout the sequence of Zyla's testimony on this issue, it was apparent that Zyla was making up what he was saying as he went along. His testimony was neither cohesive nor effortlessly smooth on this point.

Taken as a whole, Zyla's testimony also reflects considerable disparate consideration born out of stereotyped feelings about the roles of men and women. Like Hillan, Zyla too ignored the Complainant. The remaining Commissioner who voted for Roke was Commissioner Dule. Dule represented Glen Lyon and simply indicated he wanted to keep the position in Glen Lyon. Roke was the only eligible applicant from Glen Lyon. Twice Dule indicated he wanted to "keep" the position in Glen Lyon. However, as previously mentioned in the Findings of Fact, the officer being replaced was not from Glen Lyon. He had been from Sheatown. In fact, the three remaining officers already on the force were all from Glen Lyon. This substantially diminishes the credibility of the statement that Dule wanted to "keep" the position in Glen Lyon.

Also of Significance was Dule's testimony that he "voted for the man [he] wanted. " Clearly he did just that, but he also stated he only considered Roke's qualifications. Dule tells us that at the work session when applicant's qualifications were discussed the Complainant's name was mentioned but that's about all. Clearly, Dule also simply ignored the Complainant.

Commissioners Eckrot and Vance both voted for the Complainant's husband, Michael Marshall. He had been third on the eligibility list. Eckrot simply indicated he assumed the Complainant was not interested in the position. An improper stereotyped impression can be seen as the root of such an unfortunate assumption in Eckrot's response to a question regarding the dangers of police work. Eckrot was asked what he would do if he had a daughter-in-law who was contemplating applying for a police position. Eckrot indicated that he would get after his son before she took the test. Clearly, Eckrot too stereotyped by gender resulting in an ultimate disregard of the Complainant's qualifications. Vance too ignored the Complainant, and like Hillan continually referred to the position as a "policeman."

Taken as a whole, the evidence in this case supports a finding of disparate treatment based on sex. The Complainant was totally discounted simply because she is a woman.

Accordingly, the Complainant has met her ultimate burden of establishing that the Respondent's refusal to hire violated Section 5 of the Act. Appropriate relief must therefore be considered. Following a finding of discrimination, the PHRC is empowered by Section 9 of the PHRA to award relief which includes hiring and lost wages and enjoining the Respondent. Complainant

here seeks both lost wages plus interest up to the date of this Order and reinstatement in the next available full-time police officer position.

Courts have consistently recognized that the purpose of a remedy is to provide a victim of discrimination with an award which makes the victim whole, Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975), and that the remedy is equitable in nature rather than punitive. See Head v. Zimkin Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); U.S. v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). Additionally, great flexibility in fashioning a remedy has been given to the PHRC. PHRC v. Alto Reste Cemetery Assoc., 453 Pa. 124, 306 A.2d 881 (1973).

Because the PHRC has many similarities to Title VII, we frequently rely on federal decisions under Title VII when deciding employment claims under the PHRA. On the issue of damages, a combined review of federal decisions and state decisions is helpful.

Here, the Respondent submits several reasons why, in its opinion, monetary relief is inappropriate. First, the Respondent points to the fact that the Complainant was a full-time college student. The Respondent advances the novel idea that but for her rejection, she would not today be a certified teacher. The Respondent asks "whether the completion of [the Complainant's] college education...was not worth more than the wages that she would have earned as a "policeman.""

This shows a callous insensitivity to the stated economic dilemma the Complainant and her husband faced in the fall of 1982, and winter of 1983. After weighing the economical options along with other considerations, the Complainant indicates she chose to apply to become a police officer because that is what she wanted to do. After the Respondent's rejection, the Complainant sought employment as a police officer with both the PA State Police and with the Wilkes-Barre police department. College educations are often continued part-time. Obviously, the Respondent has ignored this simple reality. The novel position asserted by the Respondent regarding the relative value of a college degree is without merit.

Next, the Respondent argues the Complainant failed to mitigate her damages. Although, under the liability phase, the ultimate burden of persuasion was the Complainant's, on the damage phase courts consistently hold that the burden shifts to the Respondent to produce evidence of interim earnings or lack of diligence in pursuing other employment, in mitigation. See Jackson v. Wakulla Springs & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7th Cir. 1981); Maine Human Rights Comm. v. City of Auburn, 31 FEP 1014, 1020 (Main Supreme Judicial Ct. 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EPD 1136,968, 46,704 (Michigan Court of Appeals 1986). Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort and it is a Respondent, not a Complainant, who has the burden of establishing that the Complainant failed to make an honest, good faith effort to secure employment. Id. at 46,704.

Clearly, the Complainant sought comparable positions and her testimony indicates she made other applications as well. Additionally, the Complainant did find work upon her graduation

from college. In Sprogis v. United Airlines, Inc., 517 F.2d 387 (7th Cir. 1975) a Complainant's formal application for one job and the procurement of another, temporary, position during a two-year period constituted "reasonable diligence" in attempting to find alternative employment, thus a failure to mitigate argument was rejected. In this matter the Complainant did even more. Accordingly, she has not violated her duty to mitigate damages.

We must now turn to consideration of interim earnings from other employment as such amounts are deductible from a back pay award. See Jackson v. Wakulla Springs and Lodge Supra. at 1315. Based upon the evidence developed at Public Hearing as to the Complainant's interim earnings, the following deductions shall be made from the Complainant's back pay award:

1983

Roke Wages	\$ 7,254.97
Complainant's Interim Earnings	<u>-0-</u>
1983 Lost Wages	\$ 7,254.97
Interest at 4.5% (partial Year)	<u>326.47</u>
	\$ 7,581.44

1984

Roke Wages	\$ 10,803.14
Complainant's Interim Earnings (Dallas Area School District)	<u>2,910.84</u>
1984 Lost Wages	\$ 7,892.30
1983 Lost Wages plus interest and 1984 Lost Wages	15,473.74
Interest at 6%	<u>928.42</u>
	\$ 16,402.16

1985

Roke Wages	\$ 11,661.07
Complainant's Interim Earnings (Dallas Area School District)	<u>7,356.00</u>
1985 Lost Wages	\$ 4,305.07
1983, 1984 Lost Wages plus interest and 1985 Lost Wages	20,707.23
Interest at 6%	<u>1,242.43</u>
	\$21,949.66

1986

Roke Wages Annualized based upon \$10,809.33 earned to 10/20/86. (approximate weekly wage \$263.64)	\$ 13,709.28
Complainant's Interim Earnings	<u>12,221.84</u>
1986 Lost Wages	\$ 1,487.44
1983, 1984, 1985 Lost Wages plus interest and 1986 lost wages	23,437.10

Interest at 6% 1,406.23  
\$ 24,843.33

1987

Projected Roke Wages upon 1986  
annualized wages and increase of  
18% approximated based upon prior  
increase \$ 16,176.95

Complainant's projected interim  
earnings based upon year to period  
ending 10/9/87 - approximately  
\$282.00 per week. \$ 14,664.00

1987 Lost Wages \$ 1,512.95

1983, 1984, 1985, 1986 Lost Wages  
plus interest and 1987 Lost Wages 26,356.28

Interest at 6% 1,581.38

Lost Wages and Interest through 1987 \$ 27,937.66

1988

3 months lost wages of approximately  
\$130.00 per month. \$ 390.00

1983, 1984, 1985, 1986, 1987 Lost  
Wages plus interest and 1988 Lost  
Wages through March 1988 \$ 28,327.66

Interest at 2% 566.55

Lost Wages and Interest through  
March, 1988. \$ 28,894.21

Reimbursement for Medical Insurance  
Expenses March 1983 -September 1985  
at \$75.00 per month. 2,325.00

**TOTAL MONETARY DAMAGES \$ 31,219.21**

In addition, to monetary damage the Claimant is entitled to reinstatement in the next available full-time police officer position, with seniority retroactive back to March 1983.

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



**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**DAWN MARSHALL, Complainant**

**v.**

**NEWPORT TOWNSHIP, Respondent**

**DOCKET NO. E-26120D**

**RECOMMENDATION OF THE HEARING EXAMINER**

Upon consideration of the entire record in the above-captioned matter, it is the view of the Hearing Examiner that the Respondent's disregard of the Complainant as a job applicant and ultimate refusal to hire the Complainant was because she is a woman. Accordingly, the Complainant has proven discrimination in violation of §5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Final Order be adopted by the full Pennsylvania Human Relations Commission.



---

Carl H. Summerson  
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAWN MARSHALL, Complainant

v.

NEWPORT TOWNSHIP, Respondent

DOCKET NO. E-26120D

FINAL ORDER

AND NOW, this 28th day of March, 1988, following a review of the entire record in this matter, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore,

ORDERS

1. That the Respondent cease and desist from rejection of job applicants because of sex and stereotyped presumptions.
2. That the Respondent shall pay to the Complainant within 30 days of the effective date of this Order, the lump sum of \$31,219.21, which amount represents medical insurance expenses incurred and backpay lost for the period between March, 1983, and March 1988, plus interest of 6% per annum, calculated up to March 1988.
3. That the Respondent shall pay additional interest of 6% per annum calculated from the effective date of this Order until payment is made.
4. That the Respondent shall offer the Complainant the next available police officer position.
5. That the Respondent's offer of employment shall include retroactive seniority back to March 1983, 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 Sallie A. Rodgers, Esquire in the PHRC Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

John P. Wisniewski  
John P. Wisniewski  
Secretary