

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK, :
Complainant :
 :
 :
v. : DOCKET NO. E-14678
 :
 : As Amended
 :
HARRISBURG SCHOOL DISTRICT, :
BENJAMIN TURNER, SUPERINTENDENT, :
RON KELLER, ACTING DIRECTOR FOR :
SPECIAL EDUCATION, :
Respondents :

HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Linda Portlock ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Harrisburg School District, Benjamin Turner, Superintendent, and Ron Keller, Acting Director for Special Education ("Respondents"). The complaint, filed on September 26, 1978, alleged that Respondents discriminated against Complainant on the basis of her race, Black, and sex, female, by not interviewing or considering her for the position of Instructional Supervisor of Special Education ("ISSE"), in violation of Section 5(a) of the Pennsylvania Human Relations Act ("Act") (Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §§951 et seq.). On May 5, 1981, Complainant filed an amendment to her complaint alleging that Section 5(e) of the

Act as well as Section 5(a) had been violated by Respondents.

An investigation into the allegations of the complaint was made by Commission representatives, who determined that probable cause existed to credit the allegations. Thereupon the Commission endeavored to eliminate the practice complained of by conference, conciliation, and persuasion. These efforts were unsuccessful, and on March 30, 1981, the Commission approved the case for public hearing.

At a pre-hearing conference held on June 10, 1981, Respondents and Complainant waived their statutory right to a public hearing before three Commissioners and agreed to proceed to hearing before Commissioner Doris M. Leader, Chairperson of the designated hearing panel.

Public Hearing was held on September 29, 1981 in Harrisburg, Pennsylvania, and was conducted at all times before Commissioner Doris M. Leader. The case on behalf of the Complainant was presented by G. Thompson Bell, Assistant General Counsel to the Commission. The Respondent was represented by William T. Smith, Esquire, of Smith and Smith, P.C., Harrisburg, Pennsylvania. Marion M. Cowperthwait, Assistant General to the Commission's Philadelphia office, served as legal advisor to the Hearing Commissioner.

6. On May 5, 1981, Complainant filed an amendment to her complaint at docket number E-14678. (Amended Complaint)

7. Ms. Portlock applied for the ISSE position in April of 1978. (N.T. 16)

8. The job vacancy notice posted by Respondent School District for the ISSE position in April of 1978 listed the following qualifications for the job:

- a. Master's Degree in Special Education;
- b. Pennsylvania certification in at least one major discipline of Special Education;
- c. Pennsylvania certification as a Supervisor in Special Education; and
- d. Commitment to the education of exceptional children. (S.F. 11, C. Ex. 1)

9. The job vacancy notice stated that the National Teacher's Examination was a requirement for the ISSE position. (C. Ex. 1)

10. Gail Edwards, a Black female, and John Tommasini, a White male, also applied for the ISSE position. (N.T. 104, 105)

11. Ms. Portlock possessed all necessary degrees and certifications for the ISSE position. (N.T. 16-19)

12. Ms. Portlock took the National Teacher's Examination in May of 1978, prior to the selection of the ISSE. (N.T. 20)

13. Respondents did not hold personal interviews for the ISSE position in 1978, and never interviewed Ms. Portlock for the position. (N.T. 115)

14. John Tommasini was selected for the ISSE position.
(N.T. 115)

15. Mr. Tommasini and Ms. Edwards were interviewed for the ISSE position in 1977 when the position was originally posted. (N.T. 77, 121)

16. Respondents believed in 1978 that personal interviews were required before the ISSE position could be filled.
(C. Ex. 13, N.T. 109, 135-6)

17. Mr. Tommasini assumed the ISSE position in August of 1978. (N.T. 126)

18. Complainant's relevant work experience included two years as a Learning Disability Teacher and four years as a Master Itinerant. (N.T. 14)

19. Respondent School District directed the performance of ISSE duties and had the authority to effectively hire and terminate the person holding the position of ISSE. (N.T. 91, 92, 93, 111, 117)

20. As a Master Itinerant, Ms. Portlock performed many of the duties to be performed by the ISSE. (N.T. 14-15, C. Ex.1)

21. Respondents deleted relevant credentials from the application of Gail Edwards, which was produced in response to a Commission subpoena. (C. Ex. 7 and 8)

22. Respondent Keller's primary consideration in rejecting Complainant was what he described as a "gut feeling" that they would not make a compatible team. (N.T. 108)

23. Secondary experience was not a stated requirement for the ISSE position. (C. Ex. 1)

24. Respondent Keller told Complainant in June of 1978 that he would be interviewing for the ISSE position; when subsequently questioned about why this was not done, he responded that it was an oversight. (N.T. 25, 109, 110, 111)

25. Respondent Keller's background included both primary and secondary experience. (N.T. 114, 115)

26. Mr. Tommasini's elementary background prior to 1978 included only an intramural flag football league. (N.T. 124, 125)

27. Initially in his tenure as ISSE, Mr. Tommasini handled only secondary duties; subsequently, after a funding change, he handled both elementary and secondary duties. (N.T. 125, 128)

28. Mr. Tommasini's salary as ISSE for the period between August of 1978 and July of 1981 was as follows:

- a. He was hired August 27, 1978, on a 205 day contract at an annual salary of \$16,500;
- b. His contract was renewed for 1979-80, for 205 days, at an annual salary of \$17,600;
- c. His contract was renewed for 1980-81, for 205 days, at an annual salary of \$19,050. (C. Ex. 17)

29. Ms. Portlock's salary for the period between July of 1978 and June 26, 1981, computed quarterly, was as follows:

09/22/78	\$4,110.38
12/29/78	3,837.89
03/23/79	3,289.62
06/29/79	4,837.89
09/30/79	3,370.38
12/28/79	4,466.76
03/21/80	3,762.72
06/27/80	4,418.88
09/19/80	3,864.92
12/19/80	4,941.92
03/20/81	4,170.00
06/26/81	4,865.00

(C. Ex. 16)

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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v.

HARRISBURG SCHOOL DISTRICT,
BENJAMIN TURNER, SUPERINTENDENT,
RON KELLER, ACTING DIRECTOR FOR
SPECIAL EDUCATION,
Respondent

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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. Complainant is Linda M. Portlock, an adult female, residing at 1438 Market Street, Harrisburg, Pennsylvania 17110.

2. Respondent is the Harrisburg School District, located at 1201 North 6th Street, Harrisburg, Pennsylvania 17102. Respondent employs four or more persons within Pennsylvania and, therefore, is an "employer" as that term is used in the Pennsylvania Human Relations Act ("Act").

3. On September 26, 1978, Complainant filed a verified complaint of discrimination with the Pennsylvania Human Relations Commission ("Commission") at docket number E-14678. A copy of the complaint is attached hereto as Appendix "A" and is incorporated by reference herein as if fully set forth.

4. On October 11, 1978, Commission staff duly served all parties of this action with a copy of the complaint described in item #3 above in a manner which satisfies the requirements of 1 Pa. Code §33.32.

5. On May 5, 1981, Complainant duly filed an amendment to her complaint. A copy of the amended complaint is attached hereto as Appendix "B" and is incorporated by reference herein as if fully set forth.

6. On May 8, 1981, Commission staff duly served all parties of this action with a copy of the complaint described in item #5 above in a manner which satisfies the requirements of 1 Pa. Code §33.32.

7. In correspondence, dated September 13, 1979, the Commission notified Respondent that Probable Cause existed to credit the allegations of the complaint.

8. The Commission voted to close the case at its September 29, 1980 meeting for lack of jurisdiction. Respondent was notified of this action of the Commission by correspondence, dated October 1, 1980.

9. Efforts have been made to conciliate this case pursuant to Section 9 of the Act but all such efforts have failed to date.

10. Respondent posted a job vacancy notice dated April 12, 1978, for the position of "Instructional Supervisors for Special Education".

11. The April 12, 1978, job vacancy notice for the "Instructional Supervisor for Special Education" position

listed the following as the "Qualifications" for the position:

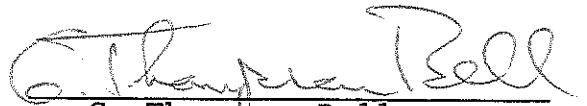
- "1. Master's Degree in Special Education.
2. Pennsylvania certification in at least one major discipline of Special Education.
3. Pennsylvania Certification as a Supervisor in Special Education.
4. Commitment to the education of exceptional children."

12. Three persons, Complainant, John Tommasini, white male, and Gail Edwards, black female, were considered for the position of "Instructional Supervisor of Special Education".

The Stipulations of Fact, together with all appendices, and the witness lists and lists of exhibits of each party will be incorporated into a Pre-Hearing Order that will become part of the official record of this case and will be incorporated into the transcript prepared during the course of any public hearing held in this matter.



William T. Smith, Solicitor
Harrisburg School District



G. Thompson Bell
Assistant General Counsel
Pennsylvania Human Relations
Commission

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CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this action, pursuant to Section 4, 5, and 9 of the Act. (43 P.S. §§ 954, 955, 959).
2. The Commission and the parties have fully complied with the procedural prerequisites to a public hearing in this matter. (43 P.S. § 959).
3. Complainant is an "individual" within the meaning of Section 5 of the Act. (43 P.S. §955).
4. Respondents are the employers within the meaning of Sections 4 and 5 of the Act. (43 P.S. § 954, 955).
5. Complainant had and met the initial burden of proving a prima facie case of discrimination.

6. Respondents had and failed to meet the burden of proving that Complainant was not the best able and most competent candidate for the ISSE position. Nor did they produce sufficient evidence in explanation of their actions to justify a verdict in their favor.

7. The selection criteria used by Respondents were impermissibly vague and subjective.

8. Upon a finding of discrimination, the Commission must order Respondents to cease and desist from unlawful discriminatory practices and may order them to promote Complainant and pay her all wages lost as a result of the discriminatory action.

9. Respondents discriminated against Complainant on the basis of her race and sex, in violation of Section 5(a) of the Act.

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O P I N I O N

I. FACTUAL BACKGROUND - ISSUES PRESENTED

In April of 1978, Respondent School District posted a vacancy notice listing several vacant positions, among them "Instructional Supervisors for Special Education." The notice itself indicated that the National Teachers Examination was a requirement for the ISSE position. Admitted into evidence along with the vacancy notice was a "Position Guide" entitled "Instructional Supervisor for Special Education - Secondary Level." This document, dated November 9, 1977, listed additional qualifications:

- (1) Master's Degree in Special Education.
- (2) Pennsylvania certification in at least one major discipline of Special Education.

- (3) Pennsylvania certification as a Supervisor in Special Education.
- (4) Commitment to the education of exceptional children.

Complainant duly submitted an application for the ISSE position. She had all necessary degrees and state certifications. She took the National Teacher's Examination in May of 1978.

Complainant then attempted to arrange an interview with Respondent Keller. When she reached him, in July of 1978, he informed her that a Mr. Tommasini had been selected for the position; asked why she had not been interviewed, Mr. Keller responded that it had been an oversight. Ms. Portlock thereupon filed her complaint with the Commission.

The primary issue raised by this case is whether Respondents discriminated against Complainant on the basis of race or sex in failing to interview or hire her for the ISSE position, in violation of the Act. Should liability be found, an appropriate remedy must be fashioned. Finally, an issue has been raised as to whether Respondent School District is properly charged as the employer. Discussion of this issue is necessary, given the allegation of a Section 5(e) violation.

For the reasons which follow, we find that Respondents discriminated against Complainant on the basis of her race and sex, in violation of Section 5(a) of the Act.

II. SECTION 5(e) LIABILITY

As previously noted, Ms. Portlock originally alleged

that Section 5(a) of the Act had been violated. By amendment to the complaint she later added an allegation of Section 5(e) violation stemming from the acts originally cited.

Section 5(a) provides that it shall be unlawful for "any employer" to commit the acts enumerated therein. Liability under that section may thus be found only if the person or entity committing the discriminatory act has an employer-employee relationship with the complainant; this relationship may be present (as in a discriminatory wage scale situation) or potential (as in a refusal to hire situation).

Section 5(e) on the other hand makes it unlawful for "any person, whether or not an employer ... to aid, abet, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice ..." (emphasis added). No employer-employee relationship is necessary for liability under this section.

In its answer to the original complaint, Respondent stated at Paragraph C-3:

The respondents did not in fact hire anyone for the position [ISSE] in question. The Capitol Area Intermediate Unit hired a person who met all the requirements to fill the position. This person is not an employee of the Harrisburg School District but rather an employee of the Capitol Area Intermediate Unit as an Instructional Advisor for Special Education. The services of this individual are directed to the secondary level.

This statement was followed by a request that the Commission dismiss the complaint. The subsequent amendment of the complaint was apparently in response to this assertion that Respondent School District was not the employer of the successful ISSE

candidate.

The assertion can be easily resolved. In the case of Sweet v. Pennsylvania Labor Relations Board, 457 Pa. 456 (1974), the Supreme Court of Pennsylvania set out the test to be used in determining whether an employer-employee relationship exists. Holding that the source of an individual's salary is not dispositive, the Court stated that an employer-employee relationship will be found where:

- (1) A party may select the employee;
- (2) A party has the power to discharge the employee; and
- (3) A party has the right to direct what work shall be done and how it shall be done.

The record in this case clearly establishes that Respondent School District was correctly named as the employer of the person occupying the ISSE position, making it responsible for any discriminatory acts committed in connection with filling the position. While the ISSE salary may at one time have been paid by the Intermediate Unit, testimony established that Respondent Ronald Keller, a School District employee, performed numerous acts bringing him and the School District within the Sweet definition of an employer. Specifically, he testified that he decided not to hold interviews in 1978 for the ISSE position, that he considered Ms. Portlock as well as Ms. Edwards and Mr. Tommasini for the job and was responsible for selecting Mr. Tommasini (subject to School Board ratification). Likewise it was not controverted that Mr. Keller directed the day-to-day functions of the ISSE, and had the ability to effectively

terminate that person. We therefore find that the School District was correctly cited as the employer in this matter. This along with our finding of Section 5(a) liability makes further consideration of the Section 5(e) allegations unnecessary, and we consequently dismiss only so much of Ms. Portlock's complaint as alleges a Section 5(e) violation.

III. SECTION 5(a) LIABILITY

The United States Supreme Court in the case of McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), established the approach to be followed in analysis of "different treatment" cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq.. The Court there held that the charging party must bear the initial burden of making out a prima facie case by showing that:

1. She is a member of a protected class;
2. She applied for a job for which she was qualified;
3. Her application was rejected; and
4. The employer continued to seek other applicants.

If the charging party successfully carries this burden, the employer must come forward with some legitimate, non-discriminatory reasons for its actions. If it is able to do so, the charging party in order to prevail must establish that the proffered defense is actually a pretext for discrimination.

The Pennsylvania Supreme Court, interpreting the Act, further clarified the respective burdens of proof to be borne by the parties. After discussing with approval the requirements

of McDonnell-Douglas, the Court held that (if a prima facie case is established) the employer has the burden of proving that the complainant was not the best able and most competent candidate for the position. General Electric Corp. v. PHRC, 365 A.2d 649, 654 (1976).

Respondents rely on Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981) for clarification of their burden of proof. The Burdine Court held that the burden of persuasion at all times remains with the charging party. It described the employer's burden as one of coming forward with legitimate, non-discriminatory reasons for its actions. These must be clearly set forth and must be legally sufficient to justify a judgment for the employer.

To the extent of any conflict between these decisions, we believe ourselves to be governed by the holdings of Pennsylvania's highest court in its interpretations of the Act. Our initial inquiry must be whether Complainant has established a prima facie case.

A. Prima Facie Case

The parties do not contest that Ms. Portlock, a Black female, applied for the ISSE position and was rejected, nor that Mr. Tommasini, a White male, was selected.

The qualifications for the ISSE position, reviewed above, were:

1. A master's degree in Special Education;
2. Pennsylvania certification in at least one major discipline of Special Education;

3. Pennsylvania certification in Special Education;
4. Commitment to the education of exceptional children; and
5. The National Teacher's Examination. *

Complainant produced evidence at hearing which established that she possessed the necessary certifications and degrees, namely a Master's Degree in the Education of Exceptional Children and certification in Elementary, Supervisor of Special Education, and Emotionally Disturbed. She testified that she took the National Teacher's Examination in May of 1978, prior to the selection of the ISSE. Her commitment to the education of exceptional children has not been questioned.

We therefore find that Complainant has established a prima facie case. Under the principles enunciated above, we must next consider Respondents' proffered reason for the selection of Mr. Tommasini.

B. The Employer Issue

As previously noted, Respondents' initial defense was raised in its answer to the complaint where it was asserted that the Capitol Area Intermediate Unit and not the Harrisburg School District was the employer. This assertion has already been analyzed and rejected. No further comment is necessary beyond the obvious one that this assertion is not sufficient within the meaning of McDonnell-Douglas and General Electric, supra, to rebut the prima facie case established by Complainant.

* The National Teachers Examination was listed as a requirement on the vacancy notice, not the Position Guide.

C. The Certification Issue

In correspondence to the Commission dated June 13, 1979, and admitted as Complainant's Exhibit 13, James M. Francis, the School District Director of Personnel, indicated that three applications were submitted for the ISSE position, and further that "(o)ne of these applicants met all certification requirements for the position posted." While Mr. Keller testified at Public Hearing that all three applicants were in fact properly certified, the prior statement in Complainant's Exhibit 13 leads to consideration of a matter which has considerable bearing on the credibility of Respondents and thus on our analysis of their defenses.

Edward Zook, the Commission investigator assigned to this case, testified that Complainant's Exhibit 8, the application of Gail Edwards for the ISSE position, was produced in response to a Commission subpoena. Complainant's Exhibit 7, identical except for certain deletions, was given to Mr. Zook by Mr. Francis during an in-person visit in Mr. Francis' office. It is the deletions which concern us.

Respondent's counsel indicated at Public Hearing that Ms. Edwards' name and address were deleted when the document was first produced because Ms. Edwards' permission to reveal her name had not been obtained. Examination of the documents reveals that not only Ms. Edwards' name and address were deleted: in the space following "Areas of Certification", the words "Supervision of Sp. Ed." have been deleted (all but the lower half of the "p" in "Supervision") on Exhibit 8. As Respondent's

counsel admitted that Respondents were responsible for the deletion of Ms. Edwards' name and address, and in the absence of any other explanation, we can only conclude that Respondents also deleted from the application the words "Supervision of Sp. Ed.", in an attempt to buttress their position that only Mr. Tommasini possessed the necessary certifications. We are appalled by such unethical conduct, which has succeeded only in convincing us that Respondents believed they had something to hide and therefore made this cynical and clumsy attempt to mislead the Commission. We heartily condemn this action.

D. The Union Contract Issue

Ms. Portlock's complaint includes an allegation that she was not interviewed for the ISSE position. At Public Hearing she testified that Mr. Keller originally agreed to give her an interview but did not do so, and informed her after Mr. Tommasini's selection that he had not interviewed her through "an oversight". We find this testimony to be credible, particularly in light of Mr. Keller's statement on direct examination that it was possible he had told her it was an oversight, and the admission in the answer to the complaint's allegation that he told her interviews would be set up.

The parties strenuously contest whether the applicable union contract required that interviews be held. We find determination of this issue to be unnecessary, as we conclude that during the relevant time period, in 1978, both Complainant and Respondents believed that an interview was required. Our

task here is to determine why Respondents took the actions they did, not, except insofar as it clarifies their motives, whether those actions constituted a breach of the then-applicable union contract.

Our conclusion that Respondents believed in 1978 that an interview was required is based, in addition to the testimony referred to above, on a letter to Commissioner Leader from Mr. Francis dated June 13, 1979 and admitted as Complainant's Exhibit 13. The letter as previously noted indicates that only one applicant met all certification requirements for the ISSE position; it continues:

(Note: The applicable section of District regulations is as follows: "Any professional employee may apply for such vacancy. When more than two (2) applications are submitted by qualified professional employees, then at least two personal interviews shall be held.") (Emphasis and parentheses in original.)

While Mr. Francis, on direct examination, attempted to explain away the discrepancy between his 1979 letter and Respondent's present position (that no interviews were required) by a reference to secretarial inadvertence, he continued by stating that a mistake had been made in the letter. In view of this admission that a mistake of fact was made, and the candid comment by Respondent's counsel that it was only while preparing for the hearing that "we discovered" that the contract requiring interviews was not in effect when the incident occurred (N.T. 13), we conclude that Respondents believed in 1978 that interviews were mandatory. Their explanations for not interviewing Ms. Portlock (either that she did not possess the

necessary certifications or that Mr. Keller knew all three candidates so well that interviews would have been superfluous) fail to persuade us that they did not believe interviews were required.

Further, the testimony of Ms. Edwards and Mr. Tommasini showed that both were in fact interviewed for the ISSE position in 1977, though not by Mr. Keller, when the vacancy was first posted, making it even more incongruous that Complainant alone was never interviewed.

E. The Secondary Experience Requirement Issue

The requirements for the ISSE position, reviewed above, did not include a requirement of secondary experience. Nevertheless, Mr. Keller testified that a factor in his decision to hire Mr. Tommasini, though not a deciding factor, was Mr. Tommasini's secondary experience; both Ms. Portlock and Ms. Edwards had elementary experience. Ms. Portlock testified that in her interview with Respondent Turner, subsequent to Mr. Tommasini's selection, she was told that she had been rejected because she lacked secondary experience. We are not persuaded that this was in fact the reason for Mr. Tommasini's selection, for the following reasons:

First, Mr. Keller himself testified that the matter of secondary experience was not the deciding factor in Mr. Tommasini's selection. We note also that the posted requirements did not include secondary experience.

Finally, it is noteworthy that Mr. Keller testified on

cross examination that he himself had both elementary and secondary background. Mr. Tommasini's testimony indicated that in his initial two years in the ISSE position he dealt strictly with secondary matters while Mr. Keller handled elementary functions. More recently, after a change in his funding source, Mr. Tommasini dealt with both elementary and secondary matters, though his elementary experience prior to 1978 had included only involvement in an intramural flag football league. While not conclusive, this testimony tends to indicate a fair amount of flexibility in the allocation of functions between Mr. Keller and the ISSE, and to cast doubt on Respondents' position that Mr. Tommasini's secondary experience rendered him better qualified for the position.

F. The Subjective Criteria Issue

On direct examination, Mr. Keller described various considerations leading to the selection of Mr. Tommasini, concluding with the following:

Q. So, were there any other matters that you considered in making your decision?

A. Probably the biggest consideration from a personal standpoint, this is the type of a job that I have that requires a person that I can feel very comfortable with.

It is a job that requires working very closely with one another and thinking the same way about many critical issues.

While I don't doubt Mrs. Portlock's expertise in many areas, I don't feel that we would have made a compatible team.

I don't know how I can substantiate that other than that is a gut feeling that I had at that time. (N.T. 108, emphasis added)

This passage follows immediately after Mr. Keller's testimony that unidentified teachers related to him unspecified situations which led him to conclude that there were "difficulties" flowing from "differences of opinion between those teachers and Mrs. Portlock," leading him to conclude that she somehow posed "a threat to a classroom teacher." (N.T. 107) The vagueness and lack of specificity of this material forces us to consider it, along with Mr. Keller's "gut feeling", as application of subjective criteria to the selection process.

While application of subjective selection criteria is not, per se, discriminatory, numerous courts have articulated the dangers inherent in such decision making. See e.g. General Electric v. PHRC, supra, at 657, particularly cases cited in Footnote 14; Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dickerson v. United States Steel Corp., 439 F. Supp. 56 (19); Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5 Ca. 1976); EEOC v. E.I. duPont deNemours and Company, 445 F. Supp. 223 (D. Del., 1977); Rowe v. General Motors Corp., 4 EPD ¶7689 (N.D. Ga., 1972). As the Supreme Court indicated in Albemarle, supra., use of such criteria makes it impossible to ascertain whether the criteria actually used were job related. We therefore find that Mr. Keller's admitted reliance on his supposedly non-discriminatory "gut feeling" does not overcome the inference of discrimination raised by Complainant's establishment of a prima facie case. Given his clear statement that he could not further substantiate or articulate the bases

of these feelings, we are not persuaded by his assurance that race and sex did not influence him.

G. Legal Sufficiency of Respondents' Defenses

McDonnell-Douglas v. Green and General Electric v. PHRC, supra, articulate the standard against which Respondents' defenses must be assessed. To rebut Ms. Portlock's prima facie case, they must establish that she was not the best able and most qualified candidate for the ISSE position, by establishing that Mr. Tommasini was. We find that they have failed to do so, and that the inference of discrimination stands.

At the outset we note again that Respondents' credibility has been seriously damaged by the deletion of one of Ms. Edwards' credentials, already described. Against this background, Respondents' assertions that they were motivated solely by the (previously unmentioned) preference for secondary experience and the unarticulated (but supposedly non-discriminatory) factors contributing to Mr. Keller's gut feeling are simply not sufficient to meet their burden of proving that Mr. Tommasini was better qualified. Nor, in light of our finding that they believed an interview to be required, has their failure to interview her been adequately explained. We note also that no documentary evidence was introduced to support Mr. Tommasini's testimony that he possessed all necessary degrees and certifications, and that this testimony did not include mention of taking the National Teacher's Examination.

Respondents have not only failed to prove that Complainant was not the best able and most competent candidate; we find

that they have failed to clearly set forth legitimate, non-discriminatory reasons for their actions which are sufficient to justify a verdict in their favor.

Pennsylvania courts have repeatedly held that a finding of intentional discrimination may be inferred from the totality of factors involved in a challenged decision. As Pennsylvania's Supreme Court stated in PHRC v. Chester School District, 233 A.2d 290 at 298 (1967), "(o)ne intent on violating the law against discrimination cannot be expected to declare or announce his purpose." (Quoted with approval from Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954)). See also Slippery Rock State College v. PHRC, 314 A.2d 344 (1974); St. Andrews Development Corporation v. PHRC, 308 A.2d 623 (1973).

We therefore turn to consideration of appropriate relief.

IV. REMEDY

Section 9 of the Act provides in relevant part:

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring ... upgrading ... with or without back pay ... as, in the judgment of the Commission ... will effectuate the purposes of the Act ...

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make the Complainant whole by returning her to the position in which she

would have been, absent the discriminatory practice. Sustaining an award for lost wages in PHRC v. Transit Casualty Insurance Company, 340 A.2d 624 (1975), Commonwealth Court approved a method of calculation which, while not necessarily mathematically exact, provided "... a reasonable means to determine the amount [the Complainant] would probably have earned..." (340 A.2d at 630) absent the discriminatory act. In Goetz v. Norristown Area School District, 328 A.2d 579 (1975), the same Court entered an order directing the School District to pay the complainant the monies she would have received between her unlawful discharge and her reinstatement, along with interest of 6% per annum calculated from the due date of each unpaid installment of salary which would have accrued during the period between discharge and reinstatement.

We therefore find that Ms. Portlock is entitled to be offered the next vacant ISSE position, or position of comparable salary and responsibilities. We further find that she is entitled to receive the difference between her current salary and the ISSE salary, with 6% interest computed by the method approved in Goetz, until such time as such offer is made.

COMMONWEALTH OF PENNSYLVANIA

FEB 10 10 15 AM '82

EXECUTIVE OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION
HEADQUARTERS

LINDA PORTLOCK,
Complainant

v.

HARRISBURG SCHOOL DISTRICT,
BENJAMIN TURNER, SUPERINTENDENT,
RON KELLER, ACTING DIRECTOR FOR
SPECIAL EDUCATION,
Respondents

DOCKET NO. E-14678

As Amended

RECOMMENDATION OF HEARING COMMISSIONER

WHEREUPON, this 9th day of February, 1982,
in consideration of the entire record in this matter, including
the Complaint, Answer, Stipulations, Exhibits, Notes of Testi-
mony, and Briefs filed on behalf of the parties, the Hearing
Commissioner hereby adopts the attached as her proposed Findings
of Fact, Conclusions of Law, Opinion, and Final Order, and
recommends that the same be finally adopted and issued by the
Pennsylvania Human Relations Commission.

Doris M. Leader
DORIS M. LEADER
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK,
Complainant

v.

HARRISBURG SCHOOL DISTRICT,
BENJAMIN TURNER, SUPERINTENDENT,
RON KELLER, ACTING DIRECTOR FOR
SPECIAL EDUCATION,
Respondent

DOCKET NO. E-14678

As Amended

COMMISSION'S DECISION AND
FINAL ORDER

AND NOW this 23nd day of February, 1982,
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 Commis-
sioner, and therefore

O R D E R S:

1. That Respondents cease and desist from discriminating
in any manner against any present or potential employee on the
basis of that person's race or sex;
2. That Respondents offer to Complainant the next
available ISSE position or position of comparable salary

responsibility, and promotional opportunity;

3. That until such time as a good faith offer is made pursuant to Item 2 above, Respondents pay to Complainant the difference between her present salary and the ISSE salary together with 6% interest computed annually.

The initial payment, covering the period between August, 1978, and the date of this Order, shall be made within thirty days of the date of this Order, by check payable to Linda M. Portlock and delivered in care of G. Thompson Bell, Esquire, Pennsylvania Human Relations Commission, 301 Muench Street, Harrisburg, Pennsylvania 17102.

Subsequent payments shall be made at regular intervals to be arranged by the parties. Should the parties be unable to agree on a payment schedule, they may petition this Commission for the limited purpose of setting such a schedule.

4. That for seniority purposes and all personnel related matters the Complainant's date of seniority shall be adjusted to reflect promotion as of August, 1978.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Doris M. Leader
DORIS M. LEADER, VICE-CHAIRPERSON

ATTEST:

Elizabeth M. Scott
ELIZABETH M. SCOTT, SECRETARY

HARRISBURG SCHOOL DISTRICT : IN THE COMMONWEALTH COURT
et al., : OF PENNSYLVANIA
Petitioners :
v. :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA HUMAN RELATIONS :
COMMISSION, :
Respondent : NO. 656 C.D. 1982

BEFORE: HONORABLE DAVID W. CRAIG, Judge
HONORABLE FRANCIS A. BARRY, Judge
HONORABLE GENEVIEVE BLATT, Judge

ARGUED: SEPTEMBER 15, 1983

The Harrisburg School District, its superintendent, and its acting director for special education (school district) appeal from a decision and order by the Pennsylvania Human Relations Commission, which found that, in violation of section 5(a) of the Pennsylvania Human Relations Act (Act),¹ the school district had discriminated against Linda Portlock, a black woman, because of her race and sex, by failing to interview or hire her for the position of Instructional Supervisor of Special Education (ISSE position).

We must decide if the commission committed an error of law in its allocation of the burden of proof and if there is substantial evidence to support its findings of discrimination. See Harmony Volunteer Fire Co. and Relief Association v. Pennsylvania Human Relations Commission, ___ Pa. Commonwealth Ct. ___, 459 A.2d 439 (1983) (court must affirm commission adjudication unless commission violated constitutional rights, made findings of fact not supported by substantial evidence or committed an error of law).

Factual Background

In 1977, the school district had posted a vacancy notice for the ISSE position; at that time, John Tommasini, a white male, and Gail Edwards, a black female, had applied, and were interviewed for the position by three school district officials then in office, the former superintendent, the former director of special education, and the former director of curriculum. Apparently, because of insufficient funding, the school district did not fill the vacancy for the 1978 academic year.

In April of 1978, the school district again posted a vacancy notice for the ISSE position, listing the following qualification prerequisites:

1. Master's Degree in Special Education;
2. Pennsylvania certification in at least one major discipline of Special Education;
3. Pennsylvania certification as a Supervisor in Special Education;
4. Commitment to the education of exceptional children.

As an addendum, the vacancy notice also listed the National Teachers Examination as a requirement for the position.

Mrs. Portlock applied for the position in that April and took the National Teachers Examination in May. Mr. Tommasini and Ms. Edwards apparently did not formally resubmit applications for the ISSE position in 1978; the school district, however, treated them as candidates.

Without conducting personal interviews for the ISSE position in 1978, and without ever interviewing Mrs. Portlock, the school district selected Mr. Tommasini on the recommendation of Ron Keller, the current acting director of special education. After learning from Mr. Keller in July of 1979 that she had not been selected, Mrs. Portlock filed her complaint with the commission.²

Burden of Proof

In General Electric Corp. v. Pennsylvania Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976), our Supreme Court adopted as one touchstone, for discrimination proof, the four-prong test of McDonnell-Douglas Corp. v. Green,

411 U.S. 792 (1973), which provides that, for a complainant to establish a prima facie case of employment discrimination, he must show that: (1) he is a member of a protected minority, (2) he applied for a job for which he was qualified, (3) he was rejected, and (4) the employer continued to seek applicants of equal qualifications. At this point, the complainant will have created a rebuttable presumption that the employer engaged in unlawful discrimination. Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Winn v. Trans World Airlines, Inc., ___ Pa. Commonwealth Ct. ___, ___, 462 A.2d 301, 304 (1983).

The duty to come forward with evidence then shifts to the employer to provide proof of a legitimate, nondiscriminatory reason for not hiring the complainant. Burdine, 450 U.S. at 254; Winn, ___ Pa. Commonwealth Ct. at ___, 462 A.2d at 304. Section 5(a) of Pennsylvania's Act expressly imposes a more specific burden upon an employer, however, by requiring a demonstration that the disappointed applicant was not best qualified.³ General Electric, 469 Pa. at 302, 365 A.2d at 657; accord, Blackburn v. Pennsylvania Human Relations Commission, 62 Pa. Commonwealth Ct. 171, 173, 435 A.2d 671, 672 (1981). Only then does the production duty again shift to the plaintiff for a full and fair opportunity to demonstrate pretext.

Burdine, 450 U.S. at 256-57.⁴ Of course, the complainant at all times retains the burden of persuasion on the ultimate issue of whether the employer had a discriminatory motive. Winn, ___ Pa. Commonwealth Ct. at ___, 462 A.2d at 304.

The school district contends that we are bound by the U.S. Supreme Court's interpretation of Title VII in Burdine, and therefore must conclude that the commission erred by requiring the school district to proffer anything more than a legitimate, nondiscriminatory reason for hiring Mr. Tommasini instead of Mrs. Portlock. We disagree.

Our statute expressly requires more of the employer. Moreover, in Anderson v. Upper Bucks County Area Vocational Technical School, we held that the U.S. Supreme Court's construction of Title VII does not require our court to construe the Pennsylvania Human Relations Act in the same fashion. 30 Pa. Commonwealth Ct. 103, 373 A.2d 126, 129 (1977).

Prima Facie Case

The school district contends that Mrs. Portlock was not qualified for the ISSE position under the second prong of

McDonnell-Douglas because she had not taken the National Teachers Examination before she submitted her application. The commission, however, found that Mrs. Portlock possessed all necessary degrees and certification for the ISSE position, having taken the exam in May of 1978, before the Harrisburg school board voted on June 26 to name Mr. Tommasini to the post.

All parties agree that Mr. Keller had primary responsibility for evaluating the ISSE candidates. Yet, his testimony reveals that, when he considered Mrs. Portlock's credentials, neither he nor any of the other respondents rejected her application on the ground that she sat for the exam only after submitting her application. Indeed, it appears that, when Mr. Keller considered Mrs. Portlock's application sometime in June,⁵ he operated under the correct assumption that, by then, she had taken the exam. The school district cites no Pennsylvania authority that requires us to disturb the commission's reasonable conclusion that, under the circumstances, Mrs. Portlock was qualified, having acquired the necessary degrees and certification, by the time her application received active consideration.

The school district also contends that, under the fourth prong of McDonnell-Douglas, Mrs. Portlock failed to establish her prima facie case because, after the school district rejected her application, it did not seek other equally qualified candidates. Noting that the four prong test of McDonnell-Douglas is not a fixed absolute that applies in all respects to all circumstances, we recently rejected a similar argument in Pittsburgh Commission on Human Relations v. Central Blood Bank of Pittsburgh, ___ Pa. Commonwealth Ct. ___, ___, 462 A.2d 295, 299 (1983). There, we stated, "[i]f proof of the fourth 'prong' were, in all circumstances, a sine qua non of a discrimination case, an employer could easily escape the consequences of even the most blatant discrimination by simply delaying the overt rejection of the complainant until after a discriminatory selection from among the competing job-applicants had already been made. To allow such a result would, as a practical matter, nullify one of the cardinal purposes of the ... Act." Id. at ___, 462 A.2d at 299. See also Reed v. Miller Printing Equipment, ___ Pa. Commonwealth Ct. ___, ___, 462 A.2d 292, 294 (1983).

Finally, the school district contends that it did not truly reject Mrs. Portlock's application. Its choice of

Mr. Tommasini for the ISSE position, however, demonstrates otherwise.

Thus, Mrs. Portlock's case satisfied the criteria of McDonnell-Douglas, establishing an inference of discrimination.

Employer's Justifications

At the commission hearing, Mrs. Portlock testified that she had two years' experience as a learning disability teacher and seven years' experience as a Master Itinerant, which she described as a liaison position between the director of special education and classroom teachers.⁶ Mrs. Portlock also testified that she worked primarily in elementary schools and had a good working relationship with teachers.

Relying upon the testimony of Mr. Keller, who stated that Mrs. Portlock lacked supervisory skills, rapport with some teachers with whom she worked, and secondary education experience for the job, the school district contends that Mrs. Portlock was not the best able or most competent ISSE candidate.

The commission, however, observed that Mrs. Portlock, as a Master Itinerant, performed many of the supervisory duties of an ISSE and that the school district never listed secondary education experience as a prerequisite for the job. There is substantial evidence of record to support both findings. Harmony Volunteer Fire Co., ____ Pa. Commonwealth Ct. at ____, 459 A.2d at 441.

Although the commission made no finding on the question of Mrs. Portlock's rapport with teachers, we can infer that it found her testimony more convincing than the testimony of Mr. Keller. Indeed, the commission found that, in response to a subpoena, the school district had altered the records of Gail Edwards to bolster its case; the commission therefore concluded that the testimony of school district witnesses was generally not credible. Questions of credibility and the weight of evidence are for the commission to decide. Id. at ____, 459 A.2d at 444.

Finally, the school district contends that it had a legitimate, nondiscriminatory reason for failing to interview Mrs. Portlock, claiming that it (1) had no obligation to do so under the local union contract or (2) had no reason to do so, because of Mr. Keller's familiarity with all three candidates. In the discussion portion of its opinion, however, the commission

found that (1) the school district believed interviews were necessary, regardless of the contract's terms, and that (2) the school district offered no credible basis for interviewing Mr. Tommasini and Ms. Edwards, but not Mrs. Portlock.⁷ There is ample testimony of record to support those findings; we will not disturb them on appeal. Harmony Volunteer Fire Co.

Even if the school district had succeeded in rebutting the inference of discrimination established by Mrs. Portlock's prima facie case, there is evidence to suggest that the school district's allegedly legitimate, nondiscriminatory justifications were merely pretextual. As Mr. Keller testified:

Q. So, were there any other matters that you considered in making your decision?

A. Probably the biggest consideration from a personal standpoint, this is the type of a job that I have that requires a person that I can feel very comfortable with.

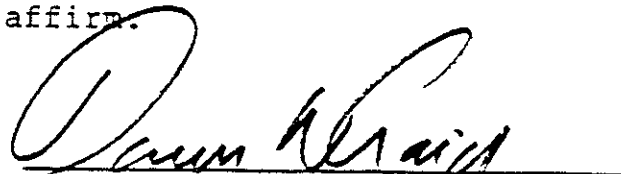
It is a job that requires working very closely with one another and thinking the same way about many critical issues.

While I don't doubt Mrs. Portlock's expertise in many areas, I don't feel that we would have made a compatible team.

I don't know how I can substantiate that other than that is a gut feeling that I had at that time.

The use of subjective criteria is not a per se violation of anti-discrimination laws, but courts generally treat employment decisions predicated on subjective appraisals with particular suspicion. General Electric, 469 Pa. at 307 n. 14, 365 A.2d at 657. Section 5(a) entitles every black female job applicant to have her qualifications for employment considered on an equal footing with those of a white male. Id. at 307, 365 A.2d at 660. By failing to afford Mrs. Portlock an interview, by failing to establish that she was not best qualified, by Mr. Keller's "gut reaction" to her qualifications, and by other evidence of record, the school board has demonstrated that it manifestly deprived her of this entitlement.

Recognizing that discrimination is seldom explicit, but must be discerned from many circumstances, Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157, 172, 233 A.2d 290, 298 (1967), we affirm.


DAVID W. CRAIG, Judge

Footnotes

1. Act of October 7, 1955, P.L. 744, as amended, 43 P.S. §§951-962.2.
2. The commission originally dismissed Mrs. Portlock's complaint for lack of jurisdiction on the ground that the Capital Area Intermediate Unit, and not the school district, funds the ISSE position. On petition for reconsideration, however, the commission determined that the school district is indeed the employer here. The school district now stipulates that fact.
3. Section 5(a) provides, in pertinent part:

It shall be an unlawful discriminatory practice

.....

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required. (Emphasis added.)
4. In Burdine, the U.S. Supreme Court rejected a Fifth Circuit Court of Appeals' interpretation of Title VII that would have required the employer, as part of his production burden, to prove by objective evidence that the person hired or promoted was more qualified than the disappointed applicant for the job. 450 U.S. at 258-59. Noting that Title VII does not require an employer to give preferential treatment to minorities or women, the Supreme Court reasoned that the fifth circuit test would have required an employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. 450 U.S. at 259.

5. Mrs. Portlock's testimony about the promise of an interview in June, see note 7 infra, indicates that Mr. Keller was still in the process of actively considering candidates at that time.
6. Mrs. Portlock also testified that as a Master Itinerant, she was responsible for administering diagnostic testing and interpreting the results, providing educational assessments and evaluations of students, assisting teachers in the selection of materials, and conducting and participating in in-service workshop training for teachers.
7. Mrs. Portlock testified that Mr. Keller told her in June of 1978 that he would be interviewing candidates for the ISEE position. When asked why he had not interviewed Mrs. Portlock, Mr. Keller responded that it was an oversight.

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK, :
Complainant :
v. : DOCKET NO. E-14678
HARRISBURG SCHOOL DISTRICT, : As Amended
BENJAMIN TURNER, SUPERINTENDENT, :
RON KELLER, ACTING DIRECTOR FOR :
SPECIAL EDUCATION, :
Respondents :

HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Linda Portlock ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Harrisburg School District, Benjamin Turner, Superintendent, and Ron Keller, Acting Director for Special Education ("Respondents"). The complaint, filed on September 26, 1978, alleged that Respondents discriminated against Complainant on the basis of her race, Black, and sex, female, by not interviewing or considering her for the position of Instructional Supervisor of Special Education ("ISSE"), in violation of Section 5(a) of the Pennsylvania Human Relations Act ("Act") (Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §§951 et seq.). On May 5, 1981, Complainant filed an amendment to her complaint alleging that Section 5(e) of the

Act as well as Section 5(a) had been violated by Respondents.

An investigation into the allegations of the complaint was made by Commission representatives, who determined that probable cause existed to credit the allegations. Thereupon the Commission endeavored to eliminate the practice complained of by conference, conciliation, and persuasion. These efforts were unsuccessful, and on March 30, 1981, the Commission approved the case for public hearing.

At a pre-hearing conference held on June 10, 1981, Respondents and Complainant waived their statutory right to a public hearing before three Commissioners and agreed to proceed to hearing before Commissioner Doris M. Leader, Chairperson of the designated hearing panel.

Public Hearing was held on September 29, 1981 in Harrisburg, Pennsylvania, and was conducted at all times before Commissioner Doris M. Leader. The case on behalf of the Complainant was presented by G. Thompson Bell, Assistant General Counsel to the Commission. The Respondent was represented by William T. Smith, Esquire, of Smith and Smith, P.C., Harrisburg, Pennsylvania. Marion M. Cowperthwait, Assistant General to the Commission's Philadelphia office, served as legal advisor to the Hearing Commissioner.

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK,

Complainant

v.

HARRISBURG SCHOOL DISTRICT,
BENJAMIN TURNER, SUPERINTENDENT,
RON KELLER, ACTING DIRECTOR FOR
SPECIAL EDUCATION,

Respondents

DOCKET NO. E-14678

As Amended

FINDINGS OF FACT

1. The Complainant is Linda M. Portlock, an adult Black female, residing at 1438 Market Street, Harrisburg, Pennsylvania, 17110. (S.F. 1)

2. Respondent Harrisburg School District, located at 1201 North 6th Street, Harrisburg, Pennsylvania, 17102, employs four or more persons within Pennsylvania. (S.F. 2)

3. Respondent Benjamin F. Turner is Superintendent of the Harrisburg School District. (N.T. 138)

4. Respondent Ron Keller is Director of Special Education for the Harrisburg School District. (N.T. 99)

5. On September 26, 1978, Complainant filed a verified complaint of discrimination with the Pennsylvania Human Relations Commission at docket number E-14678. (S.F. 3)

6. On May 5, 1981, Complainant filed an amendment to her complaint at docket number E-14678. (Amended Complaint)

7. Ms. Portlock applied for the ISSE position in April of 1978. (N.T. 16)

8. The job vacancy notice posted by Respondent School District for the ISSE position in April of 1978 listed the following qualifications for the job:

- a. Master's Degree in Special Education;
- b. Pennsylvania certification in at least one major discipline of Special Education;
- c. Pennsylvania certification as a Supervisor in Special Education; and
- d. Commitment to the education of exceptional children. (S.F. 11, C. Ex. 1)

9. The job vacancy notice stated that the National Teacher's Examination was a requirement for the ISSE position. (C. Ex. 1)

10. Gail Edwards, a Black female, and John Tommasini, a White male, also applied for the ISSE position. (N.T. 104, 105)

11. Ms. Portlock possessed all necessary degrees and certifications for the ISSE position. (N.T. 16-19)

12. Ms. Portlock took the National Teacher's Examination in May of 1978, prior to the selection of the ISSE. (N.T. 20)

13. Respondents did not hold personal interviews for the ISSE position in 1978, and never interviewed Ms. Portlock for the position. (N.T. 115)

14. John Tommasini was selected for the ISSE position.
(N.T. 115)

15. Mr. Tommasini and Ms. Edwards were interviewed for the ISSE position in 1977 when the position was originally posted. (N.T. 77, 121)

16. Respondents believed in 1978 that personal interviews were required before the ISSE position could be filled.
(C. Ex. 13, N.T. 109, 135-6)

17. Mr. Tommasini assumed the ISSE position in August of 1978. (N.T. 126)

18. Complainant's relevant work experience included two years as a Learning Disability Teacher and four years as a Master Itinerant. (N.T. 14)

19. Respondent School District directed the performance of ISSE duties and had the authority to effectively hire and terminate the person holding the position of ISSE. (N.T. 91, 92, 93, 111, 117)

20. As a Master Itinerant, Ms. Portlock performed many of the duties to be performed by the ISSE. (N.T. 14-15, C. Ex.1)

21. Respondents deleted relevant credentials from the application of Gail Edwards, which was produced in response to a Commission subpoena. (C. Ex. 7 and 8)

22. Respondent Keller's primary consideration in rejecting Complainant was what he described as a "gut feeling" that they would not make a compatible team. (N.T. 108)

23. Secondary experience was not a stated requirement for the ISSE position. (C. Ex. 1)

24. Respondent Keller told Complainant in June of 1978 that he would be interviewing for the ISSE position; when subsequently questioned about why this was not done, he responded that it was an oversight. (N.T. 25, 109, 110, 111)

25. Respondent Keller's background included both primary and secondary experience. (N.T. 114, 115)

26. Mr. Tommasini's elementary background prior to 1978 included only an intramural flag football league. (N.T. 124, 125)

27. Initially in his tenure as ISSE, Mr. Tommasini handled only secondary duties; subsequently, after a funding change, he handled both elementary and secondary duties. (N.T. 125, 128)

28. Mr. Tommasini's salary as ISSE for the period between August of 1978 and July of 1981 was as follows:

- a. He was hired August 27, 1978, on a 205 day contract at an annual salary of \$16,500;
- b. His contract was renewed for 1979-80, for 205 days, at an annual salary of \$17,600;
- c. His contract was renewed for 1980-81, for 205 days, at an annual salary of \$19,050. (C. Ex. 17)

29. Ms. Portlock's salary for the period between July of 1978 and June 26, 1981, computed quarterly, was as follows:

09/22/78	\$4,110.38
12/29/78	3,837.89
03/23/79	3,289.62
06/29/79	4,837.89
09/30/79	3,370.38
12/28/79	4,466.76
03/21/80	3,762.72
06/27/80	4,418.88
09/19/80	3,864.92
12/19/80	4,941.92
03/20/81	4,170.00
06/26/81	4,865.00

(C. Ex. 16)

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK, :
Complainant :
v. : DOCKET NO. E-14678, as
HARRISBURG SCHOOL DISTRICT, : amended
BENJAMIN TURNER, SUPERINTENDENT, :
RON KELLER, ACTING DIRECTOR FOR :
SPECIAL EDUCATION, :
Respondent :

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. Complainant is Linda M. Portlock, an adult female, residing at 1438 Market Street, Harrisburg, Pennsylvania 17110.

2. Respondent is the Harrisburg School District, located at 1201 North 6th Street, Harrisburg, Pennsylvania 17102. Respondent employs four or more persons within Pennsylvania and, therefore, is an "employer" as that term is used in the Pennsylvania Human Relations Act ("Act").

3. On September 26, 1978, Complainant filed a verified complaint of discrimination with the Pennsylvania Human Relations Commission ("Commission") at docket number E-14678. A copy of the complaint is attached hereto as Appendix "A" and is incorporated by reference herein as if fully set forth.

4. On October 11, 1978, Commission staff duly served all parties of this action with a copy of the complaint described in item #3 above in a manner which satisfies the requirements of 1 Pa. Code §33.32.

5. On May 5, 1981, Complainant duly filed an amendment to her complaint. A copy of the amended complaint is attached hereto as Appendix "B" and is incorporated by reference herein as if fully set forth.

6. On May 8, 1981, Commission staff duly served all parties of this action with a copy of the complaint described in item #5 above in a manner which satisfies the requirements of 1 Pa. Code §33.32.

7. In correspondence, dated September 13, 1979, the Commission notified Respondent that Probable Cause existed to credit the allegations of the complaint.

8. The Commission voted to close the case at its September 29, 1980 meeting for lack of jurisdiction. Respondent was notified of this action of the Commission by correspondence, dated October 1, 1980.

9. Efforts have been made to conciliate this case pursuant to Section 9 of the Act but all such efforts have failed to date.

10. Respondent posted a job vacancy notice dated April 12, 1978, for the position of "Instructional Supervisors for Special Education".

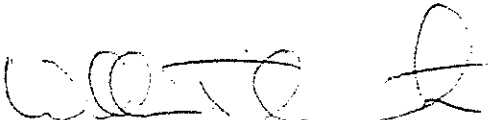
11. The April 12, 1978, job vacancy notice for the "Instructional Supervisor for Special Education" position

listed the following as the "Qualifications" for the position:

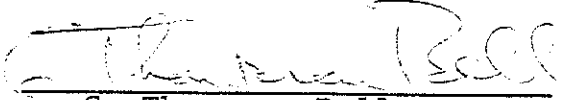
- "1. Master's Degree in Special Education.
2. Pennsylvania certification in at least one major discipline of Special Education.
3. Pennsylvania Certification as a Supervisor in Special Education.
4. Commitment to the education of exceptional children."

12. Three persons, Complainant, John Tommasini, white male, and Gail Edwards, black female, were considered for the position of "Instructional Supervisor of Special Education".

The Stipulations of Fact, together with all appendices, and the witness lists and lists of exhibits of each party will be incorporated into a Pre-Hearing Order that will become part of the official record of this case and will be incorporated into the transcript prepared during the course of any public hearing held in this matter.



William T. Smith, Solicitor
Harrisburg School District



G. Thompson Bell
Assistant General Counsel
Pennsylvania Human Relations
Commission

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK, :
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 Complainant :
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 v. : DOCKET NO. E-14678
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 : As Amended
 HARRISBURG SCHOOL DISTRICT, :
 BENJAMIN TURNER, SUPERINTENDENT, :
 RON KELLER, ACTING DIRECTOR FOR :
 SPECIAL EDUCATION, :
 Respondents :
 :

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this action, pursuant to Section 4, 5, and 9 of the Act. (43 P.S. §§ 954, 955, 959).
2. The Commission and the parties have fully complied with the procedural prerequisites to a public hearing in this matter. (43 P.S. § 959).
3. Complainant is an "individual" within the meaning of Section 5 of the Act. (43 P.S. §955).
4. Respondents are the employers within the meaning of Sections 4 and 5 of the Act. (43 P.S. § 954, 955).
5. Complainant had and met the initial burden of proving a prima facie case of discrimination.

6. Respondents had and failed to meet the burden of proving that Complainant was not the best able and most competent candidate for the ISSE position. Nor did they produce sufficient evidence in explanation of their actions to justify a verdict in their favor.

7. The selection criteria used by Respondents were impermissibly vague and subjective.

8. Upon a finding of discrimination, the Commission must order Respondents to cease and desist from unlawful discriminatory practices and may order them to promote Complainant and pay her all wages lost as a result of the discriminatory action.

9. Respondents discriminated against Complainant on the basis of her race and sex, in violation of Section 5(a) of the Act.

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK, :
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 : As Amended
 HARRISBURG SCHOOL DISTRICT, :
 BENJAMIN TURNER, SUPERINTENDENT, :
 RON KELLER, ACTING DIRECTOR FOR :
 SPECIAL EDUCATION, :
 Respondent :
 :

O P I N I O N

I. FACTUAL BACKGROUND - ISSUES PRESENTED

In April of 1978, Respondent School District posted a vacancy notice listing several vacant positions, among them "Instructional Supervisors for Special Education." The notice itself indicated that the National Teachers Examination was a requirement for the ISSE position. Admitted into evidence along with the vacancy notice was a "Position Guide" entitled "Instructional Supervisor for Special Education - Secondary Level." This document, dated November 9, 1977, listed additional qualifications:

- (1) Master's Degree in Special Education.
- (2) Pennsylvania certification in at least one major discipline of Special Education.

- (3) Pennsylvania certification as a Supervisor in Special Education.
- (4) Commitment to the education of exceptional children.

Complainant duly submitted an application for the ISSE position. She had all necessary degrees and state certifications. She took the National Teacher's Examination in May of 1978.

Complainant then attempted to arrange an interview with Respondent Keller. When she reached him, in July of 1978, he informed her that a Mr. Tommasini had been selected for the position; asked why she had not been interviewed, Mr. Keller responded that it had been an oversight. Ms. Portlock thereupon filed her complaint with the Commission.

The primary issue raised by this case is whether Respondents discriminated against Complainant on the basis of race or sex in failing to interview or hire her for the ISSE position, in violation of the Act. Should liability be found, an appropriate remedy must be fashioned. Finally, an issue has been raised as to whether Respondent School District is properly charged as the employer. Discussion of this issue is necessary, given the allegation of a Section 5(e) violation.

For the reasons which follow, we find that Respondents discriminated against Complainant on the basis of her race and sex, in violation of Section 5(a) of the Act.

II. SECTION 5(e) LIABILITY

As previously noted, Ms. Portlock originally alleged

that Section 5(a) of the Act had been violated. By amendment to the complaint she later added an allegation of Section 5(e) violation stemming from the acts originally cited.

Section 5(a) provides that it shall be unlawful for "any employer" to commit the acts enumerated therein. Liability under that section may thus be found only if the person or entity committing the discriminatory act has an employer-employee relationship with the complainant; this relationship may be present (as in a discriminatory wage scale situation) or potential (as in a refusal to hire situation).

Section 5(e) on the other hand makes it unlawful for "any person, whether or not an employer ... to aid, abet, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice ..." (emphasis added). No employer-employee relationship is necessary for liability under this section.

In its answer to the original complaint, Respondent stated at Paragraph C-3:

The respondents did not in fact hire anyone for the position [ISSE] in question. The Capitol Area Intermediate Unit hired a person who met all the requirements to fill the position. This person is not an employee of the Harrisburg School District but rather an employee of the Capitol Area Intermediate Unit as an Instructional Advisor for Special Education. The services of this individual are directed to the secondary level.

This statement was followed by a request that the Commission dismiss the complaint. The subsequent amendment of the complaint was apparently in response to this assertion that Respondent School District was not the employer of the successful ISSE

candidate.

The assertion can be easily resolved. In the case of Sweet v. Pennsylvania Labor Relations Board, 457 Pa. 456 (1974), the Supreme Court of Pennsylvania set out the test to be used in determining whether an employer-employee relationship exists. Holding that the source of an individual's salary is not dispositive, the Court stated that an employer-employee relationship will be found where:

- (1) A party may select the employee;
- (2) A party has the power to discharge the employee; and
- (3) A party has the right to direct what work shall be done and how it shall be done.

The record in this case clearly establishes that Respondent School District was correctly named as the employer of the person occupying the ISSE position, making it responsible for any discriminatory acts committed in connection with filling the position. While the ISSE salary may at one time have been paid by the Intermediate Unit, testimony established that Respondent Ronald Keller, a School District employee, performed numerous acts bringing him and the School District within the Sweet definition of an employer. Specifically, he testified that he decided not to hold interviews in 1978 for the ISSE position, that he considered Ms. Portlock as well as Ms. Edwards and Mr. Tommasini for the job and was responsible for selecting Mr. Tommasini (subject to School Board ratification). Likewise it was not controverted that Mr. Keller directed the day-to-day functions of the ISSE, and had the ability to effectively

terminate that person. We therefore find that the School District was correctly cited as the employer in this matter. This along with our finding of Section 5(a) liability makes further consideration of the Section 5(e) allegations unnecessary, and we consequently dismiss only so much of Ms. Portlock's complaint as alleges a Section 5(e) violation.

III. SECTION 5(a) LIABILITY

The United States Supreme Court in the case of McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), established the approach to be followed in analysis of "different treatment" cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. The Court there held that the charging party must bear the initial burden of making out a prima facie case by showing that:

1. She is a member of a protected class;
2. She applied for a job for which she was qualified;
3. Her application was rejected; and
4. The employer continued to seek other applicants.

If the charging party successfully carries this burden, the employer must come forward with some legitimate, non-discriminatory reasons for its actions. If it is able to do so, the charging party in order to prevail must establish that the proffered defense is actually a pretext for discrimination.

The Pennsylvania Supreme Court, interpreting the Act, further clarified the respective burdens of proof to be borne by the parties. After discussing with approval the requirements

of McDonnell-Douglas, the Court held that (if a prima facie case is established) the employer has the burden of proving that the complainant was not the best able and most competent candidate for the position. General Electric Corp. v. PHRC, 365 A.2d 649, 654 (1976).

Respondents rely on Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981) for clarification of their burden of proof. The Burdine Court held that the burden of persuasion at all times remains with the charging party. It described the employer's burden as one of coming forward with legitimate, non-discriminatory reasons for its actions. These must be clearly set forth and must be legally sufficient to justify a judgment for the employer.

To the extent of any conflict between these decisions, we believe ourselves to be governed by the holdings of Pennsylvania's highest court in its interpretations of the Act. Our initial inquiry must be whether Complainant has established a prima facie case.

A. Prima Facie Case

The parties do not contest that Ms. Portlock, a Black female, applied for the ISSE position and was rejected, nor that Mr. Tommasini, a White male, was selected.

The qualifications for the ISSE position, reviewed above, were:

1. A master's degree in Special Education;
2. Pennsylvania certification in at least one major discipline of Special Education;

3. Pennsylvania certification in Special Education;
4. Commitment to the education of exceptional children; and
5. The National Teacher's Examination. *

Complainant produced evidence at hearing which established that she possessed the necessary certifications and degrees, namely a Master's Degree in the Education of Exceptional Children and certification in Elementary, Supervisor of Special Education, and Emotionally Disturbed. She testified that she took the National Teacher's Examination in May of 1978, prior to the selection of the ISSE. Her commitment to the education of exceptional children has not been questioned.

We therefore find that Complainant has established a prima facie case. Under the principles enunciated above, we must next consider Respondents' proffered reason for the selection of Mr. Tommasini.

B. The Employer Issue

As previously noted, Respondents' initial defense was raised in its answer to the complaint where it was asserted that the Capitol Area Intermediate Unit and not the Harrisburg School District was the employer. This assertion has already been analyzed and rejected. No further comment is necessary beyond the obvious one that this assertion is not sufficient within the meaning of McDonnell-Douglas and General Electric, supra, to rebut the prima facie case established by Complainant.

* The National Teachers Examination was listed as a requirement on the vacancy notice, not the Position Guide.

C. The Certification Issue

In correspondence to the Commission dated June 13, 1979, and admitted as Complainant's Exhibit 13, James M. Francis, the School District Director of Personnel, indicated that three applications were submitted for the ISSE position, and further that "(o)ne of these applicants met all certification requirements for the position posted." While Mr. Keller testified at Public Hearing that all three applicants were in fact properly certified, the prior statement in Complainant's Exhibit 13 leads to consideration of a matter which has considerable bearing on the credibility of Respondents and thus on our analysis of their defenses.

Edward Zook, the Commission investigator assigned to this case, testified that Complainant's Exhibit 8, the application of Gail Edwards for the ISSE position, was produced in response to a Commission subpoena. Complainant's Exhibit 7, identical except for certain deletions, was given to Mr. Zook by Mr. Francis during an in-person visit in Mr. Francis' office. It is the deletions which concern us.

Respondent's counsel indicated at Public Hearing that Ms. Edwards' name and address were deleted when the document was first produced because Ms. Edwards' permission to reveal her name had not been obtained. Examination of the documents reveals that not only Ms. Edwards' name and address were deleted: in the space following "Areas of Certification", the words "Supervision of Sp. Ed." have been deleted (all but the lower half of the "p" in "Supervision") on Exhibit 8. As Respondent's

counsel admitted that Respondents were responsible for the deletion of Ms. Edwards' name and address, and in the absence of any other explanation, we can only conclude that Respondents also deleted from the application the words "Supervision of Sp. Ed.", in an attempt to buttress their position that only Mr. Tommasini possessed the necessary certifications. We are appalled by such unethical conduct, which has succeeded only in convincing us that Respondents believed they had something to hide and therefore made this cynical and clumsy attempt to mislead the Commission. We heartily condemn this action.

D. The Union Contract Issue

Ms. Portlock's complaint includes an allegation that she was not interviewed for the ISSE position. At Public Hearing she testified that Mr. Keller originally agreed to give her an interview but did not do so, and informed her after Mr. Tommasini's selection that he had not interviewed her through "an oversight". We find this testimony to be credible, particularly in light of Mr. Keller's statement on direct examination that it was possible he had told her it was an oversight, and the admission in the answer to the complaint's allegation that he told her interviews would be set up.

The parties strenuously contest whether the applicable union contract required that interviews be held. We find determination of this issue to be unnecessary, as we conclude that during the relevant time period, in 1978, both Complainant and Respondents believed that an interview was required. Our

task here is to determine why Respondents took the actions they did, not, except insofar as it clarifies their motives, whether those actions constituted a breach of the then-applicable union contract.

Our conclusion that Respondents believed in 1978 that an interview was required is based, in addition to the testimony referred to above, on a letter to Commissioner Leader from Mr. Francis dated June 13, 1979 and admitted as Complainant's Exhibit 13. The letter as previously noted indicates that only one applicant met all certification requirements for the ISSE position; it continues:

(Note: The applicable section of District regulations is as follows: "Any professional employee may apply for such vacancy. When more than two (2) applications are submitted by qualified professional employees, then at least two personal interviews shall be held.") (Emphasis and parentheses in original.)

While Mr. Francis, on direct examination, attempted to explain away the discrepancy between his 1979 letter and Respondent's present position (that no interviews were required) by a reference to secretarial inadvertence, he continued by stating that a mistake had been made in the letter. In view of this admission that a mistake of fact was made, and the candid comment by Respondent's counsel that it was only while preparing for the hearing that "we discovered" that the contract requiring interviews was not in effect when the incident occurred (N.T. 13), we conclude that Respondents believed in 1978 that interviews were mandatory. Their explanations for not interviewing Ms. Portlock (either that she did not possess the

necessary certifications or that Mr. Keller knew all three candidates so well that interviews would have been superfluous) fail to persuade us that they did not believe interviews were required.

Further, the testimony of Ms. Edwards and Mr. Tommasini showed that both were in fact interviewed for the ISSE position in 1977, though not by Mr. Keller, when the vacancy was first posted, making it even more incongruous that Complainant alone was never interviewed.

E. The Secondary Experience Requirement Issue

The requirements for the ISSE position, reviewed above, did not include a requirement of secondary experience. Nevertheless, Mr. Keller testified that a factor in his decision to hire Mr. Tommasini, though not a deciding factor, was Mr. Tommasini's secondary experience; both Ms. Portlock and Ms. Edwards had elementary experience. Ms. Portlock testified that in her interview with Respondent Turner, subsequent to Mr. Tommasini's selection, she was told that she had been rejected because she lacked secondary experience. We are not persuaded that this was in fact the reason for Mr. Tommasini's selection, for the following reasons:

First, Mr. Keller himself testified that the matter of secondary experience was not the deciding factor in Mr. Tommasini's selection. We note also that the posted requirements did not include secondary experience.

Finally, it is noteworthy that Mr. Keller testified on

cross examination that he himself had both elementary and secondary background. Mr. Tommasini's testimony indicated that in his initial two years in the ISSE position he dealt strictly with secondary matters while Mr. Keller handled elementary functions. More recently, after a change in his funding source, Mr. Tommasini dealt with both elementary and secondary matters, though his elementary experience prior to 1978 had included only involvement in an intramural flag football league. While not conclusive, this testimony tends to indicate a fair amount of flexibility in the allocation of functions between Mr. Keller and the ISSE, and to cast doubt on Respondents' position that Mr. Tommasini's secondary experience rendered him better qualified for the position.

F. The Subjective Criteria Issue

On direct examination, Mr. Keller described various considerations leading to the selection of Mr. Tommasini, concluding with the following:

Q. So, were there any other matters that you considered in making your decision?

A. Probably the biggest consideration from a personal standpoint, this is the type of a job that I have that requires a person that I can feel very comfortable with.

It is a job that requires working very closely with one another and thinking the same way about many critical issues.

While I don't doubt Mrs. Portlock's expertise in many areas, I don't feel that we would have made a compatible team.

I don't know how I can substantiate that other than that is a gut feeling that I had at that time. (N.T. 108, emphasis added)

This passage follows immediately after Mr. Keller's testimony that unidentified teachers related to him unspecified situations which led him to conclude that there were "difficulties" flowing from "differences of opinion between those teachers and Mrs. Portlock," leading him to conclude that she somehow posed "a threat to a classroom teacher." (N.T. 107) The vagueness and lack of specificity of this material forces us to consider it, along with Mr. Keller's "gut feeling", as application of subjective criteria to the selection process.

While application of subjective selection criteria is not, per se, discriminatory, numerous courts have articulated the dangers inherent in such decision making. See e.g. General Electric v. PHRC, *supra*, at 657, particularly cases cited in Footnote 14; Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dickerson v. United States Steel Corp., 439 F. Supp. 56 (19); Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5 Ca. 1976); EEOC v. E.I. duPont deNemours and Company, 445 F. Supp. 223 (D. Del., 1977); Rowe v. General Motors Corp., 4 EPD ¶7689 (N.D. Ga., 1972). As the Supreme Court indicated in Albemarle, supra., use of such criteria makes it impossible to ascertain whether the criteria actually used were job related. We therefore find that Mr. Keller's admitted reliance on his supposedly non-discriminatory "gut feeling" does not overcome the inference of discrimination raised by Complainant's establishment of a prima facie case. Given his clear statement that he could not further substantiate or articulate the bases

of these feelings, we are not persuaded by his assurance that race and sex did not influence him.

G. Legal Sufficiency of Respondents' Defenses

McDonnell-Douglas v. Green and General Electric v. PHRC, supra, articulate the standard against which Respondents' defenses must be assessed. To rebut Ms. Portlock's prima facie case, they must establish that she was not the best able and most qualified candidate for the ISSE position, by establishing that Mr. Tommasini was. We find that they have failed to do so, and that the inference of discrimination stands.

At the outset we note again that Respondents' credibility has been seriously damaged by the deletion of one of Ms. Edwards' credentials, already described. Against this background, Respondents' assertions that they were motivated solely by the (previously unmentioned) preference for secondary experience and the unarticulated (but supposedly non-discriminatory) factors contributing to Mr. Keller's gut feeling are simply not sufficient to meet their burden of proving that Mr. Tommasini was better qualified. Nor, in light of our finding that they believed an interview to be required, has their failure to interview her been adequately explained. We note also that no documentary evidence was introduced to support Mr. Tommasini's testimony that he possessed all necessary degrees and certifications, and that this testimony did not include mention of taking the National Teacher's Examination.

Respondents have not only failed to prove that Complainant was not the best able and most competent candidate; we find

that they have failed to clearly set forth legitimate, non-discriminatory reasons for their actions which are sufficient to justify a verdict in their favor.

Pennsylvania courts have repeatedly held that a finding of intentional discrimination may be inferred from the totality of factors involved in a challenged decision. As Pennsylvania's Supreme Court stated in PHRC v. Chester School District, 233 A.2d 290 at 298 (1967), "(o)ne intent on violating the law against discrimination cannot be expected to declare or announce his purpose." (Quoted with approval from Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954)). See also Slippery Rock State College v. PHRC, 314 A.2d 344 (1974); St. Andrews Development Corporation v. PHRC, 308 A.2d 623 (1973).

We therefore turn to consideration of appropriate relief.

IV. REMEDY

Section 9 of the Act provides in relevant part:

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring ... upgrading ... with or without back pay ... as, in the judgment of the Commission ... will effectuate the purposes of the Act ...

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make the Complainant whole by returning her to the position in which she

would have been, absent the discriminatory practice. Sustaining an award for lost wages in PHRC v. Transit Casualty Insurance Company, 340 A.2d 624 (1975), Commonwealth Court approved a method of calculation which, while not necessarily mathematically exact, provided "... a reasonable means to determine the amount [the Complainant] would probably have earned..." (340 A.2d at 630) absent the discriminatory act. In Goetz v. Norristown Area School District, 328 A.2d 579 (1975), the same Court entered an order directing the School District to pay the complainant the monies she would have received between her unlawful discharge and her reinstatement, along with interest of 6% per annum calculated from the due date of each unpaid installment of salary which would have accrued during the period between discharge and reinstatement.

We therefore find that Ms. Portlock is entitled to be offered the next vacant ISSE position, or position of comparable salary and responsibilities. We further find that she is entitled to receive the difference between her current salary and the ISSE salary, with 6% interest computed by the method approved in Goetz, until such time as such offer is made.

COMMONWEALTH OF PENNSYLVANIA

FEB 10 10 15 AM

EXECUTIVE OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION
HEADQUARTERS

LINDA PORTLOCK,

Complainant

v.

HARRISBURG SCHOOL DISTRICT,
BENJAMIN TURNER, SUPERINTENDENT,
RON KELLER, ACTING DIRECTOR FOR
SPECIAL EDUCATION,

Respondents

DOCKET NO. E-14678

As Amended

RECOMMENDATION OF HEARING COMMISSIONER

WHEREUPON, this 9th day of February, 1982,
in consideration of the entire record in this matter, including
the Complaint, Answer, Stipulations, Exhibits, Notes of Testi-
mony, and Briefs filed on behalf of the parties, the Hearing
Commissioner hereby adopts the attached as her proposed Findings
of Fact, Conclusions of Law, Opinion, and Final Order, and
recommends that the same be finally adopted and issued by the
Pennsylvania Human Relations Commission.

Doris M. Leader
DORIS M. LEADER
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA PORTLOCK, :
Complainant :
v. : DOCKET NO. E-14678
HARRISBURG SCHOOL DISTRICT, : As Amended
BENJAMIN TURNER, SUPERINTENDENT, :
RON KELLER, ACTING DIRECTOR FOR :
SPECIAL EDUCATION, :
Respondent :

COMMISSION'S DECISION AND
FINAL ORDER

AND NOW this 23nd day of February, 1982,
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 Commis-
sioner, and therefore

O R D E R S:

1. That Respondents cease and desist from discriminating
in any manner against any present or potential employee on the
basis of that person's race or sex;
2. That Respondents offer to Complainant the next
available ISSE position or position of comparable salary

responsibility, and promotional opportunity;

3. That until such time as a good faith offer is made pursuant to Item 2 above, Respondents pay to Complainant the difference between her present salary and the ISSE salary together with 6% interest computed annually.

The initial payment, covering the period between August, 1978, and the date of this Order, shall be made within thirty days of the date of this Order, by check payable to Linda M. Portlock and delivered in care of G. Thompson Bell, Esquire, Pennsylvania Human Relations Commission, 301 Muench Street, Harrisburg, Pennsylvania 17102.

Subsequent payments shall be made at regular intervals to be arranged by the parties. Should the parties be unable to agree on a payment schedule, they may petition this Commission for the limited purpose of setting such a schedule.

4. That for seniority purposes and all personnel related matters the Complainant's date of seniority shall be adjusted to reflect promotion as of August, 1978.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

Doris M. Leader
DORIS M. LEADER, VICE-CHAIRPERSON

ATTEST:

Elizabeth M. Scott
ELIZABETH M. SCOTT, SECRETARY