

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

FRANK J. CUDZIL, Complainant

v.

MELLON BANK (NORTH) NATIONAL ASSOCIATION, Respondent

DOCKET NO. E-39254-A

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
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v.

MELLON BANK (NORTH) NATIONAL ASSOCIATION, Respondent

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**STIPULATIONS OF FACT AND
LISTS OF EXHIBITS AND WITNESSES**

Complainant and Respondent Mellon Bank (North) National Association (hereinafter "Mellon North") , in accordance with the Pre-Hearing Order, submit the following Stipulations of Fact and Lists of Exhibits and Witnesses.

I. STIPULATIONS OF FACT

Counsel for the Complaint and Counsel for Mellon North stipulate as follows:

1. Complainant's Complaint was filed with the Commission on February 6, 1987.
2. A Finding of Probable Cause was issued on July 9, 1990. Mellon North disputes the Finding.
3. Efforts at conciliation were unsuccessful.
4. The Commission approved a Public Hearing on November 19, 1990.
5. Complainant began his employment with Mellon North on February 27, 1968. His last day of work was December 31, 1986.
6. His last job with Mellon North was that of Courier. He had also been a Custodian.
7. Mellon North sponsored a retirement plan known as the Mellon Bank (North) N.A. Retirement Plan (hereinafter the "Retirement Plan").
8. The Retirement Plan is a pension plan within the meaning of Section 3(2)(A) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. S 1002(2)(A).
9. Complainant was born on January 15, 1916.
10. Complainant was a vested participant in the Retirement Plan.
11. In 1986, Complainant attained the age of 70 which is the age of mandatory retirement set forth in the Retirement Plan.

12. The decision that Complainant's employment would be terminated, effective December 31, 1986, because of the mandatory retirement provisions of the Retirement Plan was reached at the May 5, 1986 meeting of the Mellon North Retirement Plan Committee.

II. LISTS OF EXHIBITS AND WITNESSES

A. Commission Exhibit List on Behalf of the Complaint - The authenticity of the documents lists by Counsel for the Complaint is, with the exception of C-3 and C-6, not disputed by Mellon North.

The list of exhibits that Counsel for the Complaint may offer at the hearing are:

- C-1 Complaint
- C-2 Answer
- C-3 Informal Complaint dated 12/14/86
- C-4 Commission questionnaire completed by Complainant dated 12/14/86
- C-S Late filing questionnaire completed by Complainant
- C-6 Complainant's response to Motion to Dismiss clocked in 6/24/87 (front and back)
- C-7 Commission Case Chronology Form December 1, 1986 through January 27, 1989
- C-8 Document labeled "Exhibit I" listing Messengers employed full and part-time as of 1/1/87
- C-9 Personal Information Data - Ronald Webber
- C-10 Personal Information Data - Michael Echenoz
- C-11 Personal Information Data - Jeffrey Fink
- C-12 Personal Information Data - Norman Simpson
- C-13 Personal Information Data - Gerald Cunningham
- C-14 Letter of Frances Tennant to HRR Linda Hernton dated 3/27/89
- C-15 Letter of Frances Tennant to HRR Linda Hernton dated 3/21/89
- C-16 Letter of Frances Tennant to HRR Linda Hernton dated 3/7/89
- C-17 Letter of Frances Tennant to HRR Linda Hernton dated 2/3/89
- C-18 Letter of Frances Tennant to HRR Linda Hernton dated 12/28/89
- C-19 Letter of Frances Tennant to HRR Linda Hernton dated 11/13/89
- C-20 Letter of Frances Tennant to HRR Linda Hernton dated 3/26/89
- C-21 Letter of HRR Linda Hernton dated 3/15/89 with attached response from Respondent

In addition, Counsel for the Complaint reserves the right to introduce exhibits listed on Mellon North's Exhibit List. Counsel for the Complaint also reserves the right to introduce exhibits as may be necessary for purposes of impeachment and/or rebuttal.

B. Mellon North's Exhibit List – The authenticity of the documents listed by Mellon North is not disputed by Counsel for the Complaint.

The list of exhibits that Mellon North may offer at the hearing are:

- R-I Mellon Bank (North) N.A. Retirement Plan, as Amended and Restated Effective January 1, 1984

- R-2 Summary Plan Descriptions, Mellon Bank (North) N.A. Retirement Plan Northwest Pennsylvania Bank & Trust Co. Retirement Plan
- R-3 Letter dated May 14, 1986 from Internal Revenue Service to Mellon Bank North N.A.
- R-4 Mellon Bank North Retirement Plan, Pension Checks -Disbursement Register, March 1, 1991
- R-5 Minutes of Mellon Bank (North) Retirement Plan Committee Meeting, May 5, 1986
- R-6 Mellon Bank (North) N.A. Retirement Plan -- Retirement Benefit Calculation for Frank Cudzil, 5/20/86
- R-7 Newspaper Article, "Mandatory Retirement Eliminated," The Derrick (September 24, 1986)
- R-8 Letter dated October 22, 1986 from Michael F. Noggle to Frank J. Cudzil
- R-9 Minutes of Mellon Bank (North) Retirement Plan Committee Meeting, November 12, 1986
- R-10 Letter dated December 17, 1986 from Michael F. Noggle to Frank J. Cudzil
- R-11 Exit Interview -Frank Cudzil
- R-12 Non-Officer Review Form for 1985, Frank Cudzil
- R-1J Non-Officer Review Form for 1985, Michael Echenoz
- R-14 Non-Officer Review Form for 1985, Ronald Webber
- R-15 Calendar: 1986
- R-16 Oil City Area Industrial Guide
- R-17 Oil City Area Chamber of Commerce Membership Directory and Buyer's Guide

In addition, Mellon North reserves the right to introduce exhibits listed on Commission Exhibit List on Behalf of the Complaint. Mellon North also reserves the right to introduce exhibits as may be necessary for purposes of impeachment and/or rebuttal.

C. Commission Witness List on Behalf of the Complaint

The names of witnesses who may testify on behalf of the Complaint at the hearing are:

1. Frank Cudzil
2. Linda Hernton

In addition, Counsel for the Complaint reserves the right to call the witnesses listed on Mellon North's Witness List. Counsel for the Complaint also reserves the right to call other witnesses as may be necessary for purposes of impeachment and/or rebuttal.

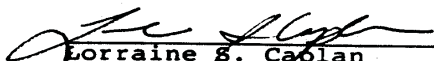
D. Mellon North's Witness List

The names and addresses of witnesses who may testify on behalf of Mellon North at the hearing are:

1. Michael F. Noggle
Mellon Bank (North)

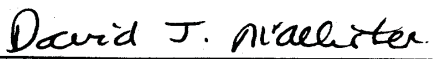
- 100 Seneca Street
P.O. Box 9
Oil City, PA 16301
2. Patricia J. Coutts
Mellon Bank (North
100 Seneca Street
P.O. Box 9
Oil City, PA 16301
3. Robert D. Jadlocki
Mellon Financial Services Corp.
5811 Pelican Bay Boulevard
Suite 410
Naples, FL 33963

In addition, Mellon North reserves the right to call the witnesses listed on the Commission Witness List on Behalf of the Complaint. Mellon North also reserves the right to call other witnesses as may be necessary for purposes of impeachment and/or rebuttal.


Lorraine B. Caplan
Pennsylvania Human Relations
Commission
11th Floor, State Office Bldg.
300 Liberty Avenue
Pittsburgh, PA 15222

Counsel for the Complaint

Date: June 7, 1991


David J. McAllister
Reed Smith Shaw & McClay
435 Sixth Avenue, Mellon Square
Pittsburgh, PA 15219

Counsel for Respondent

Date: June 7, 1991

FINDINGS OF FACT *

1. Frank J. Cudzil (hereinafter "Complainant") began his employment with Mellon North (hereinafter "Respondent") on February 27, 1968. (NT 16; SF 5.)
2. The Complainant was born on January 15, 1916, and was 52 years 01d at the date of hire by the Respondent. (SF 9.)
3. The Complainant was employed as a full-time courier the last five years of employment with the Respondent. (NT 17; SF 6.)
4. In the mid-1980s, the Respondent underwent significant staff reductions. (NT 121, 218.)
5. In late 1985, all of Respondent's Group Heads were instructed to develop a plan for reduction of staff and to identify positions where reductions could be made. (NT 175-176.)
6. Once a specific position was identified, then there was a comparison of the job performance of the various employees in the same job classification. (NT 175-176.)
7. After the comparison was made, then the lowest rated employee was chosen for outplacement. (NT 175-176, 219-220.)

* 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
SF Stipulations of Fact
RE Respondent's Exhibit

8. Robert D. Jadlocki, a Respondent Senior Vice President, was in charge of the Information Services Group. (NT 204-206.)
9. The full-time couriers were employed within the Information Services Group. (NT 204-206.)
10. Mr. Jadlocki was notified in late 1985 that he would have to reduce the staff in the Information Services Group. (NT 206-207.)
11. Mr. Jadlocki reviewed the positions in his Group and decided that the Respondent could reduce the number of full-time couriers from three to two. (NT 221.)
12. Mr. Jadlocki made this decision because the volume of work was going to be significantly reduced due to the staff reductions that the Respondent was undergoing. (NT 221.)
13. After deciding that the full-time courier position was appropriate for a reduction in force, Mr. Jadlocki then reviewed the performance of the full-time couriers. (NT 221-222.)
14. The three full-time couriers were Michael Echenoz, Ronald Webber and the Complainant, Frank J. Cudzil. (NT 215.)
15. In the 1985 Non-Officer Review Form, the Complainant's performance was deficient in a number of the review factors. (NT 212.)
16. The Non-Officer Review Form included review factors such as: quality of work, quantity of work, effectiveness in dealing with others, job knowledge, dependability, job attitude, initiative, adaptability, judgment and organizing ability. (RE 13.)

17. There had been a number of complaints about the Complainant's job performance, including a report that he had been speeding, and a report that he was inattentive while backing out of the parking lot of one of the branch banks, almost colliding with another vehicle. (RE 1. 12-13.)
18. There were no deficiencies indicated in the performance of either Mr. Echenoz or Mr. Webber. (NT 212, 215-216.)
19. Using the selection criterion of lowest-rated performance in the job classification, Mr. Jadlocki identified the Complainant as the courier whose employment should be terminated as part of the reduction in force. (NT 221-222.)
20. Mr. Jadlocki recommended to Michael F. Noggle, Senior Vice President of Human Resources, that the Complainant be selected for the reduction in force because the Complainant's job performance was the lowest-rated of the full-time couriers. (NT 221.)
21. At times relevant to the complaint, the Respondent sponsored a plan known as the Mellon Bank (North) N.A. Retirement Plan (hereinafter "the Retirement Plan") the purpose of which was "to provide benefits for and on behalf of eligible employees" of Mellon Bank. (SF 7.)
22. The Retirement Plan is a pension plan within the meaning of Section 3(2)(A) of the Employee Retirement Income Security Act of 1974. 29 U.S.C. §1002(2)(A). (SF 8.)
23. The Complainant was a vested participant in the Retirement Plan. (SF 10.)
24. In 1986, the Complainant reached the age of 70, which is the age of mandatory retirement set forth in the Retirement Plan. (SF 11; NT 141-142.)
25. At the May 5, 1986 meeting of the Respondent's Retirement Plan Committee, a decision was reached that the Complainant would be terminated effective December 31, 1986, because of the mandatory age provision. (SF 12, NT 142-148.)
26. That decision was never changed by the Respondent. (NT 156.)
27. Complainant's employment with the Respondent was terminated not only because of the reduction in force, but also because of the Respondent's Retirement Plan. (NT 178, 224, 229.)
28. Even if Complainant had not been terminated because of the reduction in force, he would have been terminated because of the Retirement Plan. (NT 178,224,229.)
29. From the time that the Complainant was notified of the decision (June 1986) until his actual retirement in December of 1986, the Complainant disagreed with the decision. (NT 69-70, 227.)
30. However, it was clear that the Complainant understood the decision. (NT 69-70,227.)
31. During this period of time, Mr. Jadlocki met with the Complainant on several occasions. (NT 226-227.)
32. The Complainant also met four times with Patricia J. Coutts who was then the Respondent's Assistant Personnel Officer and who had prepared a calculation of the Complainant's retirement benefits. (RE 8; NT 151, 248-249.)
33. The Complainant met with Michael Noggle on three different instances to discuss the Complainant's retirement date. (NT 172-173, 264.)
34. The Complainant's last day of employment with Respondent was December 31, 1986, the effective date of his retirement. (SF 5.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and PHRC have complied with all procedural prerequisites for a public hearing.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. The Respondent is an employer within the meaning of the PHRA.
5. The Complainant bears the burden of establishing a prima facie case of discrimination.
6. The Complainant has met his burden of establishing a prima facie case by showing that:
 - a) he is a member of a protected class;
 - b) he was performing the duties of the position;
 - c) c) he was terminated from the position; and
 - d) others not in the Complainant's protected class were not terminated.
7. The Respondent has met its burden of production in that the Respondent has produced evidence of legitimate, nondiscriminatory reasons for its action.
8. Once the Respondent meets its burden of production, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination.
9. The Complainant can succeed in his ultimate burden of persuasion by showing that the Respondent's proffered explanations are unworthy of credence, or pretextual.
10. The Complainant has failed to establish that the Respondent's proffered explanations are unworthy of credence, or pretextual.

OPINION

This case arises on a complaint filed by Frank J. Cudzil (hereinafter "Complainant") against Mellon Bank (North) National Association (hereinafter "Respondent"), on or about February 6, 1987, at Docket No. E-39254-A. Generally, the Complainant alleges that he was involuntarily retired by the Respondent because of his age. This allegation states a violation 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 investigated the allegations of the complaint and found probable cause to credit the Complainant's allegations. Thereafter, PHRC staff attempted to eliminate the alleged unlawful discriminatory practices through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the case was approved for public hearing.

The original public hearing in this matter was held on June 17, 1991 at the PHRC's Pittsburgh Regional Office before Phillip A. Ayers, Permanent Hearing Examiner. The case on behalf of the complaint was presented by Lorraine S. Caplan, PHRC staff attorney. David J. McAllister, Esquire, appeared on behalf of the Respondent. Following the public hearing, both parties were afforded the opportunity to submit post-hearing briefs. However, the transcript of the public hearing was so poorly transcribed that it was necessary to convene a second public hearing. The second public hearing was held on December 15, 1992. This second public hearing was also held in Pittsburgh before Phillip A. Ayers, Permanent Hearing Examiner. Attorney Caplan appeared on behalf of the complaint, and Attorney McAllister appeared on behalf of the Respondent. Ms.

Caplan filed her post-hearing brief on March 23, 1993, and Mr. McAllister filed his post-hearing brief on February 22, 1993.

At the public hearing (on December 15, 1992) the focus was mostly placed on a disparate treatment analysis of the allegations made and the evidence received. The order and allocation of proof in a disparate treatment case was first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and clarified by the Pennsylvania Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), No. 32 Western District Appeal Docket, 1986. The Pennsylvania Supreme Court's guidance indicates that the Complainant must first establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, the burden of production then shifts to the Respondent to simply... produce evidence of a 'legitimate, non-discriminatory reason for [its action].Id at 320. If the Respondent meets this burden of production, the Complainant, in order to prevail, must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. Id at 318. Also, the Complainant can succeed in its ultimate burden of persuasion by showing that the Respondent's proffered reasons are unworthy of credence and/or pretextual.

In order to establish a prima facie showing in the instant case, the Complainant must show:

- 1) he is a member of a protected class, age;
- 2) he was performing the duties of the position;
- 3) he was terminated from the position; and
- 4) others not in the Complainant's protected class were not terminated.

As often noted, the burden of establishing a prima facie case is not an onerous one. It is clear that the Complainant was within the protected age class (40 -70) during his claim for damages in the instant case, The Complainant was performing the duties of his position as a courier for the Respondent, and he was subsequently terminated from the position. The record also establishes that there were other couriers not in the Complainant's protected class who were not terminated. The Complainant has certainly established a prima facie showing.

As indicated above, once the Complainant has established a prima facie case, the burden of production then shifts to the Respondent to "simply produce evidence of a legitimate, non-discriminatory reason for its [action]." Allegheny Housing Rehabilitation Corp" supra. The Respondent has certainly articulated several reasons for its actions. These actions) are: (1) reduction in force, (2) performance reviews of the couriers, and (3) the Respondent's own bona fide pension plan which mandated retirement at age 70.

The Respondent, by articulating these reasons, has clearly met its burden of production. The burden now rests with the Complainant to show that the Respondent's stated reasons are either pretextual or unworthy of credence, Frankly, it is a proof burden that the Complainant has failed to carry. Firstly, the record reflects, through undisputed testimony, that the Respondent was experiencing a large reduction in force at all times relevant to this complaint, This was a point conceded by Commission counsel. Also, the record reflects that, in late 1985, all of the Respondent's Group Heads were instructed to develop a plan(s) to reduce staff. An indication of the impact of the reductions made by the Respondent is that in 1984 the Respondent employed

800 staff employees. The cutbacks resulted in a current staffing level of 400 employees. Neither the Complainant nor Commission counsel has disputed that there was, in fact, a reduction in force.

The next reason given by the Respondent is performance-related. It is undisputed that the full-time courier position was selected as one of the positions where staff reductions would be made. In 1986, the Respondent employed three full-time couriers in the Items Processing Department of its Information Services Group: Michael Echenoz, age 25; Ronald Webber, age 47; and the Complainant. A comparison of the performance reviews of the three individuals clearly demonstrates that the performance ratings of Echenoz and Webber were superior to that of the Complainant's. There has been no dispute as to the numerical difference in the performance ratings. Commission Counsel argues that the difference is not a "great" one, but it is, nonetheless, a measurable difference. Commission Counsel also states that "If Mr. Cudzil's performance had been so reprehensible, Respondent would have been able to produce evidence from Mr. Cudzil's personnel file to document this. It is the lack of such evidence which demonstrates pretext on the part of Respondent. " As we must remember, the ultimate burden of persuasion in this matter is on the Complainant, not the Respondent. The Respondent did not assert that the Complainant was a bad performer, but rather that Complainant's performance, as compared to the other full-time couriers, was the lowest rated. The Complainant did not offer any evidence that his performance was better than or as good as that of either Mr. Echenoz or Mr. Webber. Therefore, the Complainant has not proven that the proffered reasons of the Respondent are pretextual or unworthy of credence.

Lastly, the Respondent also asserts that the Complainant was terminated pursuant to its bona fide pension plan which mandated retirement at age 70. Commission Counsel argues that since the Complainant worked beyond the age of 70 without written permission, then the Complainant was not retired pursuant to a bona fide retirement plan.

Furthermore, since he was not retired immediately upon reaching age 70, Commission Counsel argues that the Respondent's plan does not fall within the PHRA's exemption in Section 5(a). Section 5(a) provides an exemption for "operation of the terms and conditions of any bona fide retirement or pension plan..." It is interesting to note that to follow this argument, the Complainant would have been terminated at an earlier date. The Respondent presented testimony by Michael Noggle, Senior Vice President, who had the authority to request that the retirement date be at the end of the year. Mr. Noggle testified as to why the date was chosen:

Q. Can you tell us why that date was selected?

A. It was selected on humanitarian reasons. As I said, most people who are going to retire give us basically a six-month notice. And Mr. Cudzil made no indication he wanted to retire, and it was our feeling that to tell someone on the 5th of May, "By the way, you're 70, you don't work here anymore, here's the plan," did not seem to be in the train of how we did business. So our decision was to give those individuals six months notice and make it effective the end of the year.

The explanation of the Respondent in this instance has not been shown to be pretextual or unworthy of credence.

Upon review of the entire record in this matter, the Respondent has articulated legitimate, nondiscriminatory reasons for its action, and Complainant has not shown those reasons to be pretextual or unworthy of credence.

An appropriate Order follows.

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

FRANK J. CUDZIL, Complainant

v.

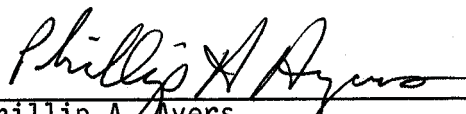
MELLON BANK (NORTH) NATIONAL ASSOCIATION, Respondent

DOCKET NO. E-39254-A

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 failed to prove 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 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.

By:



Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

FRANK J. CUDZIL, Complainant

v.

MELLON BANK (NORTH) NATIONAL ASSOCIATION, Respondent

DOCKET NO. E-39254-A

FINAL ORDER

AND NOW, this 29th day of June, 1993, 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 Stipulations of Fact, Findings of Fact. Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact. Findings of Fact. Conclusions of Law. and Opinion as its own findings in this matter and incorporates the 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

ORDERS


that the complaint in this case be, and the same hereby is, dismissed.

ATTEST:



Gregory J. Celia, Jr., Secretary

By:



Raquel Otero de Yiengst, Vice-Chairperson