

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN R. LADDA,	:	
Complainant	:	
	:	
v.	:	Docket No. P-1727
	:	
PENNSYLVANIA STATE UNIVERSITY	:	
ATHLETIC DEPARTMENT,	:	
Respondent	:	
	:	
JOYCE B. LEIBELSPERGER,	:	
Complainant	:	
	:	
v.	:	Docket No. P-1728
	:	
PENNSYLVANIA STATE UNIVERSITY	:	
ATHLETIC DEPARTMENT,	:	
Respondent	:	

STIPULATIONS

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

A. STATEMENT OF STIPULATED PROCEDURAL FACTS

1. The Complainant in P-1727, Shawn R. Ladda (hereinafter "Ladda"), is an adult female residing in New York, New York.
2. The Complainant in P-1728, Joyce B. Leibelsperger (hereinafter "Leibelsperger"), is an adult female residing in Fleetwood, Pennsylvania.
3. Leibelsperger is now married and her legal name is Joyce Angstadt.
4. In 1981, both Ladda and Leibelsperger were students in good standing at Penn State University and were members of the Women's Soccer Club.
5. The Respondent, The Pennsylvania State University (hereinafter "University"), is a state related institution of higher education, a non-profit educational corporation created by Act of General Assembly, and an instrumentality of the Commonwealth of Pennsylvania and a place of public accommodation.
6. The University maintains an Athletic Department (hereinafter "Athletic Department") whose offices are located at 235 Recreation Building, University Park, Pennsylvania 16802.
7. In March, 1981, the University denied the Women's Soccer Club's application for varsity status.
8. On April 29, 1981, Ladda made, signed and filed a verified Complaint at Docket No. P-1727 with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). University was duly served with a copy of the Complaint.
9. The Complaint alleged University's commission of an unlawful discriminatory practice under Section 5(i) of the Act by allegedly denying the Women's Soccer Club's request for varsity status because of the sex, female, of the Club members.

10. On April 29, 1981, Leibelsperger made, signed, and filed a verified Complaint at Docket No. P-1728 with the PHRC. University was duly served with a copy of the Complaint.

11. The Complaint alleged University's commission of an unlawful discriminatory practice under Section 5(i) of the Act by allegedly denying the Women's Soccer Club's request for varsity status because of the sex, female, of the Club members.

12. On August 3, 1981, Respondent filed Motions to Dismiss the Complaints. On August 27, 1981, counsel for the PHRC filed a reply to said motions. By Interlocutory Order, dated September 4, 1981, the Motions were denied.

13. On December 13, 1984, the PHRC, after investigation, found probable cause to credit the allegations made in the Complaints at P-1727 and P-1728 and attempted, unsuccessfully, to conciliate the Complaints.

14. In 1986, the PHRC notified the parties that a public hearing had been approved in Docket Nos. P-1727 and P-1728.

15. By Pre-Hearing Order dated December 14, 1988, and, with the consent of the parties, Docket Nos. P-1727 and P-1728 were consolidated for hearing.

B. STATEMENT OF STIPULATED FACTS

1. The Athletic Department oversees all of the University's varsity sports and also determines whether a non-varsity sports team's application for varsity status is granted.

2. In January of 1977, a number of female students at the University organized the International Soccer Club - Women's Division.

3. In 1979, the University formally recognized the Women's Soccer Club as an independent club.

4. In Academic Year 1979-80, University maintained 31 intercollegiate varsity sport teams in its Intercollegiate Sports Program, including 16 men's sports teams, 14 women's teams and one coed team.

5. The intercollegiate varsity sport teams were as follows: FALL - Football (men); Soccer (men); Field Hockey (women); Cross Country (men); Cross Country (women); Volleyball (women); WINTER - Basketball (men); Basketball (women); Gymnastics (men); Gymnastics (women); Wrestling (men); Swimming/Diving (men); Swimming/Diving (women); Indoor Track (men); Indoor Track (women); Volleyball (men); Fencing (men); Fencing (women); Bowling (men); Bowling (women); Riflery (coed); SPRING - Lacrosse (men); Lacrosse (women); Track and Field (men); Track and Field (women); Baseball (men); Softball (women); Tennis (men); Tennis (women); Golf (men); Golf (women).

6. The intercollegiate varsity sport teams maintained by University during Academic Year 1979-80 were granted varsity status, and thereafter recognized as intercollegiate varsity sport teams in University's Intercollegiate Sports Program, in the following years: Men's Football (1887); Men's Baseball (1889); Men's Track (1891); Men's Basketball (1896); Men's Wrestling (1910-11); Men's Tennis (1910-11); Men's Soccer (1911-12); Men's Lacrosse (1913-14); Men's Golf (1922-23); Men's Gymnastics (1931-32); Men's Fencing (1932-33); Men's Swimming (1935-36); Women's Basketball (1964-65); Women's Fencing (1964-65); Women's Field Hockey (1964-65); Women's Golf (1964-65); Women's Gymnastics (1964-65); Women's Lacrosse (1964-65); Riflery (1964-65); Women's Softball (1964-65); Women's Tennis (1964-65); Women's Bowling (1967-68); Women's Swimming and Diving (1969-70); Women's Track & Field (1974-75); Women's Volleyball (1976-77); Men's Bowling (1976-77); Men's Volleyball (1976-77); Men's Cross-Country (date unknown);

Women's Cross-Country (date unknown); Men's Indoor Track (date unknown);
Women's Indoor Track (date unknown).

7. In Fall 1979, the Women's Soccer Club competed against college varsity as well as club teams, and qualified for the EAIWA Championship in Winter 1979.

8. In Spring 1979, the Athletic Department had provided funds for uniforms and a van for the team to compete at the Altamont Invitational Tournament in Alabama.

9. In November of 1979, the Women's Soccer Club, through its coach, Timothy Conley (hereinafter "Conley"), requested that the University grant it varsity status and recognition as an intercollegiate varsity sport team in University's Intercollegiate Sports Program.

10. In determining whether a sport receives varsity status, University considers the following criteria:

- a. Financial resources - can the sport be added without affecting the financial viability of the University's present Intercollegiate Sports Program;
- b. Facility availability;
- c. Student/spectator interest;
- d. Availability of opponents from an area within reasonable traveling distance;
- e. High school involvement in the sport.

11. Paterno denied the application in March, 1980, for financial reasons, on grounds that addition of another varsity team would adversely affect the financial viability of the existing Intercollegiate Sports Program, and he made the decision to discontinue the use of intercollegiate athletic funds to assist the club, as well as other club sports, both male and female.

Subsequently, and at all times relevant to the Complaints, all Club sports were funded by and through University's Club Sports Office which disburses funds received from University's Central Administration. Additional funds were raised and/or provided by members of a Club and/or its supporters to cover expenses above and beyond those covered by University.

12. In Academic Year 1978-79, University verbally denied the Men's Hockey Club's request for varsity status and recognition as an intercollegiate varsity sports team in University's Intercollegiate Sports Program for financial reasons, on grounds that addition of another varsity team would adversely affect the financial viability of the existing Intercollegiate Sports Program. No documentation exists to refute, impeach or corroborate that statement. No documents exist regarding this application or which states the reason for the University's denial of the application.

13. In February of 1980, the University's Athletic Department conducted a financial review of the operating expense budgets for all varsity teams in the Intercollegiate Sports Program.

14. At the present time, and at all times relevant to these complaints, the University's Athletic Department primarily operates on the basis of revenue generated from the Intercollegiate Sports Program. Funds received from the annual appropriation by the General Assembly are not used to support the Intercollegiate Sports Program.

15. Said review revealed a projected net deficit for fiscal year July 1, 1979 through June 30, 1980.

16. On the basis of the projected deficit, the Director of Intercollegiate Athletics at the University, Joseph Paterno, ordered a reduction

in the operating expense budgets for all varsity teams in University's Intercollegiate Sports Program for fiscal year 1979-1980 and further ordered that the operating expense budgets for such teams for fiscal year 1980-1981 be restricted, with minor exceptions, to the levels budgeted for fiscal year 1979-1980.

17. In the summer of 1980, Paterno established the Budget Priorities and Planning Committee (hereinafter "Committee") for the dual purpose of conducting an in-depth review of the financial viability of the Intercollegiate Sports Program and establishing a schedule of priorities for allocating diminishing resources in an effort to maintain a broad and viable Intercollegiate Sports Program.

18. The Committee's in-depth review of the Intercollegiate Sports Program revealed a projected net deficit in the operating expense budgets for all sports in the Intercollegiate Sports Program for fiscal years 1981-1982, 1982-1983, 1983-1984 and 1984-1985.

19. On the basis of the Committee's projected deficits, Joseph Paterno ordered a reduction in the operating expense budgets for all sports in the Intercollegiate Sports Program for fiscal years 1981-1982, 1982-1983, 1983-1984 and 1984-1985.

20. The University did not request funding for the Athletic Department and/or Intercollegiate Athletic Program from the Pennsylvania General Assembly, either individually or as part of a budget or funding proposal for the University.

21. On November 7, 1980, the Women's Soccer Club again petitioned for varsity status.

22. In March of 1981, University denied the Women's Soccer Club's request for varsity status and recognition as an intercollegiate varsity

sport, giving, as its only reason for denial, financial reasons on grounds that addition of another varsity team would adversely affect the financial viability of the existing Intercollegiate Sports Program.

23. On March 16, 1981, the Men's Hockey Club again petitioned for varsity status. University verbally denied the Men's Hockey Club's request for varsity status and recognition as an Intercollegiate Varsity Sports Team in University's Intercollegiate Sports Program for financial reasons, the reason given being that addition of another varsity team would adversely affect the financial viability of the existing Intercollegiate Sports Program under the existing financing system.

24. In April, 1981, the University of Connecticut refused to sign a contract with the Women's Soccer Club, on the grounds that any team which has club status could only play against it at home.

25. By letter dated October 21, 1981, Robert A. Patterson, the University's Senior Vice-President for Finance and Operations, informed Conley that the Women's Soccer Club was a club sport which the University would not, at that time, certify for regional or national AIAW championship competition.

26. In the Committee's report of June 1, 1981, the coed Riflery team was designated as having the lowest priority for continuation as a varsity team in University's Intercollegiate Sports Program.

27. On the basis of budgetary constraints in University's Intercollegiate Sports Program, under the existing financing system, the coed Riflery team was eliminated from the Intercollegiate Sports Program, effective July 1, 1981. This left 16 men's teams, 14 women's teams, and no co-ed teams.

28. In the Committee's report of June 1, 1981, the Men's Bowling team was designated as having the second lowest priority of the existing teams for continuation as a varsity team in University's Intercollegiate Sports Program.

29. On the basis of budgetary constraints in University's Intercollegiate Sports Program, under the existing financing system, the Men's Bowling Team was eliminated from the Intercollegiate Sports Program, effective July 1, 1982. This left 15 men's teams, 14 women's teams, and no co-ed teams.

30. In the Committee's report of June 1, 1981, the Women's Bowling team was designated as having the third lowest priority for continuation as a varsity team in University's Intercollegiate Sports Program.

31. On the basis of budgetary constraints in University's Intercollegiate Sports Program, under the existing financing system, the Women's Bowling team was eliminated from the Intercollegiate Sports Program, effective July 1, 1982. This left 15 men's teams, 13 women's teams, and no co-ed teams, the current composition of varsity teams in University's Intercollegiate Sports Program.

32. In 1987 and 1988, the Women's Soccer Club petitioned unsuccessfully for varsity status.

33. In January and March of 1987, the men's Hockey Club again petitioned for varsity status. University verbally denied the Men's Hockey Club's request for varsity status and recognition as an Intercollegiate Varsity Sports Team in University's Intercollegiate Sports Program for financial reasons, the reason given being that addition of another varsity team would adversely affect the financial viability of the existing Intercollegiate Sports Program under the existing financing system.

34. During Academic Year 1988-89, the University maintained 28 intercollegiate varsity sport teams in its Intercollegiate Sports Program.

35. The 28 intercollegiate varsity sport teams consisted of 15 men's teams and 13 women's teams.

36. As a consequence of the budgetary constraints in the Intercollegiate Sports program which resulted in the elimination of three varsity teams in University's Intercollegiate Sports Program in 1981 and 1982, University has refused since 1980 to consider the addition of any varsity sports teams to the Intercollegiate Sports Program on the grounds that the addition of any varsity sports team would adversely affect the financial viability of the University's Intercollegiate Sports Program and could result in elimination of a current varsity sport under the existing financing system.

C. STATEMENT OF STIPULATED FACTS REGARDING SOCCER

1. As a varsity team, the men's soccer team has the following items which, as a club team, the women's soccer club does not:
 - (a) a paid coach (about \$7,000 a year, 1981-83);
 - (b) a paid trainer covering all games and practices and medical supplies;
 - (c) athletic scholarships (Levi Lamb Grants-in-Aid);
 - (d) all equipment paid for by University (1979-1981, 25 female soccer players personally paid for warm-up suits at \$25.00 a piece and shoes at \$40.00 a pair each year);
 - (e) admission upgrades to enable student-athletes admitted at other campuses to transfer to Main Campus.

- (f) access to the Academic Support Center;
- (g) access to medical specialists retained by the Athletic Department;
- (h) Administrative support from the Athletic Department (In 1979-81, Conley personally paid approximately \$100.00 per year for postage and telephone).
- (i) The amounts budgeted for and expended by the University for Women's Soccer Club and the Men's Soccer Team:

WOMEN'S

<u>YEAR</u>	<u>TOTAL BUDGETED</u>	<u>ENCUMBERED</u>	<u>ACTUAL EXPENDITURES</u>
1981-82	\$ 7,536.00	\$ 990.00	\$ 6,545.49
1982-83	6,250.00	1,935.00	4,269.62
1983-84	5,625.00	1,280.00	4,249.39
1984-85	5,500.00	0.00	5,407.13
1985-86	4,900.00	0.00	4,515.44
1986-87	4,750.00	0.00	4,749.88
1987-88	4,500.00	0.00	4,489.00
1988-89	5,500.00	0.00	4,118.75

MEN'S

<u>YEAR</u>	<u>TOTAL BUDGETED</u>	<u>ENCUMBERED</u>	<u>ACTUAL EXPENDITURES</u>
1976-77	\$29,724.00		\$29,493.94
1977-78	40,381.00		38,234.03
1978-79	41,861.00		40,846.94
1979-80	34,492.00?		34,977.00
1980-81	44,645.00		40,475.00
1981-82	49,949.00		48,804.82

1982-83	57,930.00		55,943.00
1983-84	59,925.00		59,219.92
1984-85	62,103.00		60,862.47
Aug. 1986	67,960.00	\$853.92	66,401.10
1986-87	91,570.00		91,611.09

(j) The 1979-81 Women's Soccer Club members:

(1) Paid all expenses for a trip to England (1980).

(2) Food on road: (22 players).

1) 1979 - \$12.00 per day per student (2 days traveling).

2) 1980 - \$12.00 per day per student (7 days traveling).

(3) costs of lodging (22 students).

(i) 1979 - 1 night - 7 players stayed in a motel;

(ii) 1980 - 7 days traveling;

(iii) 1981 - 2 trips - Parents of players housed and fed students.

2. During the time periods in question, the Women's Soccer Club advertised on campus for new members. Players had to try out for the "A" team which was the primary team for competition with other colleges/universities. The rest of the Club formed the "B" team which primarily engaged in intrasquad scrimmages.

D. IDENTIFICATION STIPULATIONS

1. In March, 1981, Joseph Paterno was University's Director of Intercollegiate Athletics.

2. In the 1980-81 school year, Karl G. Stodefalke was acting Dean of University's College of Health, Physical Education, and Recreation.


3. James G. Tarman is presently University's Director of Intercollegiate Athletics.

4. Intercollegiate Sports Program: Intercollegiate Varsity Sport Teams directed and operated by and through University's Intercollegiate Athletics Department and primarily funded by revenues generated by the Intercollegiate Sports Program.

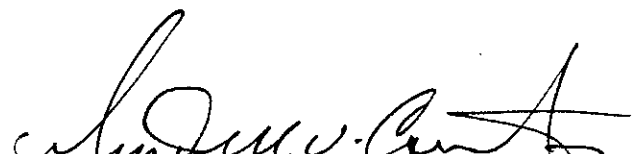
5. Sports Clubs: Competitive sports clubs and sports interest groups chartered and approved as club sports by Associated Student Activities, a student sponsoring organization, and funded through disbursements from the Sports Club Office (competitive club sports) or Associated Student Activities (sports interest groups), which funds are provided by University's Central Administration.

6. Intramural: Intracollegiate recreational activities.

7. EAIAW: Eastern Association of Intercollegiate Athletics for Women, a division of the former Association of Intercollegiate Athletics for Women (AIAW), later merged into the NCAA (National Collegiate Athletic Association).


Margaret D. Blough, Esq.
Attorney for the Pennsylvania
Human Relations Commission in
Support of the Complaints

Dated 3/14/90


Wendell V. Courtney, Esq.
McQuaide, Blasko, Schwartz, Fleming
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Attorney for Respondent

Dated 3/19/90

CONCLUSIONS OF LAW

1. In 1981, the female Complainants, Shawn Ladda and Joyce Leibelsperger, were students at Pennsylvania State University and members of the Women's Soccer Club.
2. Pennsylvania State University, is a place of public accommodation within the meaning of Section 5(i)(1) of the Pennsylvania Human Relations Act (PHRA), 43 P.S. §955(i)(1).
3. In March 1981, the Women's Soccer Club was denied varsity status for financial reasons.
4. Under a disparate impact theory, the Complainants have the initial burden of proof and to meet their burden must demonstrate that a facially neutral policy has a disproportionate impact on female athletes.
5. The Complainants failed to demonstrate that the Respondent's financially grounded rejection of the Women's Soccer Club's application for varsity status had a disparate impact on female athletes at Penn State.
6. At or about the time of the Respondent's rejection of varsity status for women's soccer, the Respondent also rejected varsity status for the club sport of men's ice hockey.
7. The evidence of record fails to establish disparate treatment of the women's soccer club when they applied for varsity status.
8. The women's soccer club was denied varsity status for legitimate financial considerations.
9. The record considered as a whole displays the Respondent as committed to establishing substantial equality for both men and women to participate in intercollegiate sports at Penn State.

OPINION

These consolidated cases arose on complaints filed by Shawn R. Ladda, (hereinafter "Ladda"), and Joyce B. Leibelsperger, (hereinafter "Leibelsperger"), against the Pennsylvania State University Athletic Department, (hereinafter either the "Athletic Department" or "Respondent"), on April 29, 1981 at Docket Nos. P-1727 and P-1728. In effect, the identical allegations of the two complaints allege that on March 12, 1981, the female soccer club at Penn State University, (hereinafter "Penn State") was denied varsity status because of the sex of the female members of the soccer club team. That denial has been alleged to violate section 5(i) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq, (hereinafter the "PHRA").

PHRC staff conducted investigations of these cases and found probable cause to credit the allegations in each complaint. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation, and persuasion. These efforts were unsuccessful, and these cases were approved for Public Hearing. By Pre-Hearing Order dated December 18, 1988 these matters were consolidated for Public Hearing. However, rather than conduct a Public Hearing, the parties agreed this matter could be submitted on briefs in lieu of a Public Hearing. Subsequently, on or about April 1990, this matter was submitted for resolution by briefs of the parties. The brief on behalf of the State's interest in the complaints was submitted by Margaret D. Blough, Esquire, and the Respondent's brief was submitted by Wendell V. Courtney, Esquire.

Initially, the precise nature of these cases should be clarified. In pertinent part both complaints allege that:

"on or about March 12, 1981, the Respondent denied to grant the soccer team, comprised of females, varsity status, thus eliminating and denying me the opportunity to participate in competition with intercollegiate soccer teams. I allege that the real reason we have been denied varsity status is because of our sex female in that:

1. The male soccer team has varsity status.
2. The male soccer team has a coach who is paid, our coach is not.
3. The denial of varsity status limits our opportunity to compete with other soccer teams with comparable skills.
4. My coach is continually denied recognition by the administration as a coach.
5. We the female soccer club/team have been denied the privileges that the male soccer team members have been afforded."

By the nature of the allegations, Ladda and Leibelsperger specifically have not suggested that the Athletic Department denies women the opportunity to participate on Penn State's varsity soccer team. In fact, both briefs in this case recognize that neither Ladda nor Leibelsperger are seeking the right to participate on the all male varsity soccer team. Instead, the complaints focus on an extremely narrow position which suggests that the Athletic Department must establish "separate but equal" soccer teams.

The complaints and the brief on behalf of the complaints make no meaningful mention of the larger picture: The overall opportunity for women to compete in intercollegiate athletics and whether there is a disparity in resources allocated to men's and women's intercollegiate athletic programs. Instead, the brief on behalf of the complaints seeks an extremely narrow interpretation of applicable legal principles regarding disparate impact.

The argument made by the brief on behalf of the complaints and the allegations raised by the complaints are actually and entirely "separate but equal" assertions. In effect, the Complainants argue that simply because there is a men's varsity soccer team, women should be automatically given an equal opportunity to have a comparable women's varsity soccer team.

Historically, the "separate but equal" doctrine articulated in Plessy v. Ferguson, 163 U.S. 537 (1896), which approved racial separation in transportation facilities, was soundly rejected in Brown v. Board of Education, 347 U.S. 483 (1954).

In Pennsylvania, the Commonwealth Court has declared, "The 'separate but equal' principle is no longer a legitimate argument in civil rights cases." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 287 A.2d 161, 168 (1972). The Pittsburgh Press case dealt with employment advertisements which referred to sex. In that case, the court found a violation and ordered utilization of a classification system of employment advertising with no reference to sex.

Approximately one year later, the U.S. District Court in the Western District of Pennsylvania looked at the separate but equal principle in the realm of interscholastic sports. Ritacco v. Norwin School Dist., 361

F. Supp 930 (W.D. Pa. 1973). In Ritacco, the Federal District Court indicated that, "sound reason dictates that 'separate but equal' in the realm of sports competition unlike that of racial discrimination, is justifiable and should be allowed to stand where there is a rational basis for the rule." Id at 932.

More recently, the U.S. District Court in the Eastern District of Pennsylvania revisited the "separate but equal" principle as applied in intercollegiate sports. Haffer v. Temple University, 678 F. Supp. 517 (E.D. Pa. 1987). Like the court in Ritacco, the Haffer court tends to embrace the "separate but equal" philosophy in the area of a school's athletic programs. Id at 525. However, the Haffer court went on to state: "This court's task is to define the 'equality' that is required, and then to determine whether defendants offer equivalent athletic programs to men and women student athletes." Id at 525.

The Complainants' may wish to keep the controversy of this case within the confines of only the sport of soccer, however, the actual controversy which has been presented here would be better articulated as whether there was an opportunity for men and women students at Penn State to participate in an athletic program which presents a variety of choices for those of differing interests and abilities. Accordingly, much of the analysis which follows will view the scope of the total athletic program offered at Penn State. As the Haffer court noted, "the standard should be one of comparability not absolute equality." Id at 525, citing Leffel v. Wisconsin Interscholastic Athletic Ass'n., 444 F. Supp. 1117 (E.D. Wis. 1978).

Section 5(i)(1) of the PHRA states in pertinent part:

"It shall be an unlawful discriminatory practice
....[f]or any....place of public accommodation...to...
[r]efuse, withhold from, or deny to any person because
of...sex...either directly or indirectly, any of the
accommodations, advantages, facilities or privileges of
such place of public accommodation..."

PHRC regulations at 16 Pa. Code §47.41(3) further provide in
pertinent part:

"it shall be an unlawful discriminatory practice
for any school to...[d]eny an equal opportunity to
participate in...intramural and interscholastic
athletics..."

In this case, there is no dispute that Penn State is a public
accommodation as defined by the PHRA. Additionally, the brief on behalf of
the complaints makes no attempt to claim that the Athletic Department
intentionally discriminated against Ladda and Leibelsperger. Instead, the
disparate impact theory was the only theory discussed by the brief on behalf
of the complaints: Disparate treatment arguments were effectively
abandoned.

However, the Respondent's brief did discuss both the disparate
treatment and disparate impact implications of this case. Briefly, there
are fundamental differences between the rules of proof for the two theories.
Under the disparate impact theory, the burden of proof rests first on a
Complainant. A Complainant must initially demonstrate that a facially
neutral factor has a disproportionate impact on either the treatment of or

opportunities available to the entire group of which the Complainant is a member. Once a Complainant meets this initial burden, a Respondent may either refute the existence of a disparate impact or attempt to justify the neutral policy which has led to a disproportionate impact. If a Respondent can make such a showing, a Complainant may ultimately prevail by then offering either an equally effective alternative practice which has less of a discriminatory impact, or proof that the legitimate practices are a pretext for discrimination. General Electric Corp. v. PHRC, 365 A.2d 649 (1976); Connecticut v. Teal, 457 U.S. 440, (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405, (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973); Griggs v. Duke Power Co., 401 U.S. 424, (1971); Sheehan v. Purolator, 839 F.2d 99, 104 (2d Cir. 1988); and most recently, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

By comparison, the disparate treatment theory is the most easily understood type of discrimination. Under this theory, a Respondent simply treats one person less favorable than others for an unlawfully discriminatory reason. Proof of a discriminatory motive is critical to the ultimate showing of disparate treatment. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987).

In contrast, proof of a discriminatory motive is not required of a Complainant proceeding under a disparate impact theory. See General Electric Corp. v. PHRC, 365 A.2d 649, at 658 (1976); and Griggs v. Duke Power Co., Supra. The Respondent's brief argues that there must be a showing that an alleged disproportionate impact reflects a discriminatory purpose. Washington v. Davis, 426 U.S. 229 (1976). However, the Respondent's citation to the Washington v. Davis case is misplaced as

Washington is readily distinguishable because it was a case dealing with a 14th amendment, constitutional question, not Title VII. Here we are dealing with the PHRA which is Pennsylvania's civil rights legislation which is analogous to Title VII. Therefore, proof of a discriminatory intent is not required to establish a disparate impact.

Courts have observed that both theories might overlap and that either theory could be applied to a specific set of facts. International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977). Here, the facts as stipulated shall be applied to both theories.

First, we shall review the facts as they relate to the disparate impact theory. As noted, the initial burden of proving that a facially neutral standard has a disproportionate impact is on the Complainants. Within this proof burden two basic issues arise. First, to what do we look to make a proper comparison? And second, once a comparison is made, what degree of disparity constitutes a significant disparity?

In response to the first inquiry we observe that the nature of the facially neutral standard will help establish the appropriate probative comparison. Here, the challenged standard was a financial consideration which initially arose from a February 1980 financial review of operating expense budgets of all varsity teams. That review revealed projected deficits for fiscal year July 1, 1979 through June 30, 1980. Subsequently, in the Summer of 1980, Penn State's Director of Intercollegiate Athletics created a Budget Priorities and Planning Committee to both review the financial viability of the entire Intercollegiate Sports Program and establish a schedule of priorities for allocating resources. This committee's review revealed projected deficits in operating expense budgets for all existing intercollegiate sports for 4 fiscal years: 1981-1982 through 1984-1985.

The March 1981 denial of the Women's Soccer Club's request for varsity status was thus predicated on the financial consideration that the addition of another varsity team would adversely affect the financial viability of the then existing intercollegiate sports program.

As a theory, disparate impact is generally found in such facially neutral employment practices as identifiable aptitude tests, requirement of high school graduation, arrest and conviction record bans, and height and weight requirements. Here, of course, the context is not an employment arena, but is an aspect of a university's intercollegiate athletic program policies. The disqualifying factor involved here was not a standard the Complainants could personally meet or pass. Instead, the neutral standard was a fixed disqualification.

Here we choose to adopt two statistical test procedures used by courts in fixed disqualifying factor cases. See, Green v. Missouri Pacific Railroad Co., 534 F.2d 1290 (8th Cir. 1975). The first procedure shall consider whether female sports clubs were excluded by the relevant neutral policy at a substantially higher rate than male sports clubs. The second procedure will examine the then level of program composition of female varsity sports in comparison to the then level of male varsity sports.

Before these procedures are applied, one further consideration is in order. Should Penn State Football be excluded from the test procedures about to be applied? Exhibit "U" portrays football as one sport which generates revenues in amounts greater than the expense of the program. In fact, it would appear that football revenues in no small way enable the remaining sports programs to be funded internally. Courts have held that the revenue-generating ability of a sport is an appropriate factor to

consider. See Haffer v. Temple University, 678 F. Supp. 517 (E.D. Pa. 1987); and Aiken v. Lieuallen, 593 P.2d 1243 (Ore. Ct. of Appeals 1979). In this case, given the extremely superior revenue-generating capacity of football, it is appropriate to make male and female comparisons of Penn State's athletic program in a light which excludes consideration of football.

Regarding the first tests outlined above, the evidence fails to portray any disparity. As presented, the evidence reveals that, at the relevant time frame, only two sports clubs applied for varsity status: The female soccer club and the male hockey club. When the policy in question was applied, both clubs were denied varsity status. Accordingly, male and female clubs were excluded at an equal rate.

With respect to the second test procedure, the brief on behalf of the complaints actually concedes that there is no statistically significant difference between 15 men's and 13 women's varsity teams. At the time of the women's soccer team's application for varsity status there existed 16 men's varsity teams, (15 excluding football), and 14 women's varsity teams. Shortly after the denial of the women's soccer team's request, Penn State eliminated the men's and the women's varsity bowling teams, thereby, leaving 15 men's and 13 women's varsity teams. (14 men's teams excluding football) Once again, the proof requirement to show a significant disparity cannot be met.

The Complainants with the evidence produced here, quite simply are unable to make out a prima facie case of disparate impact. The Complainants have similar difficulty with a disparate treatment theory.

Quite simply, the women's soccer club was treated exactly the same as the men's hockey club as both club's requests for varsity status were rejected for legitimate financial reasons. No attempt was made here to suggest that this articulated reason was in any manner a pretext for discrimination.

Generally, when one looks at Penn State's athletic program in a historical context, one readily sees that prior to 1964, varsity athletics effectively did not exist for women. However, between 1964 and 1976, Penn State appears to have aggressively introduced women's varsity athletics. (see "Statement of Stipulated Facts" #6). Twelve varsity sports for women were created in this time frame. The record displays an apparent commitment to the establishment of a meaningful measure of equality for men and women alike to share in the varied advantages offered to students who participate in intercollegiate athletics. The varsity team programs present varied choices for both male and female students of differing interests and abilities.

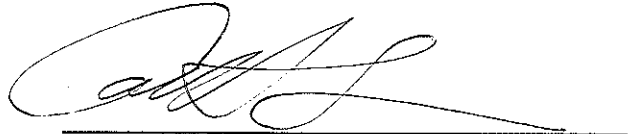
Accordingly, the Complainants having failed to prove their cases by a preponderance of the evidence, these cases should be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN R. LADDA, Complainant	:	
v.	:	Docket No. P-1727
PENNSYLVANIA STATE UNIVERSITY ATHLETIC DEPARTMENT, Respondent	:	
JOYCE B. LEIBELSPERGER, Complainant	:	
v.	:	Docket No. P-1728
PENNSYLVANIA STATE UNIVERSITY ATHLETIC DEPARTMENT, Respondent	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned consolidated cases, the Permanent Hearing Examiner finds that the Complainants have failed to prove discrimination in violation of Section 5(i) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations, 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
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ATHLETIC DEPARTMENT,
Respondent

Docket No. P-1727

Docket No. P-1728

FINAL ORDER

AND NOW, this 25th day of October, 1990, after a review of the entire record in these consolidated matters, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations, Conclusions of Law, and Opinion into the permanent record of this consolidated proceeding, to be served on the parties to the complaints and hereby

O R D E R S

that the complaints in these cases be, and the same hereby are Dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Rita Clark, Rita Clark
Rita Clark, Acting Chairperson

ATTEST:

Raquel Otero de Yiengst
Raquel Otero de Yiengst, Secretary