

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD BIONDO,
Complainant

v.

CITY OF PITTSBURGH,
DEPARTMENT OF PERSONNEL and
CIVIL SERVICE COMMISSION,
Respondent

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DOCKET NO. E-25813

JOINT STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant in this case is Richard Biondo (hereinafter "Biondo"). (SF 1, 2.)

2. The Respondent is the City of Pittsburgh, Department of Personnel and Civil Service Commission (hereinafter "the City"). (SF 2.)

3. On April 7, 1981, Biondo applied to be a police officer with the City. (SF 5; CE 1.)

4. The City's hiring procedures for the position of police officer includes several distinct steps. (SF 4, 7; JE 3.)

5. For the position of police officer, the final step in the City's hiring practice entailed the process of a medical exam and evaluation. (SF 7.)

6. In effect, the City physician, Dr. Donna Swan (hereinafter "Dr. Swan"), testified that the City initially sends an employee candidate to an outside medical panel to obtain a comprehensive medical evaluation. (NT 34, 40-41, 67.)

* The foregoing "Joint Stipulations of Fact" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

NT Notes of Testimony
CE Complainant's Exhibit
RE Respondent's Exhibit
JE Joint Exhibit
SF Joint Stipulations of Fact

7. After the outside evaluation was completed, a report would be forwarded to Dr. Swan for her review of the reported medical evaluation. (NT 34, 68.)

8. In 1983, City rules included a variety of physical standards (NT 31; JE 10.)

9. Section 12 B(10) of the City's rules listed the following physical standard: "SPINE: Evidence of serious back injury, disc, or back pathology, abnormal curvature, Pott's disease, ankylosis, osteomyelitis, or other gross abnormalities will be disqualifying." (JE 10.)

10. On May 10, 1983, Biondo was evaluated by an outside medical panel of the City's choosing, Central Medical Health Services. (SF 9.)

11. On May 10, 1983, Biondo also completed a medical history form on which he indicated "no" to the question, have you ever had or have now, back trouble? (JE 9.)

12. A part of Central Medical Health Services' evaluation entailed back x-rays and a report thereon. (NT 36, 64; JE 9.)

13. Dr. Joseph Mazzei (hereinafter "Dr. Mazzei"), a physician at Central Medical Health Services, generated a letter to the City dated May 19, 1983, relative to Dr. Mazzei's examination of Biondo's back. (JE 9.)

14. Dr. Mazzei's May 19, 1983 letter commented on Biondo's lumbar spine as follows: "The alignment is satisfactory. Minimal bony lipping is seen involving the anterosuperior margin of the body of T-12, which is indicative of degenerative changes, minimal in degree. No abnormality of the lumbar spine can be demonstrated." (JE 9.)

15. After Dr. Swan reviewed Dr. Mazzei's May 19, 1983 letter, she noted the word "fail" on the letter and instructed the City's nurse to communicate to Biondo that he was being considered medically disqualified. (NT 37, 115.)

16. Nurse Ferguson called Biondo to tell him that he was disqualified and that a letter would follow. (NT 115.)

17. By letter dated May 26, 1983, signed by the City's Chief Examiner, Michele Cunko (hereinafter "Cunko") and Ferguson, Biondo received written notice that the City had determined that he did not meet their physical standards. (JE 4.)

18. This notice also informed Biondo that he could consult his own doctor, and if a written medical report was received which indicated the "disqualifying condition" does not exist, Biondo may be eligible for employment. (JE 4.)

19. Biondo retrieved the x-rays from Dr. Mazzei and took them to Dr. E. Richard Prostko (hereinafter "Dr. Prostko"), a board certified neurological surgeon who had affiliation with six area hospitals and was also a professor of neurological surgery. (NT 18, 19, 116.)

20. Following Dr. Prostko's examination of Biondo and his x-rays, Dr. Prostko formed the opinion that Biondo could handle the stress and physical exertion of the position of police officer. (NT 21.)

21. In a letter dated June 7, 1983 to Cunko, Dr. Prostko indicated he had examined Biondo and stated the following findings:

Physical examination in my office revealed no specific focal motor, sensory or reflex abnormalities in the lower extremities. Lumbar range of motion was normal. Paraspinal muscles were normal. Review of the patient's recent x-rays, which were obtained, show

no significant abnormality. The patient has a very minimal and entirely normal amount of facet sclerosis over the lower lumbar spine which is consistent with having achieved the age of 44.

In addition he, approximately one year ago, underwent a total spine series along with tomography of the thoracic spine which revealed no significant abnormalities at the Veterans Administration Hospital in Pittsburgh. (JE 9.)

22. Following Dr. Swan's review of Dr. Prostko's letter of June 7, 1983, Dr. Swan made the following notation on Dr. Prostko's letter, "fail - degenerative changes are a failure by current standards." (JE 9.)

23. Dr. Swan testified that she had realized that with age a certain amount of degenerative or arthritic changes occur. (NT 36.)

24. In addition to submitting Dr. Prostko's June 7, 1983 letter, Biondo also provided the City with several medical records from a VA hospital where he had gone approximately one year earlier after a slight back injury at work. (NT 44; RE 1, 2 and 3.)

25. In pertinent part, a Veterans Administration diagnostic radiology report dated October 5, 1982 indicated:

THORACIC SPINE. Minimal anterior wedging T-8 and 9, compatible with healed fracture vertebral body. Minimal spondylosis. No evidence of acute fracture. No other abnormality.
LUMBAR SPINE. Normal. PELVIS. Normal. (JE 1.)

26. A diagnostic radiology report dated October 26, 1982, indicated, "TOMOGRAM THORACIC SPINE. Tomograms of lower T-spine in lateral projection at 5 m.m intervals [sic]. No evidence of fracture, lytic lesion or blastic lesion. Opinion: no significant abnormality." (JE 2.)

27. Biondo's slight back injury caused some back pain which did not require Biondo to miss work and was not considered by Biondo to constitute "back trouble." (NT 119-120.)

28. Cunko, by letter dated July 8, 1983, notified Biondo that the City had reviewed the additional medical information Biondo had submitted and still maintained that Biondo did not meet the required medical standards. (JE 6.)

29. Dr. Swan had concluded that Biondo had a physiological condition which affected his musculoskeletal system, and she ultimately recommended his rejection under the City's physical standard, "Back Pathology." (NT 71, 77-78.)

30. The degenerative changes noted in Biondo's back were consistent with Biondo's age and did not present an abnormal pathologic condition. (NT 23, 36, 65.)

31. The City did not attempt to clarify either Dr. Prostko's or the VA reports. (NT 27, 93.)

32. Before applying for the position of police officer, Biondo served over twenty-one and one-half years in the U.S. Army, where he served with distinction. (NT 96-105.)

33. Biondo served three tours of duty in Vietnam and received both the Silver and Bronze Stars for Valor and, among many other citations, was awarded the Purple Heart. (NT 103, 113; JE 11.)

34. Biondo served with the Army's elite forces, the Rangers, and was also a paratrooper. (NT 97; JE 11.)

35. While in the Army, Biondo had constantly been subjected to detailed physicals, and at no time had Biondo ever had a problem with his back. (NT 123-124.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Biondo is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The City is an employer within the meaning of the PHRA.
5. Biondo has met his initial burden of establishing a prima facie case by proving that:
 - a. he belongs to a protected class;
 - b. he applied for a position for which he was qualified;
 - c. his application was rejected; and,
 - d. the City continued to seek applicants of equal qualifications.
6. Biondo is a handicapped or disabled person within the meaning of the PHRA and applicable regulations.
7. The City failed to establish that Biondo's back condition was job-related.
8. The City's reliance on Dr. Swan's recommendation was unreasonable under the circumstances.
9. A prevailing Complainant is entitled to lost wages, plus six percent interest.

OPINION

This case arises on a complaint filed by Richard Biondo (hereinafter "Biondo") against the City of Pittsburgh, Department of Personnel and Civil Service Commission (hereinafter "the City"), on or about June 27, 1983, at Docket Number E-25813. Generally, Biondo alleged that the City discriminated against him because of his age and non-job-related handicap/disability when the City refused to hire Biondo as a police officer. Biondo claims that the City's action violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit the allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on May 29, 1992, in Pittsburgh, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. Briefs were submitted by the parties. The Respondent's brief was received on August 3, 1992, and the brief on behalf of the complaint was received on August 11, 1992. Reviewing the record in this case and the brief on behalf of the complaint, it is apparent that the age-based allegation was abandoned.

Turning to the general issue arising from the substance of Biondo's handicap/disability allegation, we note that the ultimate question for resolution here is whether the City's rejection of Biondo's application to be a police officer violated the PHRA.

Section 5(a) of the PHRA provides in relevant part:

It shall be an unlawful discriminatory practice. . . for any employer because of the. . . non-job-related handicap or disability. . . of any individual to refuse to hire or employ. . . 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. . .

(43 P.S. 955(a).)

Sections 4(p) and 4(p)(1) provide the Act's only clarification of the reach of the cited portion of Section 5(a). Section 4(p) states:

The term "non-job-related handicap or disability" means 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. . .

Section 4(p)(1) states:

The term "handicap or disability", with respect to a person, means:

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities;
- (2) a record of having such an impairment; or
- (3) being regarded as having such an impairment. . .

(43 P.S. 954(p) and (p.1).)

The PHRA provisions are supplemented by applicable regulations promulgated by the PHRC which provide:

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; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or 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 such 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.

(16 Pa. Code §44.4.)

Non-job-related handicap or disability includes:

- (i) 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. Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a handicap or disability job-related.

- (ii) 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.
- (iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

(16 Pa. Code §44.4.)

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 85 Pa. Commonwealth Ct. 621, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

The burden of proof applicable to this case was set forth by Pennsylvania's Commonwealth Court in National Railroad Passenger Corporation (AMTRAK) v. PHRC, 70 Pa. Commonwealth Ct. 62, 452 A.2d 301 (1982). Biondo must first make out a prima facie case, which he has done here by proving:

1. That he was handicapped within the meaning of the PHRA and applicable regulations at the time of the action he challenges;
2. That he applied for a position for which he was otherwise qualified;
3. That his application was rejected because of his handicap; and,
4. That the City continued to seek qualified applicants.

Generally, the City's arguments submit that Biondo is unable to establish a prima facie case. The City's argument focuses on an assertion

that Biondo has failed to establish he has a non-job-related handicap or disability within the meaning of the PHRA and applicable regulations.

The record in this case reveals that, medically speaking, Biondo had minimal bony lipping/facet sclerosis of the anterosuperior margin of the twelfth vertebrae, which suggested minimal degenerative changes attributable to his age. In layman's terms, in approximately the middle of Biondo's back, x-rays showed some minimum signs of wear and tear caused by age and/or activity. With regard to the first prong of the requisite prima facie showing, the question here is, was Biondo's back condition a handicap within the meaning of the PHRA?

The City's brief refers to a footnote in the recent Pa. Supreme Court case of Civil Service Commission of City of Pittsburgh v. PHRC, ___ Pa. ___, 591 A.2d 281 at 284, n.1 (1991). In this note, the Pa. Supreme Court specifically indicated they were expressing no opinion regarding whether PHRC regulations at 16 Pa. Code §§44.4(i)(C) or (ii)(D) are valid. These regulations define a handicapped person as an individual who is "regarded as" having a physical impairment. The City's brief then states that the PHRA does not specifically cover individuals who are merely regarded as having a physical impairment.

While this was true when the Pa. Supreme Court issued Civil Service Commission City of Pittsburgh, Id., the PHRA has been amended in the interim to specifically declare the PHRA does not require an individual to actually have a physical impairment to be afforded the protections of the PHRA. (See Section 4(p.1).) The PHRA now declares that the legislature had intended to cover individuals who are merely "regarded as" having a physical impairment. Accordingly, we reject outright any argument which suggests an

individual who suffers no actual physical impairment is not covered by the PHRA.

Next, the City's brief argues that, in any event, the City did not regard Biondo as having had a handicap or disability. 16 Pa. Code §44.4(i)(A) prescribes two indispensable conditions before one can be said to have a handicap or disability. First, one must have a physical impairment. Second, that physical impairment must substantially limit one or more major life activities. In pertinent part, 16 Pa. Code §44.4(ii)(A) defines a physical impairment as a "physiological disorder or condition. . . affecting. . . the [body's] musculoskeletal system. . ."

Whether Biondo actually has a physical impairment or not, Dr. Swan's response to a specific question on this issue illustrates that she did in fact regard Biondo as having a physical impairment. Dr. Swan was asked, "[Did you] conclude that Mr. Biondo had a physiological condition affecting his musculoskeletal, that portion of his body?" Dr. Swan responded, "Yes, I think that's fair to say. . ."

16 Pa. Code §44.4(i)(C) and Section 4(p.1) of the PHRA declare that a person is handicapped if that individual "is regarded as having such an impairment." Since Dr. Swan regarded Biondo as having had a physiological condition which affected his body's musculoskeletal system, Biondo established proof of the first portion of 16 Pa. Code §44.4(i)(A).

The City also strongly urges that Biondo's condition did not substantially limit a major life activity. Section 12(a) of the PHRA requires that provisions of the PHRA be construed liberally. The City's brief seeks a less than liberal construction regarding what is meant by limiting a major life activity. In Pennsylvania, the law on what constitutes a limit to a

major life activity has been clearly articulated. In Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584, n.12 (1983), the court stated, "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." Therefore, the City's arguments are wholly rejected with regard to anything which would limit the scope of what is meant by an impairment of the major life activity, working.

Accordingly, Biondo has established the first element of the requisite prima facie showing by proof that he was regarded as having a physical impairment which substantially limited the major life activity, employment. We therefore turn to the remaining three elements of the requisite prima facie showing.

Clearly, Biondo applied to become a police officer, and he was otherwise qualified. Biondo had passed every phase of the hiring process up to the final stage, the physical examination. Equally clear are the remaining two elements. Biondo's application was rejected because Biondo was deemed not physically qualified. Finally, the City continued to seek and ultimately hire equally qualified applicants.

Before we move to the opportunity for the City to attempt to articulate a legitimate, nondiscriminatory reason for its failure to hire Biondo, one aspect of this case stands somewhat apart from the normal evidentiary flow of a disparate treatment case. The issue to be addressed here is the Respondent's assertion that Biondo's condition was "job-related." Unlike the normal burden of proof which is on a Complainant, Pennsylvania courts have consistently held that the burden of proof of job-relatedness is on the employer. National Railroad Passenger Corp.

(AMTRAK) v. PHRC, 70 Pa. Commonwealth Ct. 62, 452 A.2d 301 (1982). In AMTRAK, the court stated, "Once having established a prima facie case, we agree with the HRC that the burden then shifts to AMTRAK to establish that the Complainant's handicap is job-related and, thus, presents a valid basis for the denial of employment."

The pertinent regulations on this question have been fully recited above. AMTRAK suggests that careful consideration must be given to this issue when the health and safety of others is a factor. Here, obviously, a police officer's interaction with others requires a heightened level of scrutiny on this issue.

There is strong evidence in this case that Biondo's condition has not only never hindered him in the performance of jobs he has done, but that the jobs he has consistently performed have required a high degree of physical exertion and strength. Biondo is a decorated war hero, having successfully served three tours of duty in Vietnam as a member of one of the U.S. Army's most elite fighting forces, the Rangers. At no point did his back inhibit Biondo's extensive patriotic efforts.

Furthermore, upon leaving the Army after twenty-one and one-half years of exemplary service to the country, Biondo's jobs continued to be positions which required pulling, lifting, and general physical exertion. For a short time, Biondo worked as an armored car guard where he loaded and unloaded heavy bags of coins and currency. Biondo then also worked for the U.S. Postal Service where he again had to load and unload trucks of mail. Biondo has successfully continued to perform this job until the present without ever missing a day's work because of a back-related problem.

The only evidence of any minor back pain ever suffered by Biondo was approximately one year before he was rejected by the City. Biondo related an incident which occurred when he was working for American Industrial Contracting. While he and a co-worker were attempting to carry some heavy materials, the co-worker suddenly dropped his end, jarring Biondo a bit. The following day Biondo was in some pain so he went to the V.A. Hospital to be examined. In effect, Biondo was treated with muscle relaxants and never even lost a day's work from the slight injury.

The City's evidence on the job-relatedness issue consists almost entirely of Dr. Swan's general testimony which simply concludes that Biondo presents an increased risk to himself and others because of his back condition. Dr. Swan's testimony was vague when she offered her opinion that, statistically, Biondo would be subject to an increased risk of back injury. Furthermore, the record considered as a whole supports Biondo's private doctor's finding that the condition of Biondo's back was normal for his age.

The City's evidence does not even amount to a statement that Biondo's back probably would be affected by working as a police officer. Instead, the City's evidence only rises to the level of a suggestion that it is statistically possible that Biondo's back would affect his job performance at some future point. On the other hand, Biondo's evidence strongly offsets the City's evidence.

After weighing the two sides of this issue, the conclusion is that the City has not met its burden on the question of job-relatedness. The City failed to demonstrate that the position of police officer posed a

serious threat to either Biondo or others because of Biondo's back condition. Also, absent a showing of undue hardship, the City may not rely on a condition which is presently non-job-related but which could worsen and possibly become job-related. No attempt was made to set forth the basis of an undue hardship in this case.

We now turn to the next analysis of whether the City has articulated a legitimate, nondiscriminatory reason for its action. The City argues that the reason the City refused to hire Biondo was based on an opinion and recommendation of its medical expert.

The Respondent first points to a portion of a footnote in Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584, n.12 (1983). In the Pennsylvania State Police case, the court indicated that "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. . . 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." The Respondent then also cites the case of Action Industries, Inc. v. PHRC, Pa. Commonwealth Ct. , 518 A.2d 610 (1986), for the general principle that, "[A]n employer can have a good faith defense which negates its intent to discriminate where it reasonably relies upon the opinion of a medical expert in refusing to hire an applicant."

Here, the City argues that Dr. Swan examined Biondo, reviewed his medical records, and provided him with an opportunity to present additional information regarding his back. Following this process, Dr. Swan conveyed her opinion to the City that Biondo's records indicated a degenerative back

condition which placed Biondo at the risk of injury if he were to be placed in the position of police officer.

A careful reading of Action Industries, Id., reveals that the City is not automatically insulated because of Dr. Swan's recommendation. This case is distinguishable from the facts of Action Industries in several important respects. First, in Action Industries, the medical opinion relied upon was the independent opinion of a doctor who was not an employee of Action. Here, the opinion upon which Biondo's rejection rested was by a City employee. Dr. Swan was the City Physician.

There was an outside evaluation done in this case like that in Action, however, it was not the outside doctor's report the City relied upon here. In fact, the outside medical report generated by the outside doctor concluded, "Minimal bony lipping is seen involving the anterosuperior margin of the body of T-12, which is indicative of degenerative changes, minimal in degree. No abnormality of the lumbar spine can be demonstrated." Had the City simply applied its physical standards to this report, it appears Biondo should have been medically qualified.

The City's physical standards regarding back problems disqualify an applicant when there is "Evidence of serious back injury, disc, or back pathology, . . . or other gross abnormalities . . ." The phrase "or other gross abnormalities" more than implies that to be disqualifying a "back pathology" must amount to a "gross abnormali[ty]." Here, of course, Biondo's report spoke of changes "minimal in nature" and "Minimal bony lipping."

The second important distinction between the facts of this case and those of Action Industries is that in the Action Industries case, the

employer was not made aware of separate medical evidence favorable to the Complainant until long after a refusal to hire occurred. Here, Dr. Prostko's report was made available to the City before the final decision was made.

This large difference weighs heavily on the general issue of whether the City's reliance on Dr. Swan's recommendation was reasonable under all of the circumstances present. Dr. Prostko's June 7, 1983 communication was to Michelle A. Cunko, the City's Department of Personnel and Civil Service Commission's Secretary and Chief Examiner, not to Dr. Swan. In his report, Dr. Prostko generally advised Cunko that Biondo's x-rays showed no significant abnormality and that any facet sclerosis found was not only minimal but also consistent with Biondo's age. Even Dr. Swan testified that certain changes naturally occur to a person's spine as the person gets older. This process was described as normal.

Biondo also presented some Veterans Administration records from approximately one year earlier which were prepared after Biondo was slightly injured at work. These records also suggest that Biondo's back had "minimal wedging" and "minimal spindylosis" with "no other abnormality" which, in total, amounted to "no significant abnormality."

The City therefore had three independent medical sources basically telling the City that Biondo's back condition was normal for his age. Despite this overwhelming and consistent medical evidence, favorable to Biondo, the City still relied on Dr. Swan's vague assertion that Biondo would be at risk if he became a police officer. Under these circumstances, the City has failed to demonstrate that its reliance upon Dr. Swan was reasonable.

Biondo has thus met his ultimate burden of establishing that his condition was not job-related and that the City's refusal to hire him violated Section 5 of the PHRA. Appropriate relief must therefore be considered. Following a finding of discrimination, the PHRC is empowered to award relief which includes hiring and lost wages. Here, Biondo requests only lost wages.

The function of back-pay relief is to put the victim of discrimination in the position he would have attained absent the discrimination. Albermarle Paper Co. v. Moody, 422 U.S. 405, 418-423 (1975); PHRC v. Transit Casualty Insurance Co., 478 Pa. 430, 387 A.2d 58 (1978). Further, the Pennsylvania Supreme Court has declared that the PHRC has broad discretion when fashioning an award. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985).

On this issue, a fundamental principle of law requires a back-pay award to be reduced by interim wages earned. Transit Casualty, *Supra*. The parties have stipulated that Biondo's interim earnings are as follows:

1983	\$ 7,200.45
1984	9,555.48
1985	16,964.28
1986	21,165.50
1987	25,640.68
1988	26,238.75
1989	30,145.78
1990	32,790.60
1991	34,938.10
1992 (through May) . . .	16,052.59

As easy as these stipulations make it to assess Biondo's interim wages, conversely, there are several factors which make it difficult to determine what Biondo would have earned had he been hired by the City in

1983. Here the evidence suggests that the components of Biondo's wage and salary, had he been hired, include normal wage increases, overtime and lost promotional opportunities. City documents basically outline the base salary for a City police officer between 1983 and 1992. Precise details regarding opportunity for overtime and promotions are more elusive.

One point was made by Biondo, and that is that even in the job he held during the period in question, when offered overtime Biondo accepted it on a fairly consistent basis. From this we can infer that had he been awarded a position with the City in 1983, Biondo would have worked overtime.

Regarding the issue of promotion, we are guided by judicial discretion. We do know that the police recruit class of 1983 had 53 members. Obviously, between 1983 and 1992 some received promotions and some did not. Additionally, some were obviously promoted to higher grades than others.

The fair way to assess the appropriate amount of damages in this case is to look at the yearly average wages of those in the recruit class of 1983 for the years of 1983 through five months of 1992. The average salary reflects both overtime and across the board promotions. Obviously some officers made more, many made less. However, the average amount reflects a sum which is considerably greater than the base salary and is therefore considered a reasonable figure with which to calculate Biondo's damages.

A gross salary analysis has been provided on which these calculations have been made. After a careful review of the records in this case, we are satisfied that these figures accurately reflect both the base salary and the average salary for the years 1983 through 1992 of most of the police officers hired in 1983.

Using these figures the following calculations are made:

<u>Year</u>	<u>Base Salary</u>	<u>Average Salary</u>	<u>Biondo's Mitigation Wages</u>	<u>Lost Wages</u>
1983 (Last 14 weeks)	\$ 5,458	\$ 5,550	\$ 7,200	\$ None
1984	21,164	22,139	9,555	12,584
1985	22,880	26,423	16,964	9,459
1986	23,795	29,516	21,165	8,351
1987	28,012	34,719	25,641	9,078
1988	29,273	38,055	26,239	11,816
1989	30,590	40,529	30,146	10,383
1990	32,120	43,003	32,791	10,212
1991	33,762	45,952	34,938	11,014
1992 (Jan. - May only)	14,335	21,213	16,053	<u>5,160</u>

Biondo's Total Lost Wages - \$88,057

Furthermore, the PHRC is authorized to award interest on the back-pay award at the rate of six percent per annum. Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975).

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

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD BIONDO,
Complainant

v.

CITY OF PITTSBURGH,
DEPARTMENT OF PERSONNEL and
CIVIL SERVICE COMMISSION,
Respondent

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DOCKET NO. E-25813

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD BIONDO,	:	
Complainant	:	
	:	
v.	:	DOCKET NO. E-25813
	:	
CITY OF PITTSBURGH,	:	
DEPARTMENT OF PERSONNEL and	:	
CIVIL SERVICE COMMISSION,	:	
Respondent	:	

FINAL ORDER

AND NOW, this 23rd day of December, 1992, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

O R D E R S

1. That the Respondent shall cease and desist from handicap/disability based discrimination with regard to hiring.

2. That the Respondent shall pay to the Complainant within thirty days of the effective date of this Order the lump sum of \$88,057.00, which amount represents back pay lost for the period between September 6, 1983 and May 1992.

3. That the Respondent shall pay additional interest of six percent per annum calculated from September 6, 1983 until payment is made.

4. That within thirty days of the effective date of this Order, the Respondent shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Diane Blancett-Maddock, Esquire, in the Commission's Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Robert Johnson Smith
Robert Johnson Smith, Chairperson

ATTEST:

Russell S. Howell
~~Russell S. Howell, Assistant Secretary~~
Gregory J. Blair, Secretary