

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

NATHANIEL J. MOORE, III,  
Complainant

v.

BOROUGH OF ECONOMY,  
Respondent

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DOCKET NO. P-2526

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING COMMISSIONER

FINAL ORDER

IN THE COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Nathaniel J. Moore, III )  
 )  
 v. )  
 )  
 Borough of Economy )  
 )  
 )

PHRC Docket No. 2526

JOINT  
EXHIBIT

#2 4/14/92

STIPULATIONS OF FACT

1. The Complaint in the case of Nathaniel J. Moore, III v. Borough of Economy was filed on August 6, 1986 at PHRC Docket No. P-2526.
2. The Complainant in this case is Nathaniel J. Moore, III, a black individual who was more than twenty-one years of age at the time he filed the complaint in Nathaniel J. Moore, III v. Borough of Economy Docket No. P-2526.
3. The Respondent in this case is the Borough of Economy, a municipality of the State of Pennsylvania, and the County of Beaver.
4. In 1986 Complainant was the sole owner of a business called L & M Sanitation.
5. Complainant was a resident of Beaver County Pennsylvania at all times pertinent to this action.
6. On or about March of 1986, the Respondent placed a newspaper ad in the Beaver County Times inviting any member of the general public to bid for the exclusive right to provide residential garbage and rubbish pickup for the Respondent if he or she could meet relevant criteria.
7. Respondent's criteria for qualification and selection were listed in its "SANITATION AND REFUSE DISPOSAL ORDINANCE," Ordinance No. 267 (Code Section 97-6).
8. The Respondent required that each bidder specify the various residential garbage and rubbish pickup services which he or she would provide and the fees to be charged to each resident.
9. ~~The Respondent's newspaper ad indicated that the person(s) who submitted the lowest qualifying bid would provide garbage and rubbish pickup service to all residents of the Borough of Economy.~~

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10. The Respondent's newspaper ad indicated that bidders should submit their bid at or before the council meeting of the Respondent on May 13, 1986.

11. Together with a business associate, Mack Brown, Complainant attended the meeting of the Respondent council on May 13, 1986.

12. Mack Brown is a black individual.

13. Complainant submitted a bid to provide residential garbage and rubbish pickup for the Respondent beginning July 1, 1986 at the meeting of the Respondent on May 13, 1986 listing his business, L & M Sanitation, as the bidder.

14. Complainant's business associate, Mack Brown, attended the May 28, 1986 council meeting of the Respondent on behalf of the Complainant and Complainant's business, L & M Sanitation.

15. Respondent informed Mack Brown that Complainant's business, L & M Sanitation, had submitted the lowest bid.

16. Respondent informed Mack Brown that if L & M Sanitation could demonstrate that it could meet the criteria set out in its invitation to the public to bid, L & M Sanitation would have the exclusive right to provide residential garbage and rubbish pickup for the Residents of Borough of Economy.

DCJ  
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~~17. Respondent informed Mack Brown that he need only secure a performance bond to obtain the exclusive right to provide residential garbage and rubbish pickup to the residents of the Borough of Economy.~~

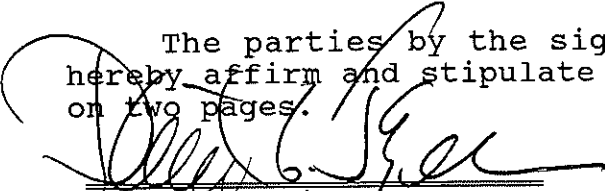
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~~18. At the May 28, 1986 Respondent Council informed Mr. Brown that L & M Sanitation had until the June 10, 1986 Meeting of the Respondent Council to obtain a performance bond.~~

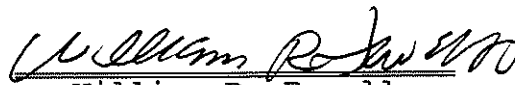
DCJ  
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~~19. Respondent refused to grant Complainant the exclusive right to provide garbage and rubbish pickup for its residents at its June 10, 1986 meeting.~~

DCJ  
4/14/92  
~~20. Respondent Council voted to award the exclusive right to provide garbage and rubbish pickup for its residents to Elliot Reid Powell at its June 10, 1986 meeting.~~

21. Elliot Reid Powell is a white individual.

The parties by the signature of their attorneys below do hereby affirm and stipulate to the foregoing facts listed above on two pages.

  
David G. Joyce  
Attorney for Respondent

  
William R. Fewell  
Attorney for Complainant

FINDINGS OF FACT \*

1. Nathaniel J. Moore, III (hereinafter "Complainant"), is an adult black individual who resides in Beaver County in the Commonwealth of Pennsylvania. (NT 9, SF 5.)
2. The Complainant at the time of the public hearing was employed with US AIR as a Tower Operator's Agent. (NT 9.)
3. In 1986, the Complainant formed a company called "L & M Sanitation". (NT 11, SF 4.)
4. The Complainant is the sole owner of L & M Sanitation. (SF 4.)
5. L & M Sanitation was formed as a refuse and disposal company with different types of equipment and vehicles. (NT 11.)
6. In March of 1986, the Borough of Economy (hereinafter "Respondent") published an advertisement in the Beaver County Times soliciting bids for the exclusive right to provide residential garbage and refuse pickup. (SF 6.)
7. The Respondent's criteria for qualification and selection were listed in its "SANITATION AND REFUSE DISPOSAL ORDINANCE." (SF 7.)
8. The Respondent further required that each bidder specify the various residential garbage and rubbish pickup services which he or she would provide and the fees to be charged to each resident. (SF 8.)

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\*The foregoing "Stipulations of Fact" are 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  
SF Stipulations of Fact  
CE Complainant's Exhibit

9. The Complainant completed a bid to provide garbage and refuse pickup with the Respondent. (NT 14.)
10. The Complainant and Mr. Mack Brown, a business associate, put the bid in an envelope and delivered it to Marie Hagy, Borough Secretary, on the evening of May 13, 1986, at 6:45 p.m. (NT 14, 15.)
11. The regular meeting of the Respondent council was to commence at 7:00 p.m. (NT 14, 15.)
12. At the meeting, the Respondent announced that there were three (3) bids to provide residential pickup. (NT 15.)
13. Both the Complainant and Mr. Brown attended the meeting of May 13, 1986. (NT 15, SF 11.)
14. The Complainant formally submitted a bid to provide residential garbage and rubbish pickup from July 1, 1986 at the May 13th meeting, listing his business, L & M Sanitation, as the bidder. (SF 13.)
15. Elliot Reid Powell, a white individual, also submitted a bid to provide residential garbage pickup at the May 13, 1986 council meeting. (NT 15.)
16. Gary Robinson, another white individual, also submitted a bid to provide residential garbage pickup at the May 13, 1986 meeting. (NT 15.)
17. These three bids were the only ones announced at the May 13, 1986 meeting. (NT 15.)
18. The next meeting of Respondent council was May 28, 1986. (NT 15.)
19. At the May 28, 1986 council meeting, the Respondent indicated that L & M Sanitation had submitted the lowest bid. (SF 15.)
20. The Complainant did not attend the council meeting of May 28, 1986. (NT 21.)

21. The Complainant's business associate Mack Brown attended the May 28, 1986 meeting on behalf of the Complainant. (SF 14.)
22. The Respondent indicated to Mr. Brown that L & M Sanitation would have the exclusive right to provide residential garbage and rubbish pickup if it could meet the criteria set forth in the invitation to bid. (NT 22, SF 16.)
23. According to the invitation to bid, the Complainant needed to have workmens' compensation liability insurance and a twenty-five thousand dollar performance bond prior to June 10th, the next council meeting. (NT 22.)
24. The Respondent, at the May 28, 1986 meeting, also stated that if the requirements were not met, then the proposal of E. Reid Powell would be accepted. (NT 24.)
25. Subsequent to the May 28, 1986 meeting, Mr. Brown informed the Complainant that the contract was contingent upon his (Complainant's) obtaining a performance bond. (NT 24.)
26. At the meeting of May 28, 1986, Mr. Brown offered a check for the amount of \$2,500 in lieu of a performance bond. (NT 121.)
27. The Respondent did not accept the offer of \$2,500 in lieu of a performance bond. (NT 121.)
28. At the May 28, 1986 meeting, Mr. Brown was asked numerous questions about the Complainant's business, L & M Sanitation. (NT 117.)
29. The questions involved several facets of the Complainant's business, such as: types of vehicles, insurance, special concessions, billing, and the performance bonds. (NT 117.)
30. Mr. Brown felt that the council members were satisfied with all of his responses except the issue of the performance bond. (NT 118.)

31. The Respondent instructed Mr. Brown that if he had any questions regarding the bond, he should contact Robert Lewis, the Respondent's solicitor. (NT 121.)
32. Mr. Brown then told the Complainant what had transpired at the meeting and told him to contact Mr. Lewis. (NT 123.)
33. After receiving this information, the Complainant went to his bank, Colony Savings (in Monaca) to secure a loan. (NT 24.)
34. The Complainant's banker informed him that he (banker) would need some sort of written verification or notification on Respondent's letterhead that he had the contract. (NT 24.)
35. The Complainant then called Robert Lewis, Respondent's solicitor, on June 3, 1986, and informed him of his conversation with the banker. (NT 27.)
36. Mr. Lewis's response was that he could not give the Complainant anything in writing because the Complainant did not have the contract at that time. (NT 27.)
37. The Complainant continually called Mr. Lewis concerning his inability to secure a performance bond. (NT 28-32.)
38. The Complainant also called several insurance companies in the vicinity in an attempt to procure a performance bond before the June 10, 1986 council meeting. (NT 28-30.)
39. As a last resort before the June 10, 1986 meeting, the Complainant offered to use property in lieu of a performance bond. (NT 32.)
40. The property that the Complainant wanted to use was his parents' home which was valued at \$110,000. (NT 32-33.)

41. The Complainant felt this option would be appropriate since the value of the property was more than four times the amount of the performance bond. (NT 32.)
42. The Complainant contacted Mr. Lewis and asked whether he could use the property in lieu of the performance bond. (NT 32.)
43. The Respondent's solicitor indicated to the Complainant that he could not use the property and that such an option was "ancient history." (NT 32.)
44. From May 28, 1986 until June 10, 1986, the Complainant was unable to secure a performance bond. (NT 61.)
45. Between May 13, 1986 and May 28, 1986, the Complainant did not attempt to secure a performance bond. (NT 61.)
46. On June 10, 1986, the Respondent held a council meeting at which time the bid of the Complainant and his company, L & M Sanitation, was considered. (NT 34.)
47. Both the Complainant and Mr. Brown, his business associate, attended the council meeting of June 10, 1986. (NT 34.)
48. The Respondent's council reiterated at the beginning of the meeting that the Complainant's company had been awarded the contract pending the insurance and the performance bond. (NT 35.)
49. Prior to the meeting of June 10th, the Complainant had secured insurance with Willard Lewis Insurance, Ambridge, Pennsylvania. (NT 37.)
50. At the June 10th meeting, the Complainant reviewed to the Respondent council the various ways he had attempted to resolve the difficulty of securing a performance bond. (NT 39-40.)



51. The Respondent did not consider the alternatives proposed by the Complainant and awarded the exclusive right to provide residential garbage pickup to E. Reid Powell. (NT 42.)

52. The Complainant was told orally, on the night of June 10, 1986, that his company would not receive the contract and that the contract would revert to Mr. Powell. (NT 43.)

53. On June 11, 1986, the Complainant received a written letter from the Respondent indicating that his company had been turned down for garbage and rubbish disposal and that the contract would revert to E. Reid Powell. (NT 42.)

54. In previous years, E. Reid Powell performed the contract and only provided property liens (CE # 5-10)

## CONCLUSIONS OF LAW

1. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. The Respondent is an employer within the meaning of the PHRA.
3. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
4. All of the procedural prerequisites for a public hearing have been met.
5. The Complainant established a prima facie case of race discrimination by showing:
  - a) he is a member of a protected class;
  - b) the Complainant was qualified to perform residential garbage and refuse pickup for the Respondent;
  - c) the Respondent denied the Complainant the opportunity to perform residential garbage and refuse pickup; and,
  - d) an individual not of the protected class (a white individual) was awarded the contract to perform residential garbage and refuse pickup.
6. The Respondent has met its burden of providing evidence of a legitimate, nondiscriminatory reason for its action.
7. The Complainant has shown that the proffered explanation of the Respondent is pretextual and unworthy of credence.
8. The Complainant has met his ultimate burden of proving unlawful discrimination.

9. The PHRC may fashion a remedy which will effectuate the purpose of the PHRA.

10. The Pennsylvania Human Relations Commission is permitted to award interest at the rate of six percent (6%) per annum.

## OPINION

This matter arises out of a complaint filed by Nathaniel J. Moore, III (hereinafter "Complainant"), against the Borough of Economy (hereinafter "Respondent"), Docket No. P-2526, with the Pennsylvania Human Relations Commission. On August 6, 1986, the Complainant filed his complaint with the Pennsylvania Human Relations Commission (hereinafter "PHRC") alleging a denial of his bid to handle the sanitation, garbage and rubbish disposal contract with the Respondent because of his race, Black. The complaint alleges a violation of Section 5(i)(1) and (2) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

PHRC staff conducted an investigation and found probable cause to credit the allegations of the complaint. Thereafter, the PHRC staff endeavored to conciliate this matter, and efforts were unsuccessful. Subsequently, a public hearing was approved in this matter.

The public hearing in this matter was held over several dates: April 14, 15 and 16, 1992, as well as July 22 and 23, 1992. On April 14, 15 and 16, 1992, the public hearing was heard by Commissioners Carl E. Denson and Lauren Lukert. Because of illness, Commissioner Lukert was unable to continue sitting as a Commissioner. Therefore, by agreement of the parties, Commissioner Denson was the Hearing Commissioner for the last two days of the hearing, July 22 and July 23, 1992.

Subsequent to the last day of the hearing, the full Commission directed Commissioner Denson to reconvene the hearing to request additional information on the issue of damages. The Complainant, with the agreement of Respondent, then filed a Motion for Leave to Submit Supplemental Argument and Other Written Materials In Lien of Further Public Hearing Proceedings.

This Motion was granted, and Complainant submitted further information on damages. The Respondent's counsel indicated that he did not wish to submit additional information.

The Complainant in this matter was represented by William R. Fewell, Esquire. The Respondent was represented by David G. Joyce, Esquire. The PHRC interest in this matter was represented by Vincent A. Ciccone, Assistant Chief Counsel. Both the Complainant and the Respondent submitted post-hearing briefs. The Complainant's brief was received on November 3, 1992 and the Respondent's brief was received on November 2, 1992.

In reviewing the Complainant's allegations, we recognize the nature of his claims present allegations of disparate treatment based on race. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a number of recent cases. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). 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, nondiscriminatory reason. . . for [its action]." If the Respondent meets this production burden, in order to prevail, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a respondent, or indirectly by showing that a respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Following its instruction on the effect of a prima facie showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The court stated that:

As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes."

The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that the evidence does preponderate to prove discrimination. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." Allegheny Housing, supra at 319.

In this court-designed burden allocation, the Complainant must, of course, first establish a prima facie case. Accordingly, the normal proof pattern must be adapted to fit the factual variance presented by the instant case. Now we move to the analysis of the prima facie showing. The prima facie showing should not be an onerous burden. In the instant case, a prima facie case of race discrimination can be established by showing that:

- 1) the Complainant is a member of a protected class;
- 2) the Complainant was qualified to perform residential garbage and refuse pickup for the Respondent;
- 3) the Respondent denied the Complainant the opportunity to perform residential garbage and refuse pickup for the Respondent; and

- 4) an individual not of the protected class (a white individual) was awarded the contract to perform residential garbage and refuse pickup.

Clearly, the Complainant meets the first element of the prima facie showing in that the Complainant is a black male. The Complainant also presented evidence showing he was qualified to perform residential garbage and refuse pickup for the Respondent. This evidence not only included testimony from the Complainant but also the exhibits that represented the Complainant's bid to the Respondent Borough. Finally, on this particular point, the Complainant was obviously qualified to perform the services, since the Complainant's bid was, conditionally, accepted by the Respondent.

Next, the Complainant meets the third and fourth prongs of the prima facie analysis in that the Respondent did deny the Complainant the opportunity to perform residential garbage and refuse pickup, and then awarded the contract to E. Reid Powell, a white contractor.

Given the above facts and the point that the burden of establishing a prima facie case should not be onerous, the Complainant has set forth a prima facie case of discrimination. As aforementioned, in the analytical model of reviewing discrimination cases, the Respondent must simply "produce evidence of a legitimate, nondiscriminatory reason for [its action]." The Respondent has clearly asserted that the reason that the Complainant was not awarded the contract was because he could not obtain a performance bond which was a contingency of the bid.

With the above assertion, the Respondent has met its burden of production by simply producing evidence of a legitimate, nondiscriminatory reason for its action. Once the Respondent has met its burden, the Complainant may prevail by showing that the proffered explanations are pretextual, or unworthy of credence. The Complainant still has the ultimate

burden of demonstrating by a preponderance of the evidence that he is the victim of intentional discrimination.

Upon review of the evidence before the Commission, it is clear that at the May 28, 1986 meeting of Respondent Borough, the Complainant's representative was informed that L & M Sanitation (Complainant's company) was awarded the contract contingent on the Complainant's obtaining a performance bond. Stated quite succinctly, the issue in this matter is whether the Complainant can show that the Respondent's stated reason (inability to obtain a performance bond) is unworthy of credence.

When the Complainant was "awarded" the contract contingent on his obtaining a performance bond, the Respondent also made it clear that if the Complainant was unable to do so, then the contract would automatically revert to E. Reid Powell. Mr. Powell is a white individual who had performed these particular services for the Respondent for a number of years. The Respondent then directed the Complainant's representative to seek the assistance of Robert Lewis, Esquire, in order to obtain a performance bond. (The Complainant himself did not attend the meeting at which the contract was contingently awarded to his company; however, he did send a representative.)

The record is clear in establishing that the Complainant had extreme difficulty in obtaining a performance bond. The Complainant made three different offers in an attempt to satisfy the performance bond requirement. Firstly, his representative at the May 28th meeting (Mr. Brown) offered \$2,500 in cash in lieu of the \$25,000 performance bond. This offer was refused by the Respondent. Secondly, the Complainant indicated



that he would get a performance bond for \$25,000 if the Respondent would forward a letter to the bank indicating that the Complainant's company would be the sole provider of the residential garbage and refuse pickup. The Respondent's solicitor refused to write such a letter, and consequently this offer was refused. Thirdly, the Complainant offered to use either his property or his parents' property as collateral to satisfy the \$25,000 performance bond requirement. At the time, relevant to the instant complaint, the Complainant's parents' property was valued at approximately \$110,000. This offer was also refused by the Respondent.

At this point in the process, the Respondent had every right to require a performance bond as long as a performance bond was required for all individuals who were awarded the contract. In essence, the Respondent appears to assert that the performance bond is a qualifying factor in the awarding of a contract. However, a review of the record reveals that the requirement of a performance bond was not always necessary. In fact, E. Reid Powell performed Respondent's refuse and garbage pickups in previous years secured by property liens. (Exhibits 5, 6, 7, 8, 9, 10.) Furthermore, when the Complainant was unable to secure a performance bond in June 1986, and the contract reverted to E. Reid Powell, Mr. Powell's bond expired two months after the contract began. Consequently, Mr. Powell was permitted to continue the contract without any security until November of 1986 when the Respondent obtained a confession of judgment.

The evidence in this matter supports the conclusion that the Respondent's stated reason is pretextual. The Complainant fulfilled all of the requirements set forth by the Respondent, except the performance bond. The Respondent provided no assistance in helping the Complainant obtain a

performance bond. On the contrary, the Respondent became extremely firm and inflexible in its demand vis a vis the Complainant. However, as aforementioned, Mr. Powell was permitted to use a property bond both before and after the Respondent refused to allow the Complainant to do the same thing.

Upon review of the entire record in this matter, the Complainant has shown that the proffered explanation of Respondent is unworthy of credence and pretextual. Accordingly, the Complainant has met his ultimate and overall burden of proving unlawful discrimination on the part of the Respondent for its action in not awarding the contract to the Complainant.

Having reached the above finding Section 9 of the Pennsylvania Human Relations Act empowers the Commission to effectuate the Act's purposes. Section 9 of the Act provides, in pertinent part:

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

43 P.S. §959(f)

This section of the Act has always been broadly interpreted. In Murphy v. Cmwlth, PA Human Relations Commission, 506 PA. 549, 486 A. 2d 388 (1985) the Pennsylvania Supreme Court said "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their

actions are entitled to deference by a reviewing court." Murphy at 486 A.2d 393.

The Commission, in awarding any remedy, has two purposes. The first purpose is to insure that the unlawful discriminatory practice is completely eradicated. The second purpose is to restore the injured party to his pre-injury status and make him whole.

Having stated thusly in regard to the issue of remedy, we now turn to the Complainant's argument in the instant case. The Complainant is essentially seeking money damages from July 1, 1986 until June 30, 1992. The Complainant also asks that the Commission order the Respondent to grant Complainant the exclusive right to perform its residential garbage and refuse pickup for a period of no less than one year, require Respondent to pay Complainant all lost earnings as measured by Mr. Powell's earnings, and require Respondent to refrain from race discrimination in its choice of garbage and refuse pickup providers.

The Respondent's position on damages is that there is no way to discern the amount of income earned by the individual who performed the contract. Interestingly, the Respondent does not attempt to prove a failure to mitigate, but rather Respondent asserts that the amount of income would be impossible to calculate. Furthermore, the Respondent presented a witness, David Kaplan, a certified accountant, who testified that the Complainant's company would not have been able to make a profit.

In the instant case, this issue of remedy is particularly difficult since the evidence presented at the public hearing in regard to damages is solely lacking on the part of both parties. Therefore the construction of a remedy in this particular case will clearly reflect the

Commission's broad discretion in fashioning a remedy, but keeping in focus that the Complainant should be restored to the position he would have been in had the contract been awarded to him. Firstly, the Complainant will be restricted to the year (1986-1987) that the Respondent awarded the contract to Mr. Powell. The Complainant asserts that if he had been awarded the contract in the year 1986-1987, he would have held all of the yearly agreements up until the present. Such a position is somewhat untenable since the contracts are re-bid on a yearly basis. Therefore, the Complainant will be restricted to the year 1986-1987.

The individual awarded the contract earned \$151,563.50 for the year 1986-1987. Upon review of the evidence before the Commission, this individual (Mr. Powell) was not the lowest bidder. The contract reverted to him because of the action against the Complainant. As aforementioned, it is unclear what the difference was between the Complainant's bid and the individual who ultimately received the contract. Therefore, given the Commission's broad discretion fashioning a remedy, there will be a ten percent (10%) reduction in the amount of the earnings because of the difference in the original bids. The Complainant's damages would then be reduced to \$136,407.15.

Another reduction is necessary in that the Complainant, if he had been awarded the contract, would have sustained expenses in paying Mr. Brown or someone else to assist him in performing the contract services, since the Complainant was working full-time elsewhere. Once again, there is nothing in the record to assist in determining what this figure is. The amount of damages will be reduced by either (1) one-third of the amount Complainant would have received, or (2) the Complainant's wages. Since there is nothing

in the record that indicates what the Complainant earned, the aforementioned sum of \$136,407.15 will be reduced by one-third (\$45,469.05) to \$90,938.10.

The next issue is whether this award should be reduced for failure to mitigate. Firstly, it is the Respondent's burden to establish that the Complainant failed to mitigate his damages in order to limit a plaintiff's entitlement. Cardin v. Westinghouse Electric Corp. 850 F. 2d 996, 1005 (3rd Cir. 1988) Furthermore, the Respondent must prove that the Complainant did not exercise reasonable diligence in seeking other employment. Cardin 850 F. 2d 1005 However, the Respondent had not presented any evidence (nor argued) that the Complainant failed to mitigate damages. Rather, the Respondent argues that the amount of damages is too speculative to make an award of damages. While the Respondent attacks the speculativeness of the damages, there has been no showing of lack of diligence on the part of the Complainant. Therefore, it is the finding of the Commission that the Complainant should be awarded the sum of \$90,938.10, plus an additional amount of six percent (6%) per annum, up to the date of Public Hearing.

Accordingly, having found that the Complainant has met its ultimate and overall burden of proving unlawful discrimination on the part of the Respondent for its action in not awarding the contract to the Complainant, an appropriate Order follows:

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PENNSYLVANIA HUMAN RELATIONS COMMISSION

NATHANIEL J. MOORE, III,  
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BOROUGH OF ECONOMY,  
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DOCKET NO. P-2526

RECOMMENDATION OF THE HEARING COMMISSIONER

Upon consideration of the entire record in the above-captioned case, it is the Recommendation of the Hearing Commissioner that the Complainant has proved discrimination in violation of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Commissioner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Final Order be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, this Hearing Commissioner recommends issuance of the attached Final Order.

By:

  
\_\_\_\_\_  
Carl E. Denson  
Hearing Commissioner

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DOCKET NO. P-2526

FINAL ORDER

AND NOW, this 29th day of September, 1994, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, and in accordance with the Recommendation of the Hearing Commissioner, pursuant to Section 9 of the Pennsylvania Human Relations Act, therefore

O R D E R S

1. That the Respondent cease and desist from any unlawful discrimination in its awarding of contracts.
2. That the Respondent award to the Complainant the residential garbage and refuse pickup contract for the year 1995-1996.
3. That the Respondent shall pay Complainant, within thirty days of the date of this Order, the lump sum of \$90,938.10, plus an additional amount of interest of six percent (6%) on that lump sum, up to the date of Public Hearing.

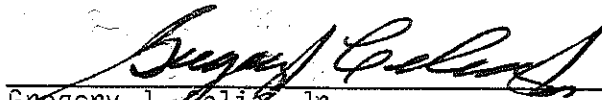
4. Within thirty days of the date of this Order, Respondent shall report on the manner of compliance with the terms of this Order by letter addressed to Lorraine S. Caplan, Esquire, at the Commission's Pittsburgh Regional Office located at 11th Floor State Office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Robert Johnson Smith  
Chairperson

ATTEST:



Gregory J. Celis, Jr.  
Secretary