

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

FLORA M. OSMAN, on behalf of herself :
and all persons similarly situated, :
and SHARON LAWSON, on behalf of the :
estate of FLORA M. OSMAN, :
Complainants : Docket No. E-35205A
v. :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA STATE EMPLOYES' :
RETIREMENT SYSTEM, :
Respondent :

STIPULATIONS OF FACT

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RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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estate of FLORA M. OSMAN, :

Complainant :

v. : DOCKET NO. E-35205-A

COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA STATE EMPLOYEES' :
RETIREMENT SYSTEM, :

Respondent

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required. The parties agree to the extent provisions of the State Employee's Retirement Code, 71 Pa. C.S. §§5101-5956, (hereinafter referred to as "Code") or other relevant law are paraphrased or restated as "facts" herein, such statements of fact shall not alter the provisions of law and all parties may argue directly from the Code and other relevant law.

1. On or about November 25, 1985, Flora M. Osman (hereinafter referred to as "Osman") filed a notarized complaint on behalf of herself and all other persons similarly situated with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-35205-A against the Commonwealth of Pennsylvania, Pennsylvania State Employees' Retirement System (hereinafter "Respondent" or "SERS").

2. The Respondent, at all times relevant to the instant case, has employed four or more individuals in the Commonwealth of Pennsylvania.

3. On June 9, 1986 Osman died.

4. On or about October 29, 1986, Sharon Lawson filed an amended complaint in this matter on behalf of the estate of Osman. A copy of the amended complaint will be included as a docket entry in this case at time of hearing.

5. Sharon Lawson, daughter of Osman, is the duly appointed executrix of the Osman estate.

6. In November, 1986, the Commission notified the Respondent that probable cause existed to credit the allegations contained in the above referenced complaint.

7. Subsequent to the finding of probable cause the Commission and Respondent attempted to eliminate the allegedly unlawful practice through conference, conciliation and persuasion, but were unable to do so.

8. In August, 1987, the Commission notified the Respondent that a Public Hearing had been approved in this matter.

9. Osman became an employee of the Commonwealth of Pennsylvania, in June, 1978, when she was hired by the Pennsylvania Human Relations Commission.

10. The Pennsylvania Human Relations Commission is a non-partisan departmental administrative Commission of the Commonwealth which is administratively located in the Governor's Office.

11. Osman became a member of SERS upon commencement of her employment with the Commonwealth, effective on the first day of her employment.

12. Membership in SERS was mandatory for Osman.

13. SERS is administered by the State Employees' Retirement Board which is an independent administrative board of the Commonwealth of Pennsylvania established pursuant to the Code.

14. On or about July 17, 1985, Osman, through her treating physician, advised the Commission that she had been unable to work from June 7, 1985 due to shortness of breath secondary to lung cancer, and that she needed to be off work indefinitely.

15. On or about July 24, 1985, the Commission advised Osman that it had approved her request for Sick Leave Without Pay With Benefits (SLWOPWB) and Extended Sick Leave and further advised Osman of the following with respect to her leave status:

- As of August 14, 1985, her anticipated leave, (sick, annual, and personal) would be depleted.
- Special Extension of sick leave of fifteen (15) days would carry her through September 4, 1985.
- Sick Leave Without Pay With Benefits would end March 4, 1986.

16. Osman began a SLWOPWB on September 5, 1985.

17. Osman, who was born on May 10, 1925, became sixty years old on May 10, 1985.

18. On or about October 9, 1985, Osman contacted SERS to determine her eligibility for receiving a disability annuity pursuant to SERS.

19. On or about October 16, 1985, Aldo J. Mastrine, Director of the Retirement Counseling Division of SERS, talked to Osman.

20. During the October 16, 1985 conversation, Mastrine advised Osman that she was not eligible to receive disability annuity benefits because she had attained superannuation age by virtue of being age sixty or older.

21. Under the Code, superannuation age is defined as:

"Superannuation age." Any age upon accrual of 35 eligibility points or age 60, except for a member of the General Assembly, an enforcement officer, a correction officer, a psychiatric security aide, a Delaware River Port Authority policeman or an officer of the Pennsylvania State Police, age 50."

22. Osman did not submit a formal application for a disability annuity to the Respondent.

23. The Respondent did not make a determination as to whether Osman was or would have been entitled to a disability annuity on the merits of her claim that she was mentally or physically incapable of continuing to perform the duties for which she was employed.

24. Had Osman submitted an application for a disability annuity it would not have been accepted because she had attained superannuation age which for her was defined by statute as age sixty.

25. On or about January 31, 1986, Osman advised the Commission that she would be unable to resume her normal job duties when her SLWOPWB status ended.

26. Osman's SLWOPWB status ended on March 4, 1986.

27. Osman terminated her employment with the Commonwealth effective March 4, 1986 and retired effective March 5, 1986.

28. Osman had 7.4590 years of credited service in SERS when she retired and had 7.4590 years of credited service in SERS as of September 5, 1985.

29. Osman, effective on her retirement, enrolled in the Retired Employee Health Program (REHP) in order to provide herself with Blue Cross/Blue Shield/Major Medical coverage.

30. Eligibility for participation in REHP and responsibility for payment of periodic premiums is provided by applicable provisions found in various contracts negotiated between the Commonwealth and its employees.

31. With respect to Osman, who was in the bargaining unit of employees represented by the American Federation of State, County and Municipal Employees (AFSCME), coverage, benefit provisions and premium payment responsibility were controlled by relevant collective bargaining agreements negotiated between the Commonwealth and AFSCME.

32. Respondent, although an agency of the Commonwealth, is not independently responsible for, and has no independent authority to establish or collectively bargain over, the qualifications and requirements for participation by former Commonwealth employees in REHP or the terms and conditions of benefits from, and premium levels and payment sources to, REHP.

33. At the time of Osman's retirement, medical benefit coverage under REHP necessitated a monthly premium payment to the insurer of \$84.00.

34. At the time of Osman's retirement, the applicable collective bargaining agreement, as it related to Osman, provided that the Commonwealth would pay \$5.00 toward the monthly benefit premium with Osman obligated to pay the remaining \$79.00 in monthly premium costs.

35. Pursuant to the collective bargaining agreement in effect between the Commonwealth and AFSCME at the time of Osman's retirement, disability annuitants received medical benefit coverage under REHP without cost to the annuitant.

36. Had Osman been eligible to receive a disability annuity under the Code, applied for a disability annuity, and actually been granted a disability annuity on the merits of her claim, the Commonwealth, pursuant to its collective bargaining agreement with AFSCME, would have paid the entire cost for medical benefit coverage under REHP.

37. Osman, even if otherwise determined to be eligible for a disability annuity in September, 1985, would not have been entitled to receive one because she had reached superannuation age as of May 10, 1985.

38. The Respondent's determination that Osman was not eligible to apply for disability annuity benefits was based solely on her attainment of superannuation age prior to application.

39. Commonwealth employees who are SERS members contribute a percentage of their compensation (usually by deduction from each paycheck received) into the State Employees' Retirement Fund.

40. The Commonwealth as an employer contributes to the State Employees' Retirement Fund based on a percentage of the compensation of active member employees.

41. The opportunity for Osman to obtain an annuity, whether superannuation or disability, provided that she met all necessary criteria, was a benefit associated with her employment by the Commonwealth.

42. Osman paid at least \$237.00 in premiums for medical benefit coverage under REHP between March, 1986 and June, 1986 inclusive.

43. Osman, effective with her retirement, was eligible to receive a superannuation annuity.

44. The following factors were used to calculate Osman's superannuation annuity:

Final Average Salary	- \$15,781.76
Credited Service	- 7.4590 years
Total Accumulated Deductions	- \$5,536.42
Option 1 Reduction Factor	- .9246
Cost of a dollar annuity	- \$14.1951

Reserve factor

- \$12.2730

45. When Osman retired she elected to receive an amount equal to all of her accumulated deductions under Option 4 and the remainder of her benefit under Option 1. Osman's account had a total initial present value of \$33,419.81 (minus \$894.88 deducted to satisfy an agency debt). Osman's gross monthly check after optional modification was \$151.35.

46. Osman was not a joint coverage member, was not a multiple service member, did not have Social Security Intergration coverage and had only Class A membership.

47. The Code creates three types of annuities: (1) a superannuation (or "normal retirement") annuity; (2) a withdrawal (or "early retirement") annuity; and (3) a disability annuity.

48. Under the Code, all SERS annuities are calculated on the basis of a "standard single life annuity" (hereinafter referred to as a "SSLA"). A SSLA is an annuity equal to 2% of the final average salary, multiplied by total number of years and fractional part of a year of service.

49. The Code sets forth the eligibility requirements for each of the three types of annuities:

a. Superannuation Annuity:

1. must be an active member or an inactive member on leave without pay status;
2. must have attained superannuation age;
3. must have at least three years of school or state service;
4. must terminate service;
5. must comply with section 5907 (f) requirements (relating to rights and duties of State employees and members).

b. Withdrawal Annuity:

1. must be an active member or an inactive member on leave without pay status;
2. must be under superannuation age;
3. must have ten or more eligibility points (generally an active member accrues one eligibility point for each year of credited service);
4. must terminate service;
5. must comply with section 5909 (f) requirements.

c. Disability Annuity:

1. must be an active member or an inactive member on leave without pay;
2. must be under superannuation age;
3. must have at least five years of service; (certain law enforcement officers have no minimum service);
4. not required to terminate service;
5. must comply with section 5907 (k) requirements;
6. must be mentally or physically incapable of continuing to perform the duties for which he is employed;
7. must qualify in accordance with section 5905 (c) (1) (relates to duties of the retirement board regarding application for a disability annuity).

50. Under the Code, a withdrawal annuity is calculated in the same manner as a superannuation annuity except that it is actuarially reduced because the retirement has occurred prior to attainment of superannuation age. (Section 5308.1 of the Code provides for certain instances where the withdrawal annuity is not actuarially reduced.)

51. Under the Code, a disability annuity, for those employees with more than 16.6667 years of credited service at point of eligibility, produces the equivalent of a superannuation annuity except that, unlike a withdrawal annuity, it is not actuarially reduced because of the cessation of service prior to attainment of superannuation age. See "Age 30" Through "Age 55" Annuity Charts and Associated Annuity Graphs attached hereto as Exhibit "A" ("Age 30" Annuity Chart) and Exhibit "A-1" ("Age 30" Annuity Graph) through Exhibit "F" ("Age 55" Annuity Chart) and Exhibit "F-1" ("Age 55" Annuity Graph). See also "Age 60" Annuity Chart attached as Exhibit "G".

52. Under the Code, a disability annuity and a superannuation annuity for an employee with exactly 16.6667 years of credited service at point of eligibility will equal one-third of final average salary ($.02 \times 16.6667 = .33334$). These same annuities, for employees with more than 16.6667 years of credited service at point of eligibility, will exceed one-third of final average salary and will increase by 2%, when expressed as a percent of final average salary, for each additional year of service beyond 16.6667 years at point of receipt of the annuity. See Exhibits "A" through "G" attached hereto.

53. Under the Code, with respect to a disability annuity, employees who began their employment before the age 43.3333 and who have at least five years of credited service but not more than 16.6667 years of credited service at point of eligibility will receive a disability annuity equal to one-third of their final average salary irrespective of their age at point of hire (as long as under 43.3333) and irrespective of the number of years of service at point of eligibility within the five year to 16.6667 year timeframe previously mentioned. See Exhibits "A" through "G" attached

hereto.

54. Under the Code, with respect to a disability annuity, employees who began employment after the age of 43.3333, who have not purchased creditable non-state service and are not multiple service members, and who have at least five years of credited service at point of eligibility (such employees mathematically cannot reach 16.6667 years of credited service before attainment of superannuation age) will receive a disability annuity of less than one-third of final average salary and one that, when expressed as a percent of final average salary, will decrease as the age of the employee at point of hire increases.

<u>Age hired</u>	<u>Age initially eligible</u>	<u>% of FAS</u>
44	49	32
45	50	30
46	51	28
47	52	26
48	53	24
49	54	22
50	55	20
51	56	18
52	57	16
53	58	14
54	59	12
55	60	*

* Not eligible for a disability annuity because superannuation age has been reached. Is eligible for a superannuation annuity which would equal 10% of final average salary (.02 x 5 years of service =10%).

55. Under the Code, the following represents, in general, a summary of comparison between a withdrawal and/or superannuation annuity and a

disability annuity:

SUMMARY OF COMPARISON

Withdrawal/Superannuation

1. Reduction if under superannuation age.
2. Option 4 available (including withdrawal of amount equal to accumulated deductions).
3. Option 2 or 3 available on entire benefit.
4. Equalizing factor for SSLA & SSI benefit.
5. Frozen present value if return to service (§5706(a).)
6. Must terminate service to receive benefit.
7. Class of service multiplier for each year.
8. Maximum Single life annuity payment of accumulated deductions.
9. Bonus for over 40 years of service. (Superannuation only)
10. By definition not available.
11. Cap on maximum benefits.

Disability

1. No reduction if under superannuation age.
2. Withdrawal of lump sum and certain other Option 4 plans not available.
3. Option 2 or 3 or an Option 4 joint and survivor annuity available only on portion of benefit available as withdrawal annuity. If elected, no other death benefit is available.
4. No equalizing factor.
5. No frozen present value if return to service.
6. Code does not require termination. Labor contracts or other personnel rules may require termination.
7. Class of service multiplier for each year.
8. Disability annuity guarantees payment of withdrawal annuity initial present value.
9. By definition not available.
10. Enhanced benefit if disability is service related, but total benefit offset by other benefits received.
11. No cap on maximum benefits, but benefit offset by outside earned income (not below amount available as withdrawal annuity.)

56. Under the Code, based upon the factors listed in stipulation of fact #45, Osman was entitled to select a superannuation annuity according to one of the following benefit payment plans. [NOTE: All of the calculations below and in paragraph 57 disregard the outstanding agency debt of \$894.88 owed by Osman. If that amount would have been satisfied by payments from Respondent, adjustments would have been made to Osman's account.]

a. Maximum single life annuity:

if selected, Osman would have received \$196.19 per month with guaranteed total annuity payments equal to her accumulated deductions of \$5,536.42. If she died before receiving this amount the balance would be paid to her beneficiary.

b. Option 1:

if selected, Osman would have received \$181.40 per month with guaranteed total annuity payments equal to the initial present value of the maximum single life annuity available to her (\$33,419.81). If she died before receiving this amount, the balance would be paid to her beneficiary.

c. Option 2:

if selected, Osman would have received "x" per month with her survivor annuitant entitled to receive the same monthly amount should her survivor annuitant outlive her. No minimum payments are guaranteed. The death of Osman followed by the death of her survivor annuitant would terminate all payments. Because the calculation of an option 2 benefit is dependent upon actuarial values for two lives, the amount varies depending on the age of the survivor annuitant and cannot be calculated here. It will always be less than the maximum single life annuity.

d. Option 3:

if selected, Osman would have received "y" per month with her survivor annuitant entitled to receive one-half that amount should her survivor annuitant outlive her. No minimum payments are guaranteed. The death of Osman followed by the death of her survivor annuitant would terminate all payments. Because the calculation of an Option 3 benefit is dependent upon actuarial values for two lives, the amount payable varies depending on the age of the survivor annuitant and cannot be calculated here. The amount due the member will always be less than the maximum single life annuity and for a survivor annuitant of the same age will be greater than the amount

payable under Option 2.

e. Option 4:

if selected, Osman could have designed her own payment plan subject to certain legal and actuarial restrictions. A commonly used feature of Option 4 benefit plans is the ability to receive a portion of the present value of the maximum single life annuity equal to the member's contributions and interest. The remaining value of the benefit is then received under one of the other options. Ms. Osman actually took this option, receiving \$5,536.42 as a lump sum and the remainder of her benefit pursuant to Option 1.

57. Had Osman been entitled to receive a disability annuity (assuming the disability annuity formula found in the Code would be applicable) she would have been entitled to select a disability annuity from among the following benefit payment plans:

a. "standard" disability annuity:

if selected, Osman would have received \$196.19 per month with guaranteed total annuity payments equal to her initial present value of the maximum single life annuity if she did not take disability of \$33,419.81:

b. Option 2:

same as #56 (c) above;

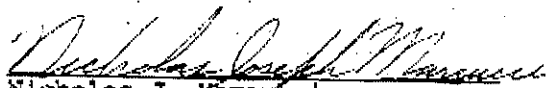
c. Option 3:

same as #56 (d) above.

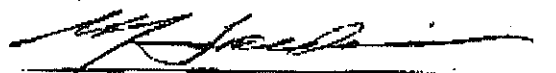
d. Option 4:

certain but not all option 4 special option modifications are permitted. There is no ability to withdraw a lump sum.

Note: only joint and survivor annuity options are available to disability annuitants. Option 1 is not a joint and survivor annuity option.


 Nicholas J. Marcucci
 Deputy Chief Counsel
 (Counsel for the Respondent)

Date: 12/5/90


 Michael Hardiman
 Assistant Chief Counsel
 (Counsel for the Commission on
 behalf of the Complainant)

Date: 10/3/90

FINDINGS OF FACT *

1. The specific provision of the Retirement Code Prohibiting Complainant from applying for a disability annuity because she had reached superannuation age should apply to any other employee who reached superannuation age. (N.T. 33)
2. Employees are not required to retire at superannuation age. (N.T. 34)
3. Employees who continued working after reaching superannuation age continue to contribute to the retirement fund at the same rate as they did before even though they are eligible to apply for a disability annuity. (N.T. 33-34)
4. Employees who are hired after reaching 43.333 years of age who become disabled are treated less favorably than employees who are hired before they reach 43.333 who become disabled, based solely on their age. (N.T. 39-44)
5. The removal of the disability MY*/Y disability annuity formula would result in otherwise eligible annuitants who were hired after 43.333 receiving the same one-third of final average salary as that provided to any disability annuitant who was hired before age 43.333 who had less than 16.6667 years of credited service. (N.T. 44-46)
6. The Complainant received a superannuation annuity equal to approximately 14% of her final average salary. (N.T. 92)
7. If Complainant had been permitted to apply for a disability annuity and had been awarded such, using a non-age biased formula, Complainant would have received annuity equal to 33% of her final average salary. (N.T. 93)

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

N.T. Notes of Testimony
S.F. Stipulations of Fact

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter under the Pennsylvania Human Relations Act ("Act").
2. The parties and the Commission have complied with the procedural prerequisites to a public hearing.
3. Respondent is an employer within the definition in the Act.
4. The Complainant, whose interests are being represented by the executrix of her estate, is an "individual" within the meaning of the Act.
5. The estate of the Complainant is a "person" within the meaning of the Act.
6. The complaint satisfies the particularity requirements of Section 9 of the Act.
7. The complaint was timely filed.
8. The opportunity to apply for and/or obtain superannuation disability or a withdrawal annuity is a term, condition or privilege of employment within the meaning of Section 5(a) of the Act.
9. The Respondent, by denying the Complainant and others similarly situated the opportunity to apply for a disability annuity because of age, has committed an unlawful discriminatory practice in violation of Section 5(a) of the Act.
10. The Respondent has failed to show that the Act contains an exception or exemption sufficient to permit age-based discriminatory treatment to occur without violating the Act.
11. Where the Commission rules that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order and it may further order such affirmative action as in its judgment will effectuate the purposes of the Act.

12. Relief, when granted under the relevant provisions of the Act, is in the nature of class relief and may include an order that the Respondent cease and desist from discriminating against all persons adversely affected by the unlawful conduct.

OPINION

Flora M. Osman (hereinafter referred to as the "Complainant"), on November 25, 1985, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") on behalf of herself and all persons similarly situated, against the Commonwealth of Pennsylvania, State Employees' Retirement System ("Respondent" or "SERS") at docket number E-35205A. The Complainant specifically alleged that the Respondent discriminated against her because of her age by not permitting her to apply for a disability annuity because she had reached age, sixty, prior to her inquiry as to her eligibility for such an annuity. On June 9, 1986, Ms. Osman died. On or about October 29, 1986, Sharon Lawson, the daughter of Ms. Osman and Executrix of her estate, filed an amended complaint on behalf of Ms. Osman's estate.

In November of 1986, the Commission, after completing its investigation of the Complainant's allegations, notified the Respondent that probable cause existed to credit the allegations. The Commission attempted to resolve the matter between the Complainant and Respondent through conference, conciliation and persuasion but was unable to do so. In August of 1987, the Commission notified the Complainant and Respondent that it had approved the holding of a public hearing in this matter.

On October 23, 1990, the Commission held the public hearing regarding this complaint. Commissioner Gregory J. Celia, Jr., presided as the Chairperson of the hearing panel. Commissioners Russell S. Howell and Raquel O. Yiengst also served on the panel. Subsequent to the public hearing, both parties filed post hearing briefs and the Respondent filed a reply brief.

The long and detailed facts stipulated to by the parties and the jointly submitted exhibits present a situation where no facts are left in dispute. However, a brief delineation of the facts will serve to illustrate the legal issues in this case. The Complainant commenced employment with the Commonwealth of Pennsylvania in June 1978. It was at that time she began employment with the Pennsylvania Human Relations Commission. Also, upon commencing employment, the Complainant became a member of the State Employees' Retirement System ("SERS"). Membership in SERS was not discretionary, but mandatory.

In July of 1985, the Complainant notified the Commission that she needed to be off work indefinitely because of physical problems associated with lung cancer. In September of 1985, at her request, the Complainant was placed on "Sick Leave Without Pay With Benefits" status. At this time the Complainant had exhausted all of her available paid leave. The Complainant was also advised, in September of 1985, that her "Sick Leave Without Pay With Benefits" status would end on March 4, 1986. In October of 1985, the Complainant contacted SERS to determine if she was eligible for a disability annuity. At that time, the Complainant was advised that she was not eligible for the annuity because she had reached "superannuation age." This term meant that the Complainant had already reached age sixty. The Complainant had reached the age of sixty on May 10, 1985.

At the time of her contact with SERS, the Complainant did not submit a formal application for a disability annuity. It is undisputed that had she done so, it would not have been accepted since she had attained the age of sixty. The Retirement Code at Section 5308(c) precludes anyone who has reached superannuation age from applying for and/or receiving a disability annuity.

In January of 1986, the Complainant notified the Commission that she would not be able to resume her job duties when her "Sick Leave Without Pay With Benefits" status ended on March 4, 1986. The Complainant then terminated her employment with the Commission on March 4, 1986. When the Complainant retired, she had 7.4590 years of credited service with SERS. The Complainant was also eligible to receive a superannuation annuity based on her years of service. (As PHRC Regional Counsel notes, superannuity annuity is the term for what is more commonly known as a normal retirement benefit which is distinguished from a withdrawal annuity which would be termed as "early retirement" annuity.) The Complainant, though not eligible to apply for the disability annuity, selected a benefit option from several available to superannuation annuitants. In selecting this particular option, the Complainant's benefits included a lump sum payment and a monthly annuity check. After the death of the Complainant, her beneficiary received a payment equal to the present value of her annuity minus the payments made to her.

As noted before, this central issue in this case is that the Complainant was unable to apply for or obtain a disability annuity because of the statutory prohibition in the Retirement Code. As PHRC Regional Counsel notes in his brief, this Commission is not to judge whether the Complainant was medically eligible to receive a disability annuity from the Respondent. Moreover, the Respondent admits that the Retirement Code treats SERS members who are over superannuation age differently than SERS members who are under superannuation age in that members over superannuation age are not eligible to apply for disability annuities. (Respondent's Brief p 6)

However, the Respondent asserts, mere differential treatment, unless prohibited by the Act, is not unlawful discrimination, citing Philadelphia Electric Co. v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 68 Pa. Cmwlth. 212, 448 A.2d 701 (1982) (Respondent's Brief p 6)

The relevant portion of the Pennsylvania Human Relations Act is as follows:

"It shall be an unlawful discriminatory practice...

(a) For any employer because of the...age...of an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and must be competent to perform the services required. The provision of this paragraph shall not apply to (1) termination of employment because of the terms or conditions of any bona fide retirement or pension plan, (2) operation of the terms or conditions of any bona fide retirement or pension plan which has the effect of a minimum service requirement, (3) operation of the terms or conditions of any bona fide group or employe insurance plan...

43 P.S. §955

The Respondent's position in this matter is that it [Respondent] is statutorily mandated by §5308(c) of the State Employees' Retirement Code. Furthermore, Respondent alleges that differential treatment is mandated by State Employees' Retirement Code and Respondent was acting in a purely administrative capacity.

The only real issue in this case is whether the conflict between the Retirement Code and the Pennsylvania Human Relations Act can be resolved. More precisely, the question is whether the relevant portion of

the State Employees' Retirement Code violates the Pennsylvania Human Relations Act. As counsel on behalf of the complainant and Respondent Counsel both recognize, there are sections of the Retirement Code which mandate age based, disparate treatment which appear to be in conflict with the sections of the Pennsylvania Human Relations Act which prohibits age-based disparate treatment. (Complainant's Brief p 36) Quite succinctly, the Respondent asserts that it could not have discriminated against the Complainant since the General Assembly "expressly required and sanctioned" the differential treatment in question.

Next we turn to that portion of the Pennsylvania Human Relations Act which deals with this case. Section 12(a) of the Act provides:

The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply.

43 P.S. §962(a)

It is the Complainant's position that this section of the Pennsylvania Human Relations Act supersedes the subsequent provision by the Legislature of the disability structure in the State Employees' Retirement Code.

Generally the Respondent argues that any conflict must be resolved in its favor since the State Employees' Retirement Code is more recent legislation. In support of this argument Respondent cites the Statutory Construction Act which provides where two or more statutes enacted by different General Assemblies are in conflict, the statute later in date of final enactment must prevail. 1 Pa. C.S. §1936 The Pennsylvania Human Relations Act was enacted in 1955 while the most recent version of the State Employees' Retirement Code was enacted in 1974.

However, as PHRC Regional Counsel for the Commission notes, we must look further at the history of the statutes in question. The most important point here is that even though the 1974 Retirement Code was finalized, these provisions were not new enactments but rather a continuation of existing law. Furthermore when the State Employees' Retirement Code was created in 1923, those employees who had superannuation age (60) were no longer eligible to receive a disability annuity. Therefore, the 1974 Retirement Code was not a new enactment by the Legislature, as it relates to disability annuities.

Lastly, the Pennsylvania Human Relations Act has been subject to review by the General Assembly since 1974. This review not only evaluated and enacted legislation but also amended several provisions to the Pennsylvania Human Relations Act. Act of December 16, 1986 P.L. 1626, No. 186, 43 P.S. §1951 et seq. The Legislature retained the provision stating that inconsistent laws did not apply. Clearly, the Legislature could have fashioned an exception that would have exempted the disability structure set forth in the Code. The Legislature did not do so.

In conclusion we are left with the fact that the Legislature (General Assembly) has clearly established that where an inconsistent law exists, the Pennsylvania Human Relations Act shall apply. In the instant case, the Pennsylvania Human Relations Act shall apply.

Since the Pennsylvania Human Relations Act does apply in this matter, the Respondent makes several other arguments. Initially the Respondent argues that it is not an employer of the Complainant, and secondly, that the Pennsylvania Human Relations Act does not apply to termination of employment because of the terms and conditions of any bona fide retirement or pension plan, or to the operation of the terms and conditions of any bona fide retirement or pension plan which has the effect of a minimum service requirement.

Firstly, we must turn to the question of whether the Respondent is an employer of the Complainant in this matter. The definition of "employer" clearly includes the Commonwealth of Pennsylvania and its political subdivisions.

Secondly, the Respondent asserts that the Pennsylvania Human Relations Act does contain exceptions which allow for age-based differing treatment. However, there is no such exception in reference to the instant matter before the Commission. The exceptions are as follows:

1. the right to terminate employment because of the terms or conditions of any bona fide retirement or pension plan;
2. operation of the terms or conditions of any bona fide retirement or pension plan which has the effect of a minimum service requirement;
3. operation of the terms or conditions of any bona fide group or employee insurance plan;
4. age limitations placed upon entry into certain bona fide apprenticeship programs of two years or more.

43 P.S. §955(a)

A review of these exceptions indicates there is no basis for the impact of the Retirement Code provisions in this matter. Furthermore if the legislature had determined that such an exception was needed, then it had the authority to do so.

Another argument made by the Respondent is that the Complainant was "better off" taking a superannuation annuity. This argument has little merit. At the time the Complainant was denied the opportunity to apply for

a disability annuity, and she had no idea what the future would hold. The Complainant could not discern what was in her best interests because she was not provided a full range of options. The Complainant could not compare a superannuation annuity or a disability annuity. She simply did not have that opportunity.

The Respondent also argues that there was an internal procedure that the Complainant could have followed in pursuing her allegations against the Respondent. However, the administrative procedure does not preclude the Complainant from pursuing an action before the Pennsylvania Human Relations Commission based on an allegation of age discrimination.

The Pennsylvania Human Relations Commission by virtue of Section 9 of the Act has broad power when fashioning a remedy in a particular case. Section 9 provides in part:

"(f) 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 practice as defined in this Act, the Commission shall state its findings of fact, and shall and caused 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 upgrading of employees..."

43 P.S. §959(f)

There is also case law that holds when the Pennsylvania Human Relations Commission orders broad relief, it is also relief for that class. In Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission v. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976), the court stated:

"Moreover, relief, when granted, is class relief.

The Respondent is ordered to cease and desist from the unlawful discriminatory practice with regard to all persons in the affected class."

In this matter before the Commission, the Respondent shall cease and desist implementing those provisions of the Retirement Code which are age-based and, therefore, in violation of the Pennsylvania Human Relations Act. The Respondent shall cease and desist from prohibiting employees from applying for disability annuities because of their age. Furthermore the Respondent shall cease and desist from instituting any portion of said disability annuity formula which discriminates on the basis of age.

As noted in Section 9 of the Act, the Respondent can be ordered to give affirmative relief in cases of this nature. In the instant case, the Respondent should be ordered to allow the Complainant, through her estate, to apply for a disability annuity using the standards developed in the Retirement Code. With respect to clarity, the Respondent should assume facts in evidence at the time that the Complainant would have been evaluated upon in the instant case before the Commission.

Therefore, having found that the Respondent treats the Complainant, and others similarly situated, differently because of their age by denying them the opportunity to apply for a disability annuity and by calculating annuities in a less favorable manner, and having found that the Respondent is in violation of Section 5(a) of the Pennsylvania Human Relations Act, an appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

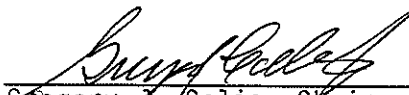
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

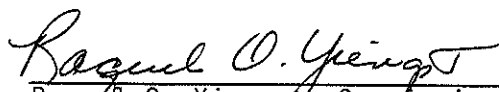
FLORA M. OSMAN, on behalf of herself :
and all persons similarly situated, :
and SHARON LAWSON, on behalf of the :
estate of FLORA M. OSMAN, :
Complainants : Docket No. E-35205A
v. :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA STATE EMPLOYEES' :
RETIREMENT SYSTEM, :
Respondent :

RECOMMENDATION OF HEARING PANEL

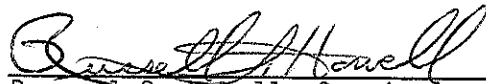
Upon consideration of the entire record in the above-captioned matter, the Hearing Panel finds that the Respondent is in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Panel's Recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions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



Gregory A. Celia, Chairperson



Raquel O. Yiengst, Commissioner



Russell S. Howell, Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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and all persons similarly situated, :
and SHARON LAWSON, on behalf of the :
estate of FLORA M. OSMAN, :
Complainants : Docket No. E-35205A
v. :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA STATE EMPLOYES' :
RETIREMENT SYSTEM, :
Respondent :

FINAL ORDER

AND NOW, this 3rd day of April, 1992, following review of the entire record in this case, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Conclusions of Law and Opinion, in accordance with the Recommendation of the Hearing Panel, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S

1. That Respondent cease and desist from discriminating against Complainant and all others similarly situated because of their age with respect to eligibility to apply disability annuities and/or with respect to the formula used to calculate the amount of any such annuity awarded.
2. That the Respondent cease and desist from administering that section of the Retirement Code that prohibits employees from becoming eligible for a disability annuity, solely because of age where the disability occurs after attainment of supernannuation age.

3. That the Respondent permit employees who have reached superannuation age to apply for and receive annuity under the same criteria as is currently utilized for employees who are under superannuation age.
4. That the Respondent contact Complainant's estate through the administrator and provide the opportunity to apply for a disability annuity on behalf of the Complainant, as of October 16, 1985.
5. That the Respondent treat Complainant's application in the same manner it would have been treated, if actually filed on October 16, 1985.
6. That Respondent cease & desist from applying that section of the Retirement Code which contains an age-biased disability formula and that Respondent use the disability formula which will result in employees otherwise eligible who are hired after they become 43.333 years old with a disability annuity equal to not less than one-third of final average salary in the same manner as is received by those employees who are otherwise eligible who were hired before they became 43.333 years old.
7. That Respondent provide written proof compliance with the terms of this Order by letter addressed to Michael Hardiman, Esquire at the Commission's Regional Office located at Broad and Spring Garden Streets, Philadelphia, Pennsylvania.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Robert Johnson Smith, Chairperson

ATTEST:



Gregory J. Celia, Secretary