

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA STATE POLICE,

Petitioner :

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

v.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA HUMAN RELATIONS
COMMISSION AND PHYLLIS M.
SWEETING,

Respondents: NO. 1447 C.D. 1981

BEFORE:

HONORABLE JAMES CRUMLISH, JR., President Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE ROBERT W. WILLIAMS, JR., Judge
HONORABLE JOHN A. MacPHAIL, Judge

ARGUED: November 16, 1982

After being rejected as an applicant for admission to the Pennsylvania State Police Academy as a cadet on September 5, 1979, Phyllis M. Sweeting (Complainant), filed a complaint with the Human Relations Commission (Commission) alleging that she had been discriminated against by the Pennsylvania State Police (Employer) as a handicapped or disabled person in violation of Section 5(a) of the Pennsylvania Human Relations Act (Act).¹ Finding probable cause, the Commission ordered a hearing after efforts through conference, conciliation and persuasion were unsuccessful.

After a hearing before a panel, the Commission found that Employer had rejected Complainant because it regarded her as having an impairment which would interfere with her ability to breathe due to a medical condition diagnosed as allergic rhinitis for which she had been receiving treatment since 1973. In addition, the Commission found that Complainant would be able to perform the essential duties of a cadet despite her allergy. The Commission concluded that Complainant was a handicapped or disabled person within the meaning of the Act and that Employer had discriminated against her because of her non-job related handicap or disability. The Commission's order directed appropriate relief, the precise nature of which is a matter not at issue in this appeal.

Employer contends to this Court that: (1) it was denied due process of law at the Commission hearing; (2) the Commission erred when it concluded that Complainant was a handicapped or disabled person under its regulations; (3) the "regarded as" component of the Commission's regulations found at 16 Pa. Code §44.4² is an improper extension of the Act and (4) assuming for purposes of argument that Complainant is handicapped or disabled, her disability is job related.

Our scope of review in these matters is to determine whether the Commission's adjudication is in accordance with the law, whether its findings of fact in support of its conclusions are based upon substantial evidence and whether Employer's constitutional rights were violated. Slippery Rock State College v. Pennsylvania Human Relations Commission, 11 Pa. Commonwealth Ct. 501, 314 A.2d 344 (1974).

In the recent past; this Court has decided two cases³ involving discrimination by reason of handicap or disability, both of which are on appeal to our Supreme Court, and both of which arose prior to the effective date of the Commission's regulations found at 16 Pa. Code §§44.1-44.21. This is our first case, then, wherein the Commission's regulations are clearly applicable and wherein a handicap or disability has been determined to exist by reason of the language contained in those regulations.

Factual Background

It appears from the record that Complainant was referred by her family physician to Dr. Winter, a physician specializing in allergies, in 1973. Complainant at that time was in her early teens. Dr. Winter diagnosed her condition as allergic rhinitis due to sensitivity to ragweed pollen, house dust and molds. At that time, she was placed on a regimen of hyposensitization injections and symptomatic medication consisting of the drug drixoral, an antihistamine. She continued with that medication up to the time of her physical examination by Employer with the exception of a few years while she was in college when she did not receive the injections. At the time of the physical examination she was receiving the injections on a weekly basis. At the time of the hearing before the Commission on February 2, 1981 she was receiving two injections every two weeks. When Complainant filled out a medical history form as part of Employer's physical examination requirements she indicated that she had or had had asthma, hay fever and an allergy and that she had or had had nose and sinus trouble.

Employer's examining physician, Dr. Dutlinger, filed a notice of medical rejection of Complainant with Employer's Bureau of Personnel which stated that because of Complainant's allergic condition, which the physician found to be permanent and not correctable, Complainant did not conform to designated standards for

acceptance. Dr. Dutlinger also noted on the rejection form:

History of severe allergic condition
requiring weekly injection treatments.
Condition would probably be aggravated
by exposure [4] stables and horse
environment.

In his testimony before the Commission, Dr. Dutlinger said that Complainant was the first applicant he had rejected because of an allergic condition but he explained that he regarded Complainant as having a rather severe allergy which would be aggravated, in all probability, by her period of training as a cadet. Applicants previously admitted with allergic conditions, the doctor said, were admitted because their allergies seemed mild. He testified that 25 to 30 percent of all applicants have a history of an allergic disorder of some kind.

After the Complainant was rejected, Dr. Winter sent a letter to Employer confirming that Complainant was in his care, that she was on medication for allergic rhinitis, that she no longer encountered drowsiness from taking the antihistamine, that she is unable to breathe freely through her nose, that her condition was not permanent and was correctable and that, in his opinion, Complainant's condition would not be aggravated by exposure to stables and horses. In his testimony before the Commission, Dr. Winter said Complainant's condition was permanent and was correctable to a certain extent by medication. He also testified that

Complainant was not disabled or limited in her ability to work and that she had no impairment of life functions by reason of her allergy. He further testified that there were no duties associated with the work of a Pennsylvania State Police Officer that she could not perform because of her allergies.

After reviewing Dr. Winter's letter, Dr. Dutlinger reaffirmed his previous medical rejection of Complainant.

Complainant testified that she was not impaired by reason of her allergy and medication in any of her physical activities, neither those related to recreation nor those related to previous and subsequent employment,⁵ that there were no restrictions in her life style, that she had never been hospitalized for her allergy, that she can go up to 8 weeks without injections and that she had never been rejected for employment for physical reasons.

Employer's witness, Dr. Trautlein, professor of an ear, eye, nose and throat clinic at Pennsylvania State University, who did not examine Complainant but who evaluated her on the basis of testimony and records, stated that Complainant was in the top ten percent of allergy sufferers and that he would concur with Dr. Dutlinger's conclusions.

Sgt. Sparks of the Pennsylvania State Police and Mr. Wagner an Industrial Psychologist testified for Employer concerning the

physical activities cadets engage in as a part of their training.

Constitutional Challenge

Employer contends that it has been denied due process because the prosecutorial and adjudicatory functions were impermissibly commingled by virtue of the fact that one assistant general counsel of the Commission presented the case for Complainant and another assistant general counsel of the Commission advised the hearing panel. Employer alerted the Commission well in advance of the hearing of its concerns in this regard but the Commission refused to change its procedures.

The same objection was raised and disposed of contrary to the Employer's position in Pennsylvania Human Relations Commission v. Thorp; 25 Pa. Commonwealth Ct. 295, 361 A.2d 497 (1976).

Employer argues that that case is distinguishable from the one now before us because in Thorp there was virtually no dispute as to the facts whereas here there is a definite conflict in the expert opinion testimony. Noting that Judge Blatt, writing for the majority in Thorp, stated that the Commission's hearing practice came "perilously close" to a constitutional violation, Employer contends that the facts in this case take it over the line into the realm of at least the appearance of possible prejudice.

Our Court has examined this area of the law in other cases and has concluded that as long as the two functions are separate in

fact, that is, where both counsel although related to the same agency operate independently of one another during the course of the hearing, minimum due process is satisfied. Togans v. State Civil Service Commission, ___ Pa. Commonwealth Ct. ___, 452 A.2d 576 (1982) and cases cited therein. In the instant case, we are unable to conclude that there was even the appearance of impropriety in the conduct of counsel and that our decision in Thorp controls.

Application of Commission Regulations

Inasmuch as the key to this case is controlled by the Commission's regulations, we must first determine whether the regulations are an improper extension of the Act. As we have noted in Philadelphia Electric Co., the Legislature did not define "handicap" or "disability" in the Act. The Legislature did, however, give to the Commission broad rule-making power to effectuate the policies and provisions of the Act.⁶ When the Commission adopted its regulations defining those key words in the statute, they were engaged in legislative, not interpretative, rule-making. When we review such a regulation, we are not at liberty to substitute our own judgment for that of administrative officers who have kept within the bounds of their administrative powers. Uniontown Area School District v. Pennsylvania Human Relations Commission, 455 Pa. 52, 313 A.2d 156 (1973). Unless we find the regulations to be so at odds with fundamental principles

of law as to constitute whim or fancy, we may not contravene the promulgated regulations. Id.

In the instant case, the Commission not only tracked the Act but followed verbatim the language used by Congress in the Rehabilitation Act of 1973, as amended, 29 U.S.C.A. §706(7) (West Supp. 1976-1981) in defining a handicapped or disabled person.⁷ We, consequently, cannot say that the Commission's regulations are an improper extension of the law or that they are at odds with fundamental principles of law.

Complainant bears the initial burden of establishing a prima facie case of unlawful discrimination. General Electric Corp. v. Pennsylvania Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976). She meets this burden by showing that she is a member of a protected minority, that she applied for a job for which she was qualified and that the employer continued to seek other applicants of equal qualifications. Once she establishes those elements, the burden then shifts to the employer to show that the rejection of the complainant was not in violation of the Act. Id.

Complainant contended and the Commission found that her physical impairment did not substantially limit her major life functions. There is substantial evidence in the record to support that finding. Therefore, Complainant does not fall within sub-clauses (A) and (3) of the Commission's definition of a handicapped

or disabled person.⁸

Complainant contended and the Commission found that she was, however, regarded by Employer as having a physical impairment which substantially limited one or more of her major life activities under sub-clause (C) of the Commission's definition.⁹ Employer specifically rejected Complainant because of a permanent, non-correctable allergy condition for which Complainant received weekly injections.¹⁰ The Commission found that that condition did not substantially limit Complainant's major life activities but that she was treated by Employer as having such a limitation. Those findings, according to the Commission, brought Employer within clause (ii) sub-clause (D)¹¹ of the Commission's definition of a handicapped or disabled person. Again, the Commission's findings in this regard are supported by substantial evidence in the record although there is other evidence to the contrary.

On the basis of the foregoing, we must affirm the Commission's conclusion that Complainant was regarded by Employer as a handicapped person.¹²

Employer urges that if we dismiss its other arguments, we must, nevertheless, hold that Complainant's physical impairment is job-related. The medical rejection did state that Complainant's condition would probably be aggravated by exposure to stables and horse environment. Employer states that the damage to Complainant's

health was a significant factor in refusing to accept Complainant as a cadet.

The Commission's regulations define a non-job related handicap or disability by stating, inter alia, that:

A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.

16 Pa. Code §44.4. The regulations also provide that:

An employer shall not . . . refuse to hire . . . an . . . applicant because of a present handicap or disability which is not job-related but which may worsen and become job-related . . . provided that this subsection shall not be construed so as to impose an undue hardship on the employer.

16 Pa. Code §44.15.

Employer argues that the testimony of its witnesses concerning the effect upon Complainant's condition of her cadet training and her ultimate capability to perform the duties of a State Police officer is entitled to more weight than the evidence presented by the Commission to the contrary. Employer recognizes that it is the Commission's function to resolve conflicts in the evidence and to decide where the weight of the evidence must be given. The Employer's evidence was that Complainant's health probably would be affected by cadet training and that perhaps she

would be unable to carry out efficiently the duties assigned to her. Dr. Winter testified that Complainant would not be affected by horses or stable conditions, although he had not tested her for that exposure. He based his opinion on the fact that Complainant had no history of those conditions affecting her allergies. He testified, also, as we have noted, that Complainant's allergic condition would not prevent her from performing any of the duties of a Pennsylvania State Police Officer. The Commission weighed the testimony on both sides of this issue and concluded that Dr. Winter's testimony was sufficient to offset that of Dr. Dutlinger and Dr. Trautlein. As we have said, that was the Commission's proper function and we will not disturb it.

We conclude that Employer's evidence falls far short of proving a demonstrable or serious threat of harm to Complainant; nor has Employer shown that it will suffer undue hardship if Complainant is employed.

Summary

It is this Court's conclusion that there is substantial evidence in the record of this case to support the Commission's findings of fact and we are also of the opinion that the Commission's conclusions that (1) Complainant is a handicapped person within the purview of the Commission's regulations which have the effect of law and (2) Complainant's handicap is non-job related, are in accordance

with the law.

The Commission's order, accordingly, must be affirmed.

John A. MacPhail

John A. MacPhail, Judge

FOOTNOTES

§955(a).¹ Act of October 27, 1955, P.L. 744, as amended, 43 P.S.

follows:² 16 Pa. Code §44.4 provides, in pertinent part, as

Handicapped or disabled person -- Includes the following:

(i) A person who:

(A) has a physical or mental impairment which substantially limits one or more major life activities;

(B) has a record of such an impairment; or

(C) is regarded as having such an impairment.

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

(A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

(B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(C) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(D) "is regarded as having an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.

(Emphasis added.)

³National Railroad Passenger Corp. v. Pennsylvania Human Relations Commission, ___ Pa. Commonwealth Ct. ___, 452 A.2d 301 (1982) and Philadelphia Electric Co. v. Pennsylvania Human Relations Commission, ___ Pa. Commonwealth Ct. ___, 448 A.2d 701 (1982).

⁴As part of a cadet's training, a 12 hour course in horsemanship is required including care of the animals and the facilities in which they are housed.

⁵Although Complainant failed the strength and agility test for admission to the Academy in March of 1978, she did pass it on September 5, 1979.

⁶Section 7 of the Act, 43 P.S. §957.

⁷See 16 Pa. Code §44.4 definition of "handicapped or disabled person", subsections (i)(A) - (C).

⁸See note 2.

⁹See note 2.

¹⁰ Although Employer contends in its brief and presented testimonial evidence to the Commission panel that Complainant also suffered from asthma; a fact which influenced the medical rejection, the rejection itself does not mention an asthmatic condition as a basis for rejection.

¹¹See note 2.

¹² This Court is well aware of the long range ramifications of such a result. If an Employer rejects an applicant for medical reasons, that act under the Commission's regulations is an impairment, per se, of a major life activity, i.e. employment. Unless the employer, therefore, can show that the physical condition is job-related, a burden not easy to meet, see National Railroad Passenger Corp., the employer faces the probability of defending a complaint under the Act. While we are well aware of the laudable purpose of the Act to foster the full employment of all of our citizens regardless of their race, color, religious creed, ancestry, handicap or disability, Section 1(b) of the Act, 43 P.S. §952(b), we do not believe that an employer's rejection of an applicant based upon a recommendation of its medical expert which has some basis in fact, is discrimination as that term is understood and has been applied to conditions of race, color, religious creed or ancestry. We are especially conscious of the need for some employer discretion in such matters where the employer, as here, is responsible for public safety and welfare.

We feel bound, nevertheless, to interpret the statute liberally because of its remedial nature and to enforce the Commission's regulations since they are legislative in nature.

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COMMISSION AND PHYLLIS M.
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Respondents

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 1447 C.D. 1981

ORDER

The order of the Pennsylvania Human Relations Commission
dated May 18, 1981 is affirmed.

DATE: March 11, 1983

John A. MacPhail
John A. MacPhail, Judge

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

PHYLLIS M. SWEETING, Complainant

v.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE
BUREAU OF TRAINING AND EDUCATION and BUREAU OF PERSONNEL, Respondents**

DOCKET NO. E-16970

FINDINGS OF FACT

1. Complainant is an adult female named Phyllis Sweeting who resides at Box 507 Freedom Road, Williamsport, Pennsylvania 17011. (S.F. 1)
2. Respondents are the Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Training and Education and Bureau of Personnel with its headquarters at 1800 Elmerton Avenue, Harrisburg, Pennsylvania 17109. (S.F. 2)
3. On November 7, 1979, Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission (Commission) alleging in relevant part that Respondent violated Section 5(a) of the Pennsylvania Human Relations Act (Act), Act of October 27, 1955 P.L. 744, as amended, 43 P.S. §955 et seq., in that Respondent refused to hire her because of her non-job related handicap disability, allergic rhinitis. (S.F. 3)
4. After an investigation of the complaint was conducted, probable cause was found to credit the allegations. (S. F. 6)
5. After a determination of probable cause was made, the Commission attempted to eliminate the alleged discriminatory practice through conference, conciliation and persuasion but were unsuccessful in their efforts. (S.F. 7)
6. The Complainant originally applied for the position of State Police Cadet on October 8, 1977. (S.F. 8)
7. In order to be accepted as a State Police Cadet, all candidates are required to pass in sequence:
 - a. a preliminary application;
 - b. a written examination administered by the Pennsylvania Civil Service Commission;
 - c. a strength and agility test;
 - d. a physical examination by the State Police Medical Officer and prior examination by the applicant's doctor;
 - e. an oral interview; ,and
 - f. a background investigation. (S.F. 9)
8. Complainant met all the preliminary application requirements at the initial screening. (S.F. 10)
9. Complainant passed the written examination on December 17, 1977. (S.F. 11)
10. Complainant's physician Dr. Rogers performed a preliminary examination of Complainant on February 22, 1978. (S.F. 9)
11. Complainant failed the Strength and Agility Test on March 14, 1978 and therefore was disqualified. (S.F. 13)
12. Complainant reapplied for the position of State Police Cadet on December 21, 1978. (S.F. 14)
13. Complainant took and passed the written examination on February 10, 1979. (S.F. 15)

14. The Complainant's physician, Dr. Coleman Funk, performed a preliminary physical examination of her on August 23, 1979. (S.F. 16)
15. Complainant took and passed the Strength and Agility Test on September 5, 1979 (S.F. 17)
16. After administering a physical examination to the Complainant, the State Police Medical Officer, Dr. Robert P. Dutlinger, disqualified the Complainant for the position of police cadet because of her allergy. (S.F.18)
17. Dr. Dutlinger gave the reason for Complainant's rejection as "History of severe allergic condition requiring weekly injection treatments. Condition would probably be aggravated by exposure to stables and horse environment." (Exh. C-4)
18. By correspondence dated September 5, 1979, Complainant's allergist, Dr. John C. Winter, stated that he did not agree with Dr. Dutlinger's analysis .of Complainant. (S.F. 19)
19. By correspondence dated September 27, 1979, Respondent's attorney, John L. Heaton, advised Complainant's attorney, Germaine Ingram, that Dr. Dutlinger "reaffirmed his opinion" regarding Complainant's condition. (S.F. 20)
20. The Respondent permits individuals who are sensitive to dust and pollens to wear a protective respiratory mask in the stable area if such a decision is recommended by its Medical Officer. (S.F. 21)
21. The Complainant has allergic rhinitis and has been receiving treatment from a specialist since 1973. (N.T. p. 64)
22. At the present time, Complainant receives injections once a month from her specialist. (N.T. p. 32)
23. Complainant's allergy has never prevented her from participating in any physical activities. (N.T. pp. 35-36)
24. Respondent regarded Complainant as having an impairment which would interfere with her ability to breathe. (N.T. p. 146)
25. During Complainant's interview, no one questioned her as to her ability to perform the essential duties of the position for which she was applying. (N.T. p. 35)
26. Respondent did not consult the Complainant's allergist before making its decision to reject her. (N.T. p.. 139)
27. The Respondent did not administer tests to the Complainant which would have indicated what allergies affected her and to what degree they affected her. (N.T.. p.. 140)
28. Complainant would be able to perform the essential duties of a Pennsylvania State Police Cadet despite her allergy. (N..T. p. 69)
29. There is a 75% probability that Complainant would have been hired if she had passed the physical examination. (N.T. p. 227)
30. Complainant made immediate and substantial efforts to find employment after her rejection by Respondent. (N.T. pp. 213-215)
31. Had Complainant not been disqualified by the physical examination, she would have been admitted to the Cadet Class of October 11, 1979. (N..T.. p. 224)
32. The bi-weekly salary of a Cadet beginning training on October 11, 1979 was \$436.00.. Upon promotion to the rank of Trooper on March 27, 1980, the salary increased to \$516..00 and remained there through December 31, 1980. (Exh. C-7)
33. Complainant's earnings were \$8,093..33 for the period from October 1979 to January 29, 1981.

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

PHYLLIS M. SWEETING, Complainant

v.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE
BUREAU OF TRAINING AND EDUCATION and BUREAU OF PERSONNEL, Respondents**

DOCKET NO. E-16970

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") has jurisdiction over the parties and subject matter of this complaint.
2. The parties and the Commission have fully complied with all procedural prerequisites to a Public Hearing in this matter.
3. Complainant Phyllis M. Sweeting is a handicapped or disabled person within the meaning of Section 5 of the Act in that Respondent regarded her as having an impairment.
4. Complainant's handicap was non-job related in that it would not substantially interfere with her ability to perform the job.
5. Respondent unlawfully discriminated against Complainant by refusing to hire her for the position of a State Police Cadet because of her non-job related handicap or disability, allergic rhinitis.
6. A prevailing Complainant in an action alleging discriminatory refusal to hire is entitled to an award of back pay with interest and to an order that Complainant be hired with retroactive seniority.

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

PHYLLIS M. SWEETING, Complainant

v.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE
BUREAU OF TRAINING AND EDUCATION and BUREAU OF PERSONNEL, Respondents**

DOCKET NO. E-16970

OPINION

I. HISTORY OF THE CASE

This case arises from a complaint filed by Ms. Phyllis M. Sweeting ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Commonwealth of Pennsylvania Pennsylvania State Police Bureau of Training and Education and Bureau of Personnel ("Respondent") on November 7, 1979. The essential facts surrounding this case are not in dispute.

On October 8, 1977, Complainant originally applied for a position as a State Police Cadet but was rejected for the position after she failed the Strength and Agility test. She reapplied to be a Cadet on December 21, 1978. In order to become a Cadet, an applicant is required to pass in sequence:

- a) a preliminary application;
- b) a written examination; administered by the Pennsylvania Civil Service Commission;
- c) a Strength and Agility test;
- d) a physical examination by the State Police Medical Officer and prior examination by the applicant's doctor;
- e) an oral interview; and
- f) a background investigation.

From December 21, 1979 to September 5, 1979, Complainant took and successfully passed the preliminary application, the written examination and the Strength and Agility test. However, Complainant was rejected after Respondents' medical officer, Dr. Robert P. Dutlinger, performed a physical examination of her on September 5, 1979. The reason given for Complainant's rejection was: "History of severe allergic condition requiring weekly injection treatments. Condition would probably be aggravated by exposure to stables and horse environment."

After this complaint was filed, Commission staff conducted an investigation to determine whether probable cause existed to credit the allegations of the complaint. After probable cause was found to credit the allegations, the attempts made to adjust the complaint through conference, conciliation and persuasion were unsuccessful. Consequently, a public hearing was convened before Commissioner Everett E. Smith on February 2, 1981. Both parties waived the requirement that three (3) Commissioners preside at the hearing.

II. LIABILITY

After carefully reviewing the record in this case and in consideration of the briefs submitted by the attorneys for the Complainant and Respondents, we find that Respondents unlawfully discriminated against Complainant 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. §955 et seq. by refusing to hire her for the position of a State Police Cadet because of her non-job related handicap or disability, allergic rhinitis.

- A. Complainant satisfied her burden by showing that she was a "handicapped or disabled" person who was qualified for the position of State Police Cadet and was rejected by Respondent because of a non-job related handicap or disability.

In an action brought pursuant to the Pennsylvania Human Relations Act, the Complainant carries the initial burden of establishing a prima facie case. General Electric Corp. v. Pennsylvania Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976). A prima facie case is established by showing that Complainant is a member of a protected minority, that she applied for a job for which she was qualified, that her application was rejected and that the employer continued to seek other applicants of equal qualifications. Once a Complainant establishes these elements, the burden then shifts to the employer to justify his employee selections on the basis of job-related criteria. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973).

The evidence shows that Complainant applied for the position of a State Police Cadet on December 21, 1978; that she passed the written examination on February 10, 1979, passed the Strength and Agility Test on September 5, 1979 and was disqualified by the Respondents because of her condition, allergic rhinitis. The only question remaining is whether Complainant is a member of the class protected by the handicap and disability provisions of the Act.

The definition of a handicapped or disabled person is not found anywhere in the Act but is contained in regulations adopted by the Commission pursuant to §7(d) of the Act, 43 P.S. §957(d). A handicapped or disabled person is defined at 16 Pa. Code 44.4 as:

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

A physical or mental impairment *is* defined as:

A physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive digestive; genitourinary; hemic and lymphatic; skin, and endocrine, or mental or psychological disorder, such as mental illness, and, specific learning disabilities. 44.4 (d) (ii) (A)

Major life activities are defined as:

Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 44.4 (d) (ii) (B)

The term "has a record of such an impairment" is defined as:

Has a history of, or has been misclassified as having a "mental or physical impairment that substantially limits one or more major life activities. 44.4 (d) (ii) (C)

The term "is regarded as having an impairment" is defined as:

Has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation, has a physical or "mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or has none of the impairments defined in clause (i) (A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment. 44.4 (d) (ii) (D)

Complainant is a handicapped or disabled individual within the meaning of the Act because she was "regarded as having an impairment" by the Respondent employer. All of the evidence in the case suggested that allergic rhinitis is a physiological condition which affects the respiratory system or the ability to breathe normally through the nose. This brings it within the definition of a physical impairment. However, it is our belief that this condition does not substantially limit Ms. Sweeting's major life activities. Ms. Sweeting testified that her allergy has never restricted her participation in any type of activity. (N.T. p. 55). In addition, Complainant's allergist, Dr. Winters testified that Ms. Sweeting's allergy would not limit her major life activities (N.T. p. 103). The condition was treated by Respondent as constituting a limitation on Complainant's major life activities.

Respondent's expert, Dr. Trautlein, testified that based on the treatment Complainant was receiving, she was probably in the upper ten (10) percent of the general population who are troubled by allergies (N.T. p. 183). He also testified that if one took 100 people who suffered from allergies, ten (10) percent of them would have clinical asthma, *i.e.* they will identify themselves to other people that they have asthma (N.T. p. 184). He stated that if you take those same 100 people and challenge them with inhalation of very analgetic materials, thirty (30) percent of them could be induced to a full blown asthmatic attack (N.T. p. 184). He also testified that virtually all of the people who are on long-term immunization can be shown to have some degree of asthma (N.T. pp. 184-185). Thus, it was inferred that there was a great probability that Complainant had asthma.

Dr. Trautlein further testified that a person with asthma would have serious difficulty completing the strenuous exercise program required of state police cadets (N.T. p. 197). He specifically stated that a person with asthma who ran seven and a half (7 1/2) minute miles for three miles would probably experience a tightness in his or her chest in six (6) to eight (8) minutes, shortness of breath, wheezing and perhaps even some cyanosis of the lips. (N.T. p. 187)

There can be no question that the Respondents regarded Complainant as having an impairment which would prevent her from performing the duties of a state police cadet. The inference from Dr. Trautlein's testimony was that Complainant probably had asthma and that an asthmatic person would not be able to compete in the activities required of a cadet. Moreover, Dr. Dutlinger's response to three (3) questions indicated that he regarded Complainant as impaired:

Q. And did you feel that that would be a fairly severe impairment?
A. Yes. (N.T. p. 147)...

Chairperson Smith: Yes, I have a question, Dr. Dutlinger. Following the examination, did you feel that she had a disability that would prevent her from taking the job, serving as a trainee and performing the job of a State Policeman?

The Witness: Yes. I felt that she had a medical condition which would seriously affect her ability to complete the course of training.

Chairperson Smith: In what way would you feel it would limit her in this job?

The Witness: I felt that she would be handicapped by the severe allergic condition which she had... (N.T. p. 148)

B. Respondents did not meet its burden of showing that Complainant's disability was job related.

Since the Complainant established a prima facie case, it was incumbent upon the Respondents to show that Complainant's handicap was job-related. The Respondents failed to meet that burden. Section 4(p) of the Act defines a "non-job related handicap or disability as:

Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in...

Complainant testified that her allergy does not prevent her from leading an active life. She testified to her participation in numerous physical activities during her four years in college. (N.T. pp. 38-39). In fact, there was a period of one year while Complainant was in college when she was not receiving any shots for her allergy. (N.T. p. 33). Yet, she was able to continue her activities normally. (N.T. p. 33).

On the other hand, all of Respondents' evidence relating to Complainant's ability to perform the essential functions of the job was speculative. Dr. Trautlein testified that Complainant probably had asthma and that '~ asthmatics would not be able' to endure a strenuous physical fitness program. Dr. Dutlinger testified that he rejected Complainant because she had a severe allergy and her condition would probably be aggravated by her period of training at the Police Academy. There was no specific evidence to show that Complainant even had asthma. Dr. Trautlein did not examine Complainant and Dr. Dutlinger only examined her for fifteen (15) minutes.

Section 44.15 of the Handicap regulations provides in part:

(a) An employer shall not terminate, subject to different terms or conditions of employment, or refuse to hire or promote an employee or applicant because of a present handicap or disability which is not job-related, but which may worsen and become job-related.

Respondents refused to hire Ms. Sweeting because she had a severe allergic condition which increased the likelihood that she had asthma and because this condition would probably be aggravated by exposure to the stable environment. Since there was no evidence to show that she had asthma or that she would not be

able to perform the job because of her allergy, this amounts to a refusal to hire because of a condition which might worsen. This, refusal is a violation of Section 44.15 of the Regulations. Also, even if Complainant had asthma and her allergy would be aggravated by exposure to horses, the Respondents did not prove that the functions which Complainant might not be able to do were essential.

In conclusion, Ms. Sweeting has a handicap or disability within the meaning of the "Act because Respondents regarded her as impaired. She was qualified for the position of a State Police Cadet. The Respondents refused to hire her because of a non-job related handicap or disability which did not interfere with her ability to perform the essential functions of the job and thereby discriminated against her in violation of Section 5(a) of the Act.

III. THE HEARING PROCEDURE UTILIZED BY THE COMMISSION DID NOT DENY RESPONDENTS DUE PROCESS OF LAW

The Respondents have raised a procedural due process challenge to the hearing held on February 2, 1981. The presentation of the case in support of the Complaint was by an Assistant General Counsel of the Commission from the Harrisburg Regional Office. Another Assistant General Counsel of the Commission from the Philadelphia Regional Office served as a legal advisor to the hearing panel. This procedure is used in most of the hearings held by the Commission. The Respondents contend that this commingling of prosecutorial and adjudicatory functions was a violation of due process.

This issue was specifically addressed in Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission v. Thorp, Reed and Armstrong, 25 Pa. Cmwlt. 295, 361 A.2d 497 (1976). In that case, the court held that the practice of allowing one attorney from the Commission to present the charges and another attorney from the Commission to advise the hearing panel was not an impermissible commingling of functions. A significant factor in its decision was that the facts of the case were largely undisputed. The court stated that the fact finding process was the critical stage for the protection of due process. Since the issues were mostly legal determinations, a reviewing court could determine whether the legal conclusions were affected by bias.

Similarly, in this case the facts were largely undisputed. Complainant and Respondents stipulated to the essential facts in the case. Therefore, we find that the hearing procedure was not a violation of due process.

IV. REMEDY

Section 9 of the Act provides in part:

If upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in...any unlawful discriminatory practice...any unlawful discriminatory practice...the Commission shall state its findings of fact, and shall issue...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... with or without back pay...as, in the judgment of the Commission, will effectuate the purposes of this Act...

It is the position of this Commission that the purposes of the Act can only be effectuated by restoring Complainant to the place she would have been in if the discriminatory act had not occurred. This can only be accomplished by an order to Respondents to consider Complainant for the next Cadet class. This means that Complainant should be processed through the next steps of the application process which are the oral interview and background investigation. If Complainant successfully completes these steps and is admitted to the next Cadet class, she should be given a retroactive seniority date of October 11, 1979 and back pay for what she would have earned as a cadet from October 11, 1979 to the date she enters the cadet class minus what she actually earned. The amount shall be as specified in the order which follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS M. SWEETING, Complainant

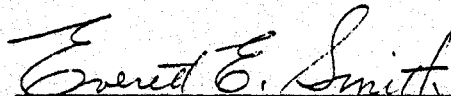
v.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE
BUREAU OF TRAINING AND EDUCATION and BUREAU OF PERSONNEL, Respondents

DOCKET NO. E-16970

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, it is the view of the hearing panel that Respondent refused to hire complainant for a position as State Police Cadet due to a non-job related handicap or disability in violation of §5(a) of the Pennsylvania Human Relations Act. Accordingly, it is the Panel's recommendation that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted by the full Pennsylvania Human Relations Commission.



Everett E. Smith, Panel Chairperson

April 13, 1981
Date