

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

MARY S. RALSTON, Complainant

v.

BOROUGH OF NORRISTOWN, Respondent

DOCKET NO. E-36609

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING COMMISSIONER

FINAL ORDER

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GOVERNOR'S OFFICE
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v.

BOROUGH OF NORRISTOWN, Respondent

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STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.


1. The Complainant herein is Mary S. Ralston, an adult female (hereinafter "Complainant").
2. The Respondent herein is the Borough of Norristown, (hereinafter "Respondent").
3. The Respondent, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth of Pennsylvania.
4. On May 2, 1986, the Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-36609. A copy of the complaint is attached hereto as Appendix "A" and will be included as a docket entry in this case at time of hearing.
5. In correspondence, dated June 7, 1990, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the above referenced complaint.
6. Subsequent to the determination of Probable Cause, the parties attempted to resolve the matter through conciliation, however the matter was not resolved.
7. In correspondence, dated October 10, 1991, the Commission notified the Respondent that a Public Hearing had been approved in this matter.
8. The Complainant began working for the Respondent as Borough Treasurer/Finance Officer on March 16, 1981.
9. In November 1985, Respondent adopted a Home Rule Charter.
10. Section 1207 B of the Home Rule Charter provided the following:

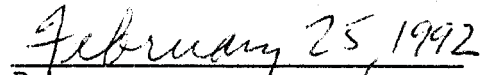
It is the intent of the Charter that qualified employees of the Borough be reappointed to the same or similar positions consistent with this Charter and the Administrative Code.

11. In November 1985, Complainant made application for job of Finance Director.
12. On December 30, 1985, Respondent notified Complainant that the Home Rule Charter, which became effective January 6, 1986, eliminated the position of Borough Treasurer

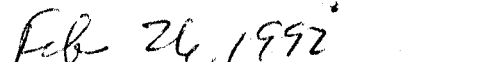
and informed Complainant that as of January 3, 1986, her employment with the Borough was terminated.

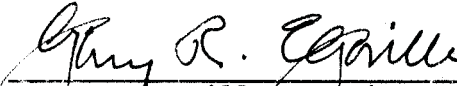
13. On January 6, 1986, Respondent hired Benjamin Dreby as Finance Director and on February 19, 1986, Benjamin Dreby began working in that position.
14. On February 19, 1986, Respondent adopted an Administrative Code to accompany the Home Rule Charter.
15. In 1987, Benjamin Dreby resigned as Director of Finance.
16. During the term of her employment, Complainant was covered by employer provided medical insurance and life insurance and was entitled to paid holidays and sick days.
17. During the term of her employment, Complainant accrued retirement benefits paid with contributions by Respondent and Complainant with contributions of six years, 9 months and 14 days. Termination of Complainant caused her to lose retirement contributions Respondent had contributed.

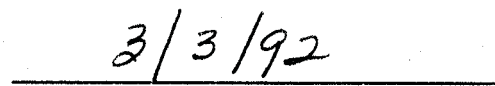

Pamela Darville, Esquire
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complaint)


Date: February 25, 1992


Richard E. Sheehan, Esquire
(Counsel for Complainant)


Date: Feb 26, 1992


Gary R. Egoville, Esquire
(Counsel for the Respondent)


Date: 3/3/92

FINDINGS OF FACT *

1. The Complainant is Mary S. Ralston (hereinafter "Ralston").
2. The Respondent is the Borough of Norristown (hereinafter the "Borough").
3. Prior to January 6, 1986, the Borough government operated under the Borough Code which generally provides a strong council-weak mayor format. (N.T. Vol 1, 225-226; N.T. Vol 3, 9; C.E. 24.)
4. Prior to January 6, 1986, the following individuals held the following positions:
 - a. Borough Administrator - John Plonski (hereinafter "Plonski")
 - b. Police Chief - William Bambi
 - c. Director of Community Development - Dick Schmoyer
 - d. Director of Public Works - Fred VonHocht
 - e. Finance Officer - Ralston(N.T. Vol 1, 111-113; C.E. 4).

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

N.T. Notes of Testimony
C.D. Complainant's Deposition
P.O. Plonski's Deposition
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
J.E. Joint Exhibit
S.F. Stipulations of Fact

5. Effective March 16, 1981, pursuant to Plonski's recommendation, and with unanimous council approval, Ralston was hired as the Borough's Finance Officer. (N.T. Vol 1, 75; S.F. 8; C.D. 2; C.E. 2, 3.)
6. In a letter dated February 19, 1981, Plonski advised Ralston that her unanimous selection was "most impressive." (C.E. 2.)
7. Under the job description for Finance Officer, the position was generally defined as follows:

This is administrative and managerial work planning, directing and coordinating the fiscal affairs of the municipality. It involves the establishing and maintaining of an accounting system, budgeting and payroll systems, investment policies and other methods and procedures.

An employee in this class serves as the primary financial assistant to the Borough Manager, and also serves in the capacity of Borough Treasurer.

A significant aspect of the work involves close working relationships with elected and appointed municipal officials in the maintaining of accounts, in the preparation and execution of the municipal budget, and in the preparation of various other financial reports and statements.

Work is performed under the general direction of the Borough Manager. (C.E. 3.)

8. Prior to becoming a Borough employee, Ralston's training and experience included: an Associate Degree in Business Administration; certification as a legal secretary from Norristown Business College; five years as Secretary/Treasurer of the Board of Supervisors for Lower Providence Township; three years as Director of Taxes and Census as member of Methacton School District Board of Directors; 10 years, Occupation Tax Enumerator for Montgomery County Board of Assessment; approximately one year of accounting and related experience in private business; and

secretarial positions to a school principal, an attorney, a farm loan association board of directors, and a country club. (N.T. Vol 1, 70, 71, 73, 155; C.E. 1.)

9. In 1981, the job description for the position of Finance Officer listed the minimum acceptable training and experience required as:

A bachelor's degree from an accredited college in accounting or public finance, plus five years of experience in governmental or business financial administration.

(Experience in governmental or business financial administration may be substituted for college education on a year for year basis.)

Or, any acceptable combination of education, training and experience. (N.T. Vol 1, 77; C.E. 3.)

10. A Borough ordinance, Ordinance No. 75-13, enacted in 1975 and still effective in 1981, created the office of Borough Administrator. (C.E. 4.)
11. Pursuant to this ordinance, the Borough Administrator was given the power, with the advice and consent of Council, to employ persons as major department heads. (C.E.4.)
12. In paragraph J(c), the ordinance listed the department heads which required Council approval as including the Finance Director.11 (C.E. 4.)
13. In paragraph K, the ordinance once again refers to “the Finance Director” position with respect to a power to invest Borough funds. (C.E. 4.)
14. Paragraph J(d) of the ordinance authorized the Finance Director to hire and fire employees, subject to the Administrator's review. (C.E. 4.)
15. Examples of the work of the Finance Officer are listed in the position's job description, as follows:
- Supervises the maintenance of all municipal accounting records.
 - Supervises the maintenance of all payroll records.
 - Supervises the investment of all municipal monies.
 - Determines the allocation of expenses and maintains an appropriate system for the payment of all municipal obligations within budget limitations.
 - Obtains budget estimates from all departments, boards and commissions, and prepares the preliminary budget for review by the Borough Manager.
 - Prepares various financial reports for the Borough Manager, Mayor, Council and other departments; prepares financial reports for federal and state grant programs.
 - Assists the Borough Manager and other employees in the preparation of grant applications.
 - Maintains a close working relationship with the municipal tax collector. (C.E. 3.)
16. In addition to work listed on her job description, Ralston performed many additional functions. (N.T. Vol 1, 82, 83, 84.)
17. Ralston worked with Borough ordinances which related to the Borough's financial department. (N.T. Vol 1, 84, 155; C.E. 6.)
18. Many of Ralston's ideas for ordinance provisions were implemented. (N.T. Vol 1, 85.)
19. Ralston was in charge of employee benefits and ticket collection. (N.T. Vol 1, 86.)

20. A savings was realized when Ralston suggested getting bids on the Borough's insurance. (N.T. Vol 1, 86.)
21. Ralston recognized the need to change the Borough's earned income tax collection agent, and a new agent was found. (N.T. Vol 1, 86-87.)
22. Often, during Plonski's absences, Ralston was left in charge. (N.T. Vol 1, 87, 158; P.D. 11.)
23. Ralston was frequently the Borough's representative at Borough conventions. (N.T. Vol 1, 149.)
24. Ralston was asked to work on the police and firefighters' pension investment. (N.T. Vol 1, 87, 148, 149.)
25. When a supervisor was demoted, Ralston was assigned duties as the supervisor of the Borough's crossing guards for approximately two years. (N.T. Vol 1, 87; Vol 2, 133.)
26. Ralston physically monitored corners and recommended to Plonski that the hours of coverage of several corners be reduced from four hours to three hours. (N.T. Vol 2, 133; Vol 3, 121.)
27. A union grievance was filed regarding the hour reduction of several corners. (N.T. Vol 2, 133.)
28. During a general strike, Ralston ran her office herself and became involved in contract negotiations with the union. (N.T. Vol 1, 88.)
29. In 1985, the Borough experienced a cash flow problem. (N.T. Vol 1, 163.)
30. In early December 1985, Plonski discussed with Ralston the feasibility of transferring funds from the Borough's sewer funds into the general funds. (N.T. Vol 1, 164, 212.)
31. Ralston was of the opinion that such a transfer of funds could not be done legally. (N.T. Vol 1, 164.)
32. Ralston asked Plonski to get written authorization from the Borough solicitor before she would transfer the funds. (N.T. Vol 1, 164.)
33. After consultation with another financial expert, the solicitor provided his written opinion that it would be alright to transfer the funds "on a temporary basis for several days." (N.T. Vol 1, 167; Vol 3, 46; R.E. 2.)
34. Upon her receipt of the solicitor's letter, Ralston transferred funds from the sewer fund into the general fund. (N.T. Vol 1, 192.)
35. Norristown's current mayor, William M. DeAngelis (hereinafter "Mayor DeAngelis"), described Ralston's reputation as a very dedicated employee. (N.T. Vol 1, 230.)
36. Mayor DeAngelis was one of the initiators of the Government Study Commission and served as the Secretary of that commission. (N.T. Vol 1, 231.)
37. Mary Biscotti, a supervisor in the Finance Department under Ralston, testified that Ralston always did a fine job running the office. (N.T. Vol 2, 5.)
38. Mr. Jude Pierce, a Borough Councilman who, as chairman of the Council's finance committee worked with Ralston, described Ralston as a well-qualified, overly competent hard worker, extremely dedicated to her job and service to the community. (N.T. Vol 2, 24, 27.)
39. Pierce called Ralston the associate Borough Manager, Financial Head, Fiscal Officer of the Borough. (N.T. Vol 2, 24.)
40. George B. Vuotto, a 25-year member of Borough Council, described Ralston as good, interested, seemed honest, appreciative of her job, worked hard, did a wonderful job, and did extra tasks. (N.T. Vol 2, 56.)

41. Thomas E. Tornetta, a Borough Councilman for 16 consecutive years. described Ralston as the financial head of the Borough and as an elegant person to go to, Ralston brought up ideas, she was pleasant with her employees, her work was magnificent as she held the Council's finance committee and Borough intact real well. (N.T. Vol 2, 79-80.)
42. Linda DiCicco, an attorney who served on Borough Council, described Ralston as above excellent, one of the Borough's best, if not the best Borough employee. Ralston was perceived as the second in command, extremely productive, extremely efficient, loyal, and responsible for the professionalism of her department. (N.T. Vol 2, 89-92.)
43. Plonski testified that Ralston performed in a satisfactory manner. (P.D. 10.)
44. In a memorandum dated November 21, 1985, Plonski directed Ralston to perform duties of a Director of Finance under the Home Rule Charter. (N.T. Vol 1, 104; C.E. 13, 24.)
45. Ralston prepared the requested financial information, as described in the Home Rule Charter. (N.T. Vol 1, 104; C.E. 13, 24.)
46. On December 3, 1985, at a regular Council meeting, Borough Council voted to raise Ralston's salary by \$5,000. (N.T. Vol 1, 106, 192; Vol 2, 183-184; C.E. 14.)
47. At the General Election in November 1983, Borough voters approved the establishment of a nine-member Government Study Commission to study Norristown's government and possible alternative forms. (N.T. Vol 1, 310; C.E. 24.)
48. The Government Study Commission recommended that the voters of Norristown adopt a Home Rule Charter which basically would establish a new form of government, generally with a strong mayor-weak council. (N.T. Vol 1, 225-226; C.E. 24.)
49. In a referendum in the General Election held on November 6, 1984, the Home Rule Charter was approved by the voters of Norristown. (N.T. Vol 1, 89; C.E. 24.)
50. The Home Rule Charter was to become effective on January 6, 1985. (N.T. Vol 1, 89.)
51. Pursuant to Section 410 and 511A of the Home Rule Charter, the Council was directed to adopt an Administrative Code. (C.E. 24.)
52. A transition team was established to formulate an Administrative Code. (N.T. Vol 1, 89-90, 307.)
53. Ralston was directed to work with the transition team. (N.T. Vol 1, 89-90.)
54. Ralston prepared a written report to the transition team and met with the committee to convey the ideas she had to improve the general structure of the finance department. (N.T. Vol 1, 90, 94; C.E. 8.)
55. One of Ralston's suggestions was to recommend that the duty of tax collection, an elected position, be placed under Borough control due to a history of delayed reports and untimely fund deposits. (N.T. Vol 1, 92-93.)
56. Section 610 of the Home Rule Charter placed the duty of tax collection under the position title of Director of Finance. (C.E. 24.)
57. As the Home Rule Charter is a strong mayor form of government, under Section 503E of the Home Rule Charter, the mayor, with the advice and consent of Council, has the power to appoint heads of key positions. (N.T. Vol 1, 11; C.E. 24.)
58. Section 510 of the Home Rule Charter lists five major departments which must be a part of the executive branch: (1) Department of Administration; (2) Department of Finance; (3) Department of Public Safety; (4) Department of Planning and Municipal Development; and (5) Department of Public Works. (N.T. Vol 1, 99; C.E. 24.)
59. The Department of Finance is listed as being headed by the Director of Finance, reporting to the Municipal Administrator, and responsible for:

- a. Borough finance;
 - b. Tax collection;
 - c. The operating plan and budget and the capital plan and budget;
 - d. All financial receipts and disbursements;
 - e. Licensing; and
 - f. Such other duties as are required by the Administrative Code, this chapter, ordinance, or such other duties as the Municipal Administrator may direct. (C.E. 24.)
60. Section 610 of the Home Rule Charter lists the responsibilities of the Director of Finance as: “[E]stablishing and maintaining an accounting system designed to accurately reflect the assets, liabilities, receipts and expenditures of the Borough and the collection, custody, investment and disbursement of all Borough funds. His or her duties shall include municipal finance, treasury, permits and licenses, tax collections, and such other duties as required by the Mayor, the Administrative Code, other ordinances, this Chapter or General Law.” (C.E. 24.)
61. Section 1207 of the Home Rule Charter declares that “it is the intent of this Charter that qualified employees of the Borough be reappointed to the same or similar positions consistent with this Charter and the Administrative Code.” (C.E.24.)
62. In a letter dated November 8, 1985, Ralston notified Mayor Marberger that she was interested in the Home Rule Charter position of Director of Finance. (N.T. Vol 1, 99-100; C..E. 10.)
63. Mayor Marberger never responded to Ralston's letter and did not have occasion to speak to Ralston for the remainder of 1985. (N.T. Vol 1. 100.)
64. Ralston was not interviewed for the position. (N.T. Vol 1, 148.)
65. On December 30, 1985, Plonski called Ralston to his office and gave her a letter effectively notifying Ralston she was being terminated, effective January 3, 1986. (N.T. Vol 1, 107; C.E. 16.)
66. Ralston's termination letter declared that the Home Rule Charter eliminated the position of Treasurer. (N.T. Vol 1, 108; C.E. 16.)
67. After Ralston was notified of being terminated, members of City Council "flocked into [Ralston's] office," and were "absolutely dismayed." (N.T. Vol 1, 222.)
68. After January 6, 1986, the following individuals held the following positions:
- a. Municipal Administrator –Plonski
 - b. Director of Public Safety -William Bambi
 - c. Director of Planning and Municipal Development -Dick Schmoyer
 - d. Director of Public Works, Fred VonHecht
 - e. Director of Finance, Benjamin Dreby (hereinafter "Dreby").
- (N.T. Vol 1, 111-113; C.E. 24.)
69. On February 19, 1986, an Administrative Code was adopted. (N.T. Vol 1, 109; C.E. 17; S.F. 14.)
70. Section 193.17 of the Borough's Administrative Code describes the "Borough Treasurer's duties.” (N.T. Vol 1, 110; C.E. 17.)
71. In January 1986, Ralston had accumulated the following additional experience: a continued member of Lower Providence Township's board of supervisors and Finance Officer for the Borough of Norristown from March 1981 through January 3, 1986. (N.T. Vol 1, 71, 74.)

72. For approximately one year, Mayor DeAngelis served on the Government Study Commission. (N.T. Vol 1, 245.)
73. The Government Study Commission evaluated all functions of the Borough government, including the Finance Department, and drafted the Home Rule Charter. (N.T. Vol 1, 245, 279.)
74. As part of the Government Study Commission's function, the Commission suggested the general qualifications for the position of Director of Finance. (N.T. Vol 1, 246.)
75. Mayor DeAngelis was of the opinion that Dreby had very narrow experience and did not meet the criteria of the Government Study Commission's recommendations. (N.T. Vol 1, 248.)
76. The Government Study Commission had taken the position that all Borough employees should be retained upon the transition to the Home Rule Charter. (N.T. Vol 1, 249.)
77. More specifically, it was the intent of the Government Study Commission that the duties Ralston performed be performed by the Director of Finance. (N.T. Vol 1, 286.)
78. Mayor DeAngelis testified that, in his opinion, the position Ralston had held and the position of Director of Finance were overlapping and the duties were essentially the same. (N.T. Vol 1, 251, 253, 274.)
79. Ralston's duties included duties which were not assigned to the position of Director of Finance, and the Director of Finance had several duties Ralston had not performed - tax collection and the primary decision regarding disbursements. (N.T. Vol 1, 257, 276, 310.)
80. Mary Biscotti, a 24-year Borough Finance Department employee, testified that as a supervisor in the Finance Department, it was her opinion that, in effect, after Ralston left, the job Ralston had done did not change. (N.T. Vol 2, 5.)
81. On November 19, 1985, a special council meeting was held for the purpose of consideration of the creation of the position of Tax Enforcement Officer. (N.T. Vol 1, 101; C.E. 11.)
82. The Tax Enforcement Officer was to be assigned to the Borough's Finance Department, and receive a salary of \$300 per week. (N.T. Vol 1, 101, 214; C.E. 11.)
83. In November 1985, Benjamin Dreby was given the position of Tax Enforcement Officer. (N.T. Vol 1, 101, 160.)
84. Between the date of his hire and the date Ralston left the Borough's employment, Dreby never reported to Ralston for work. (N.T. Vol 1, 102.)
85. Dreby was observed coming in with a paper and coffee, locking himself in an office for an hour or so, and then leaving. (N.T. Vol 1, 103, 160; Vol 2, 14.)
86. Ralston questioned Plonski regarding Dreby but was simply told the mayor is handling this. (N.T. Vol 1, 215.)
87. Soon after Dreby's appointment as the Borough's Director of Finance, Dreby took an approximately six-week leave of absence. (N.T. Vol 1, 243; P.D. 24; S.F. 13.)
88. Dreby's experience included being a graduate of the University of Pennsylvania's Wharton School of Accounting and Finance, and Rutgers Graduate School of Banking, and generally, Dreby was a retired Administrative Vice President of a bank where he had worked in all departments over a 45-year-period. (C.E. 12.)
89. In 1987, Dreby resigned from the position of Director of Finance, and in April 1987, the Borough first advertised for the vacant position. (N.T. Vol 1, 133; C.E. 21; S.F. 15.)

90. The advertisement for the Director of Finance position stated in part: The borough...is seeking an experienced professional Finance Director...Direct municipal finance management highly desirable. (C.E. 21.)
91. Ralston initially applied for the Director of Finance position. (N.T. Vol 1, 133; C.E. 20.)
92. By letter dated June 19, 1987, Plonski notified Ralston that Mayor Marberger had nominated someone else for the position and that Ralston had been a finalist out of more than 40 applicants, which spoke highly of her qualifications. (C.E. 22.)
93. In September 1987, Edward McCandless was appointed to the position of Finance Director. (N.T. Vol 1, 139; C.E. 23.)
94. During the term of her employment, Complainant accrued retirement benefits paid with contributions by Respondent and Complainant over a period of six years, nine months and fourteen days. Termination of Complainant caused her to lose her retirement benefits and the retirement contributions made by Respondent. (S.F. 17.)
95. At the time of Ralston's termination, Ralston was paid a salary of \$32,000, plus benefits. (N.T. Vol 1, 161.)
96. After her termination, Ralston attempted to find alternative work by looking at the want ads and being referred to possible jobs by the Pennsylvania Department of Employment Security. (N.T. Vol 1, 176, 177.)
97. In the Fall of 1986, Ralston began part-time work with C. E. Refractories as an administrative floater for \$7.50 per hour. (N.T. Vol 1, 179.)
98. Ralston declined dental and medical coverage through C. E. Refractories as she was already covered under her husband's employer. (N.T. Vol 1, 194, 196.)
99. After Ralston's termination, Ralston applied for and received unemployment benefits for a period of 26 weeks at the rate of approximately \$225.00 per week. (N.T. Vol 1, 132, 180.)
100. In May 1986, Ralston applied for Social Security benefits and received monthly benefits in the amount of \$402.00 per month. (N.T. Vol 1, 132, 182, 194.)
101. Ralston limited her earnings at C. E. Refractories so as not to jeopardize her Social Security benefits. (N.T. Vol 1, 182,; C.D. 81-21.)
102. Ralston would have given up Social Security benefits if she could have found a full-time job with a decent wage. (N.T. Vol 1, 182, 194.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "IPHRC") has jurisdiction over the parties and subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Ralston is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. The Borough is an employer within the meaning of the PHRA.
5. Ralston has met her initial burden of establishing a prima facie case by proving that:
 - a. she belongs to a protected class;
 - b. she applied for a position for which she was qualified;
 - c. her application was rejected; and,

- d. the position was awarded to an applicant with either equal or less qualifications than Ralston's, and who is a male.
6. The Borough articulated legitimate, nondiscriminatory reasons for refusing to hire Ralston.
7. Ralston has proven that the reasons offered by the Borough are pretextual.
8. The PHRC has broad discretion in fashioning a remedy.
9. Ralston is entitled to lost wages, plus six percent interest.

OPINION

This case arises on a complaint filed on or about May 2, 1986 by Mary S. Ralston (hereinafter "Ralston") against the Borough of Norristown (hereinafter either "Respondent" or the "Borough") with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). Ralston's complaint alleges that she was not selected for the position of Finance Director because of her sex, female. This sex-based allegation alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

PHRC staff investigated the allegation, and at the investigation's conclusion informed the Borough that probable cause existed to credit Ralston's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a Public Hearing.

The Public Hearing was held on March 11, 12 and 13, 1992, in Norristown, Pennsylvania, before Public Hearing Examiner Carl H. Summerson. Ralston was represented by Richard C. Sheehan, Esquire, and the PHRC's interest in the complaint was overseen by PHRC staff attorney Pamela Darville. Gary R. Egoville, Esquire, appeared on behalf of the Borough. The parties were afforded an opportunity to submit briefs. Ralston's post-hearing brief was received on May 28, 1992, and the Borough's brief was received on June 4, 1992. A supplemental brief for Ralston was received on June 8, 1992.

In this disparate treatment case, Ralston alleges that the Borough treated her less favorably than others because of her sex, female. To prevail, Ralston is required to prove that the Borough had a discriminatory intent or motive in failing to hire her. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). .

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Ralston must carry the initial burden of establishing a prima facie case of discrimination. Allegheny Housing, Supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "prima facie case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the prima facie case creates the presumption that the employer unlawfully discriminated against the employee. Id. at 254. The prima facie case serves to eliminate the most

common nondiscriminatory reasons for the employer's actions. Id. It raises an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In McDonnell Douglas, the U.S. Supreme Court held that a plaintiff may prove a prima facie case of discrimination in a failure-to-hire case, by demonstrating:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the prima facie case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802, n.13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 268, 43 FEP 1018 (6th Cir. 1987).

Here, we only slightly adapt the McDonnell Douglas test because this case involves an alleged sex-based refusal to hire. To establish a prima facie case here, Ralston must show:

1. that she is a member of a protected class;
2. that she applied for and she was qualified for a position for which the Borough was seeking applicants;
3. that, despite her qualifications, Ralston was denied the position; and,
4. that the position was awarded to an applicant with either equal or less qualifications than Ralston's, and who is a different gender than Ralston.

PHRC v. Johnstown Redevelopment Authority, 527 Pa. 71 588 A.2d 497 (1991)

Once Ralston establishes a prima facie case, the burden shifts to the Borough to "articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. The Borough must rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be "clear and reasonably specific," Id. at 285, and "legally sufficient to justify a judgment" for the Borough. Id. at 255. However, the Borough does not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If the Borough carries this burden of production, Ralston must then satisfy a burden of persuasion and show that the legitimate reasons offered by the Borough were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden now merges with the burden of persuading us that she has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that

the Borough intentionally discriminated against Ralston remains at all times with Ralston. Id. at 253.

On the initial question of whether Ralston can establish a prima facie case, the parties' dispute revolves around portions of two of the required elements. There is no dispute in this case that Ralston is a member of a protected category, that she applied for an open position, that she was denied the position, and that the position was awarded to a male.

The Respondent's initial contention generally focuses on issues regarding qualifications. The Borough submits that Ralston's burden to establish a prima facie case falls short in two respects. First, the Borough strongly argues that Ralston was not qualified for the position. Second, the Borough urges a finding that Ralston cannot show she was better or at least equally qualified as Dreby, the man selected.

Speaking specifically about the question of a Complainant's burden to establish that they were qualified for a position, the Pennsylvania Supreme Court has noted that it is appropriate that the burden of establishing a prima facie case should not be onerous. Allegheny Housing, supra, at 318, 319. Being mindful of this instruction, the evidence presented in this case on the issue of Ralston's qualification to hold the position of Director of Finance is sufficient to put the Borough in the position of offering a reason for its refusal to hire Ralston.

The Borough's own statement in a letter to Ralston dated June 19, 1987 attests to the fact that Ralston was qualified for the position. Ralston had reapplied for the position upon Dreby's resignation and was told by the Borough, "To be considered a finalist out of more than 40 applicants speaks highly of your qualifications..." Although there is considerable other evidence which supports the contention that Ralston was qualified for the position of Director of Finance, this single factor indicates that the Borough considered Ralston qualified for the position.

The remaining question in the prima facie area is whether Ralston established that she was either better qualified or at least as well qualified as Dreby. Johnstown Redevelopment Authority, supra at 500. Again, we are mindful that the Complainant's burden in this regard should not be onerous. Beyond the simple fact that both Ralston and Dreby met the requisite minimum qualifications for the position, there are several considerations which support the conclusion that Ralston has established that she was at least as qualified as Dreby. First, the Borough Solicitor, Paul Vangrossi, Esquire (hereinafter "Vangrossi"), testified that the Borough's then-mayor, Mayor Marberger, considered the qualifications of both Ralston and Dreby. Vangrossi suggests that Mayor Marberger's choice between Ralston and Dreby was a very difficult one to make. Dreby's experience in banking was said to make the difference.

While Dreby's qualifications can be described as different than Ralston's, this single factor of banking experience fails to distract us from finding that Ralston's experience and qualifications, considered as a whole, were at least as good as Dreby's qualifications. Here, Dreby's qualifications, although different, cannot be said to have been better than Ralston's. Arguably, Ralston's qualifications were better than Dreby's.

A careful look at Johnstown Redevelopment, *supra*, is important here. In Johnstown Redevelopment, the Pennsylvania Supreme Court found that there had been a "facially neutral method of reviewing applicants" and that this process did not establish "circumstances which give rise to an inference of unlawful discrimination" at 502, citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248 at 253 (1981).

Here, the facts can be distinguished from those in Johnstown Redevelopment. There is a serious question about the facial neutrality of the selection process in a number of respects. First, nowhere in the stated qualifications for the position is there any mention of experience in banking being a prerequisite. Added to this circumstance is the fact that when Dreby left and the Borough advertised for the position in 1987, the advertisement said nothing about banking experience being required. Quite the contrary, the advertisement stated the requisite qualifications as "Bachelor's degree in related field plus significant experience required. Direct municipal finance experience highly desirable..."

Dreby appeared to have had no direct municipal finance experience when he applied, while Ralston's background was replete with related municipal finance experiences. To suggest that Dreby's banking experience is proof of his better qualifications would effectively prevent Ralston from ever having the chance to have the ultimate issue weighed and resolved.

A lengthy quote from Allegheny Housing, *supra*, is appropriate here:

There is bound to be confusion where, as here, part of the employer's explanation attacks the plaintiff's qualifications for the job. If a plaintiff must prove a prima facie case by producing evidence of her qualifications before the defendant is obligated to proceed with a defense, there will almost of necessity be, at the close of the plaintiff's case in chief, evidence that she was qualified sufficient to avoid dismissal. At that point no evidence has been admitted on the other side. When the employer then produces evidence of disqualification, this could be understood either as an attack on the elements of the prima facie case, or as an attempt to meet the employer's burden of offering a legitimate, non-discriminatory reason. Regardless of its characterization, however, its impact is the same. The employer, understandably, would prefer not to have to offer a defense at all until a more substantial case had been presented against it. Nevertheless, in the interest of having the ultimate question of discrimination resolved on the merits rather than for procedural failings such as lack of specificity, given the importance of circumstantial proof in such cases, it is appropriate to the remedial purpose of the Act that the prima facie case not be an onerous one.

Allegheny Housing at 318-319.

Under the circumstances presented here, we find that Ralston has established that she was at least as qualified as Dreby and that Ralston therefore successfully established all of the requisite elements of a prima facie case. Having so found, we move to the question of whether the Borough has articulated a legitimate, nondiscriminatory reason for not hiring Ralston. On this question we find that the Borough has met this burden of production.

Several general reasons were advanced by the Borough in support of its position that nondiscriminatory reasons motivated Dreby's selection over Ralston. First, from the beginning, the Borough took the position that the Borough's enactment of the Home Rule Charter eliminated the position of Treasurer which had been held by Ralston for the period of March 1981 through January 3, 1986.

The second general reason advanced by the Borough was that there had been a variety of problems with Ralston's duties and performance. In the Respondent's opening statement, the Respondent declared that it would "show that the manner of the termination of Mrs. Ralston's employment saved her from the ignominy of being discharged for cause."

Finally, the Borough asserts that Dreby was chosen over Ralston because Dreby had banking experience and Ralston did not. These general factors, either separately or collectively, sufficiently meet the Borough's burden of production, thereby shifting the burden of proof to Ralston to establish that these reasons are pretextual. To show pretext, Ralston may directly persuade us that a discriminatory reason more likely motivated the Borough, or indirectly show that the Borough's proffered explanation is unworthy of credence. Burdine, Supra.

In this case, Ralston has little difficulty showing the pretext of the Borough's stated position that the Home Rule Charter eliminated the position of Treasurer. The Borough first used this reason in a letter dated December 30, 1985, from Plonski to Ralston. After successfully performing the duties of the Borough's Finance Officer for almost five years, Plonski abruptly notified Ralston that "The Home Rule Charter which is effective January 6, 1986, has eliminated the position of Treasurer. Accordingly, effective the close of business on January 3, 1986, your employment as Treasurer of the Borough of Norristown will end."

The Borough takes the firm position that Ralston's job was principally that of a treasurer and that the position of Director of Finance envisioned by the Home Rule Charter is a significantly different position. This resolute position taken by the Borough ignores several established facts.

When Ralston was hired, she received a job description which clearly declares that her position was to be more than a treasurer. The job description clearly states that Ralston's position was to be "the primary financial assistant to the Borough Manager, and...Borough Treasurer." Ralston, Plonski, and several Council members testified that Ralston was often assigned his duties in Plonski's absence. Clearly, throughout her tenure, Ralston's duties and responsibilities far exceeded just duties of a treasurer.

Granted, the newly designated Home Rule Charter position of Director of Finance envisioned duties in addition to the duties Ralston had previously been assigned. Conversely, the Home Rule Charter position of Director of Finance would not be assigned several functions Ralston had previously done.

As the current mayor of the Borough, Mayor DeAngelis, put it, the positions were generally overlapping with Ralston having done duties which the Director of Finance would not be performing and the Director of Finance doing some duties Ralston had not previously done.

Under the Home Rule Charter, one specific duty which was to be added to the Director of Finance's responsibilities was "Tax Collection." Before the Home Rule Charter, these functions had been done by an elected official. The Home Rule Charter specifically eliminated this office and turned these duties over to the Finance Department.

Interestingly, Ralston testified that she had recommended this action, as she was of the opinion that the office of tax collector was causing the Borough some problems. Concurring with Ralston's appraisal and recommendation, the Home Rule Charter placed these duties under the Borough's Finance Department. Furthermore, prior to the Home Rule Charter, Ralston's job description required that the Finance Officer "Maintains a close working relationship with the municipal tax collector." Accordingly, Ralston already had some significant connection to the duty of tax collection.

An apparently small additional new duty was licensing. Very little evidence was elicited on the changes this might entail between Ralston's duties and the Home Rule Charter position of Director of Finance. It would appear the differences were not significant as no focus was placed on this additional duty.

Finally, of some import was a change in authority from Ralston's position to the new Director of Finance title. Under the governmental system in place prior to the effective date of the Home Rule Charter, policy came from the Borough Council. After the Home Rule Charter, the Mayor created policy and the Mayor's department heads would have greater authority implementing that policy. To help show the pretext of the Borough's position that the Home Rule Charter position eliminated Ralston's position, we look to evidence of the intent of the Home Rule Charter.

The intent of the Home Rule Charter can be assessed from several sources, including: (a) Mayor DeAngelis, the Secretary of the Government Study Commission which drafted the Home Rule Charter, and (b) the Home Rule Charter itself.

Mayor DeAngelis testified that it was the Government Study Commission's position that all Borough employees should be retained upon implementation of the Home Rule Charter. Furthermore, in Mayor DeAngelis' opinion, Ralston's position and that of the new Director of Finance were essentially the same, as there was significant overlapping of the duties and responsibilities of the two positions. Finally, Mayor DeAngelis testified that, in effect, it had been the intent of the Government Study Commission that the Finance Officer's duties would be performed by the newly-titled Director of Finance.

The essence of these sentiments was clearly articulated in the Home Rule Charter. Section 1207 B of the Home Rule Charter declares, "It is the intent of this Charter that qualified employees of the Borough be reappointed to the same or similar positions consistent with this Charter and the Administrative Code."

It is also worth noting that the Borough Council had been tasked with the responsibility of adopting an Administrative Code which would supplement the Home Rule Charter. The Administrative Code had not even been adopted at the point the Borough says Ralston's position

and the position of Director of Finance were so different. Section 510 B.6 of the Home Rule Charter lists one of the responsibilities of the Director of Finance as including "Such other duties as are required by the Administrative Code..." At the time the Borough says the Director of Finance position eliminated the position Ralston held, the duties of the Director of Finance had not even been fully articulated.

Given the strong inference created by the clear intent of the Government Study Commission, it can be concluded that Ralston's position had not been eliminated but was instead generally quite similar to the duties and responsibilities envisioned for the new title of Director of Finance. Any additional duties did not exceed the point where the positions were no longer "similar."

Another factor which subtly and furtively arises from the testimony of several individuals is that it appears that Mayor Marberger did not give Ralston much consideration at all. Ralston goes so far as to argue she was ignored.

Generally, Vangrossi indicated that he had different levels of input with regard to the five director positions created by the Home Rule Charter. However, with respect to the Director of Finance position, Vangrossi indicated he had "very little input." Similarly, Plonski, Ralston's immediate supervisor, indicated that Mayor Marberger counted on him quite a bit for advice. However, with regard to the Director of Finance position, not only did Mayor Marberger not ask Plonski for a recommendation, Mayor Marberger indicated he had someone else in mind for the position of Director of Finance. Furthermore, Plonski did not recall even discussing retaining Ralston in a position other than Director of Finance. Instead, Plonski indicates he was simply instructed to tell Ralston that her position had been eliminated.

Other than the termination notice, Ralston did not even receive a reply to her letter to Mayor Marberger expressing interest in the Director of Finance position. Even the termination notice did not mention anything about Ralston's status with regard to the position of Director of Finance. Ralston's termination notice simply and abruptly informed Ralston that the Home Rule Charter eliminated her job.

The second general assertion by the Borough is that there were problems with Ralston's performance of her duties and responsibilities. The Borough's argument in this regard devotes considerable effort on illuminating several minor noted discrepancies during Ralston's tenure. Interestingly, in its brief the Borough's attack on Ralston's performance begins with scrutiny of Complainant Exhibit 5, a February 1983 financial report prepared by Ralston. The Borough argues a simple accounting practice error is evident and that this amounts to evidence that there had been problems with Ralston's performance.

There are several fundamental flaws inherent in this argument. First, the evidence presented in this case overwhelmingly showed that Ralston was at all times one of the Borough's most competent employees. Plonski's deposition confirms that as Ralston's immediate supervisor, he had always considered Ralston's performance of her duties as satisfactory. Even Vangrossi indicated he had a good working relationship with Ralston.

On the issue of the quality of Ralston's performance, the resounding high regard in which Ralston's performance was held was crystal clear in the testimony of several members of Council with whom Ralston had worked. Additionally, on December 3, 1985, Ralston's performance was financially rewarded in a significant way when Borough Council voted to increase her salary by \$5,000 per year.

Of major import in the conclusion that the Borough's attack on Ralston's performance is an after-the-fact rationalization is the fundamental realization that alleged performance problems were not part of the consideration of whether to hire Ralston. Vangrossi testified that Mayor Marberger's only consideration at the time was that the Director of Finance position required someone strong in banking who was a good supervisor. (N.T. Vol 3, 68.) There is no evidence to support the contention that dissatisfaction with Ralston's performance played any part in the decision not to hire her for the Director of Finance position.

Any justification advanced by the Borough must be found to have been considered at the time the employment decision was made and not mere after-the-fact rationalizations. As here, such rationalizations are likely to be exposed as pretext.

Ralston's brief submits that the Borough's attack on Ralston's performance was an act of desperation. Frankly, several last minute witnesses called by the Borough tend to support this observation. Delores Cook testified to a grievance which she said resulted from Ralston's supervision over crossing guards. Ralston had recommended to Plonski that the hours worked by guards on several corners be reduced. A grievance resulted not from Ralston's action, but from Plonski's implementation of Ralston's recommendation. The grievance had never even been mentioned to Ralston before the Public Hearing.

Similarly, the testimony of Mary Hertzog and Dorothy Januzelli had every appearance of having been called in a last minute attempt to uncover ostensible performance flaws which were previously unknown. To attempt to support the prior decision with such testimony is pure pretext.

Finally, the Borough's brief points to an event in November 1985 and argues this event is evidence of "Ralston's insubordination and intention to protect her own agenda at the expense of Respondent." The event was Ralston's request for written authority from Vangrossi before Ralston would transfer funds from the Borough's sewer fund into the Borough's general fund. Ralston suggested that such a transfer would be illegal.

Although the Borough labels Ralston's actions surrounding this transfer of funds incident as insubordination, the evidence considered as a whole reveals that the event was far from insubordinate. In fact, all appearances dictate that Ralston's reluctance was both prudent and in the Borough's interest. From Ralston's and Plonski's testimonies, it is clear that they simply discussed Ralston's concern and the question was posed to the Borough solicitor in the normal course of business.

Even the solicitor had to seek the advice of an expert in the field. Finally, when the authority was given to transfer funds, it was only to be done for several days. All this makes the Borough's

assertions on this question highly susceptible to a showing of pretext. Furthermore, as noted previously, this factor was not even a consideration at the time of Ralston's rejection.

Turning to the Borough's final assertion that Dreby was chosen because of his banking experience, Ralston is successful in showing that this too is pretextual. As noted earlier, neither the Home Rule Charter's list of qualifications for the Director of Finance position, nor the July 1987 newspaper advertisement for the position states that banking experience is a requirement, let alone a positive attribute. Common sense dictates that banking experience would not be as important as direct municipal experience. The Borough's job opening ad merely confirms this common sense conclusion.

After Ralston has successfully dispelled each rationale provided by the Borough, we are left with the simple fact that Ralston, the only female to hold what was in effect one of the five director positions before the effective date of the Home Rule Charter, was the only person not rehired. The four male directors were simply given positions with new titles while the new titled position which was quite similar to the position Ralston had held was given to a male. This evidences a disregard for the clearly expressed intention of the newly adopted Home Rule Charter, Section 1207 B, with regard to the treatment of Ralston. Having considered the record of this case as a whole, a finding of sex-based discrimination is appropriate. Accordingly, finding the Borough liable, we turn to the issue of an appropriate remedy.

Section 9(f)(1) of the PHRA generally outlines the remedies the PHRC is authorized to order. This section 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 practice 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...with or without back pay...as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. S. Ct. 1973).

The first aspect we must consider regarding making Ralston whole is the issue of the extent of financial losses suffered. When complainants prove an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co. Inc., 684 F.2d 1355, 29 FEP 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the complainant] would probably have earned..." PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Cmwlth. 1975), *aff'd*. 387 A.2d 58 (1978). Any uncertainty in an estimation of damages

must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See Green v. USX Corp., Slip Op. at 41-42 (3rd Cir., Mar. 29, 1988).

In this case Ralston submits that she should be completely reimbursed for lost wages and benefits from January 6, 1985 through the present, adjusted by subtracting her interim earnings. Additionally, Ralston seeks front pay until such time as the Borough reinstates Ralston into the Director of Finance position.

The Borough argues that a back pay award, if any, should be reduced because, in the Borough's opinion, Ralston failed to make reasonable good faith attempts to mitigate her damages. Ralston asserts that she made reasonable attempts at mitigation. Courts consistently hold that it is a respondent's burden to produce evidence of a lack of diligence in pursuing other employment in mitigation. See Jackson v. Wakulla Springs & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7th Cir. 1981); Maine Human Rights Comm. v. City of Auburn, 31 FEP 1014, 1020 (Maine Supreme Judicial Ct. 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EPD ¶136, 968, 46, 704 (Michigan Court of Appeals 1986). Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort, and it is a respondent, not a complainant, who has the burden of establishing that the complainant failed to make an honest, good faith effort to secure employment. Id. at 46, 704.

The Borough argues that Ralston failed to mitigate her damages in two respects. First, the Borough argues that Ralston failed to actively seek full-time employment. Second, the Borough submits that upon taking a part-time job, Ralston intentionally limited her earnings so as not to jeopardize Social Security benefits she was receiving.

Regarding whether Ralston sufficiently sought full-time employment, the evidence shows that for a short period immediately following Ralston's abrupt termination, Ralston was so devastated she did not do anything. It appears the first thing Ralston did do was file for unemployment benefits, which Ralston received for a period of 26 weeks. Ralston testified that the unemployment office sent her for job interviews, but she was always told she was overqualified. Additionally, Ralston indicated that she reviewed the want ads in local newspapers and attempted to find a job in this way. Finally, upon Dreby's resignation, Ralston applied for the open Director of Finance position, however, the job was given to another applicant. Most recently, the Director of Finance position came open again, and Ralston once again applied for the position. As of the date of the Public Hearing, Ralston was still awaiting word regarding her pending application.

In the Fall of 1986, Ralston became employed part-time as an administrative floater with a local company. Ralston remained employed part-time with this company through the period of the Public Hearing.

Because an alleged failure to mitigate damages is an affirmative defense, the employer bears the burden of proof on this issue. See Wheeler v. Snyder Buick, Inc., 41 EPD 1136,507, 794 F.2d 1228 (7th Cir. 1986). Here, in order to succeed on this general claim, the Borough must prove that Ralston was not reasonably diligent in seeking other employment, and that with the exercise of reasonable diligence there was a reasonable chance that Ralston might have found comparable employment.

The Borough's attempt to present evidence in this regard can be best described as minimal. In fact, almost no effort was made to establish that there were comparable openings which, with reasonable diligence, Ralston had a reasonable chance of obtaining. Instead, it appears the Borough is merely suggesting that when Ralston went on unemployment she did not continue to actively seek full-time employment, and that Ralston was satisfied with part-time employment.

Ralston can satisfy her requirement to mitigate her damages by simply demonstrating a continued commitment to finding work. Numerous federal cases have held that part-time work, even in another field, satisfies the requirement to mitigate. See, e.g., Donnelly v. Yellow Freight System, Inc., 50 EPD ¶38, 972 (7th Cir. 1989); Wheeler v. Snyder Buick, Inc., *supra*; Sprogis v. United Airlines, Inc., 10 EPD ¶10, 307 (7th Cir. 1975).

Here, Ralston not only accepted a part-time job, she continued to apply to the Borough each time the Director of Finance position became vacant. Furthermore, Ralston provided uncontested testimony that she was willing to forego even receipt of Social Security benefits if she could have found a decent full-time job.

Regarding the 26-week period Ralston received unemployment benefits, the evidence reveals that Ralston both went on job interviews which the unemployment office set up for her and on her own attempted to find a job through newspaper want ads.

In Orzel v. City of Wauwatosa Fire Department, 30 EPD ¶33, 264, 697 F.2d 743 (7th Cir. 1983), cert. denied, 464 U.S. 992 (1983), a complainant, who in a two-year period secured a part-time job and applied for another full-time job, was found to have sufficiently fulfilled the duty to mitigate damages. Here, Ralston did far more than the complainant in Orzel. Accordingly, the Borough has failed to establish a failure to mitigate.

Regarding the Borough's contention that Ralston intentionally limited her earnings, a close analysis of this factor will be made later when the issue of whether to deduct collateral earnings is addressed.

For now, we turn to the question of the amount of Ralston's financial loss. On the question of lost wages, we know that in December 1985, Ralston received a \$5,000 increase which brought her salary to \$32,000 per year. Dreby's earnings for 1986 were \$25,361.42. (J.E.2.) In 1987, Dreby and his replacement McCandless together earned \$23,096.14. Beginning in 1988, McCandless earned an amount greater than \$32,000, as he then earned \$38,499.85. Joint Exhibit 2 indicates that between 1988 and 1991, McCandless's salary increased approximately \$3,000 per year.

Since Ralston's yearly salary would have been greater than both Dreby's 1985 income and a combination of Dreby's and McCandless's 1986 combined compensation. it would be appropriate to increase the salary Ralston would have received in 1987 by at least the same approximate yearly increase McCandless received between 1988 and 1991 (\$3,000).

Accordingly, the following reflects an approximation of the salary Ralston lost by reason of the Borough's discrimination:

1986 - \$32,000.00
1987 - 35,000.00
1988 - 38,499.85
1989 - 41,581.06
1990 - 44,027.48
1991 - 47,408.17
1992 - 10,406.66 (2 ½ months at \$50,000 per year)

Total Gross Lost Wages -\$248,923.22

Ralston's brief also asks for the cost of medical and dental benefits as part of her remedy. As stated earlier, the purpose of a remedy is to make the complainant whole and is not intended to be punitive. Federal courts looking at the question of whether a complainant can recover the cost of medical, dental and life insurance coverage consistently hold that such costs are recoverable only when the complainant either incurs costs of securing alternative coverages or incurs losses which would have been covered. Otherwise, to award such costs is punitive. See Kossmann v. Calumet County, 41 FEP 1355 (7th Cir. 1986), cert denied, 479 U.S. 1088 (1987); Spagnuolo v. Whirlpool Corp., 32 FEP 1377 (W.D. N.C. 1982), aff'd. in part and rev'd. in part, 32 FEP 1382 (4th Cir. 1983). Here, there is no evidence that Ralston incurred costs either to secure alternative coverage or in connection with a loss which would have been covered by the benefits she would have had with the Borough.

We now turn to the question of whether the gross back pay lost should be reduced in any way. Fundamentally, amounts Ralston earned from substitute employment are deductible. Ralston's interim earnings from her part-time job were as follows:

Fall of 1986 (estimate)	\$ 1,500.00
1987	1,735.83
1988	3,031.61
1989	5,828.93
1990	6,051.14
1991	6,606.88
1992 (2 ½ month estimate)	<u>1,000.00</u>
Total Gross Interim Wages.	\$25,754.39

Ralston's wages from employment as an elected official in Lower Providence Township would have been earned even if Ralston had been given the position of Director of Finance with the Borough. Accordingly, these wages are not deductible.

This brings us to the question of whether it is appropriate to deduct either unemployment compensation or Social Security benefits received, or both, or neither. Ralston argues that neither benefit should be deducted.

In the Third Circuit, courts have carved out an exception to what has come to be known as the "collateral source rule." Under the collateral source rule, payments under Social Security, unemployment compensation and similar programs are normally treated as collateral benefits which would not ordinarily be set off against damages awards. Maxfield v. Sinclair Int'l., 766 F.2d 788, 38 FEP 442 (3rd Cir. 1985). The exception which has begun to be recognized are cases in which a governmental body, rather than a private entity, is the party that would benefit from a setoff. See, e.g., Dillon v. Coles, 746 F.2d 998, 36 FEP 159 (3rd Cir. 1984), and Crosby v. N.E.T.&T. Co., 39 FEP 1271 (D.C. Mass. 1985). The fundamental distinction behind the exception goes to the fact that local tax funds are at stake rather than funds of a private entity.

Following the Third Circuit's course in this area, combined with the Borough's evidence that Ralston intentionally limited her earnings, we find it appropriate to set off the amounts Ralston received in both unemployment compensation and Social Security benefits.

Ralston indicated that for 26 weeks she received \$220 to \$225 per week in unemployment compensation. Accordingly, the following deduction should be made:

26 weeks @ \$222.50 per week = \$5,785.00

Joint Exhibit 3 indicates Ralston received the following Social Security benefits between 1986 and 1991:

1986	\$1,985.00
1987	4,884.00
1988	5,096.00
1989	5,360.10
1990	5,743.90
1991	6,087.80
1992 (2 ½ month estimate)	<u>1,500.00</u>
Total Social Security Benefits.	\$30,656.80

The offset from Ralston's gross lost wages would therefore be as follows:

Interim wages	\$25,754.39
Unemployment Compensation	5,785.00
Social Security benefits	<u>30,656.80</u>
Total Offset	\$62,196.19

TOTAL GROSS WAGES LOST	\$248,923.22
<u>TOTAL OFFSET</u>	<u>62,196.19</u>
BACK PAY AWARD	\$186,727.03

Ralston's supplemental brief also seeks front pay. Here, there is evidence that since November 1991 the Director of Finance position has been vacant. The duties are being performed by an acting Director of Finance, Anthony Biondi. Rather than front pay, the appropriate remedy here is reinstatement of Ralston into the position. Accordingly, the Borough shall be ordered to offer Ralston the vacant position of Director of Finance. However, if an immediate offer of reinstatement is not possible because the position is not presently vacant, front pay shall then be appropriate. To fully make Ralston whole, such front pay shall be paid from the date of the Final Order in this matter until such time as Ralston is offered the position.

Ralston's supplemental brief further argues that Ralston is entitled to retirement benefits. During Ralston's employment, both the Borough and Ralston made contributions to the Borough's pension plan. The Borough's share of the contribution was six percent of Ralston's salary (Joint Exhibit 1). When Ralston was terminated, Ralston's contributions were returned to her. Should Ralston accept the Borough's offer of reinstatement into the position, both Ralston and the Borough shall make the appropriate retirement plan contributions on behalf of Ralston as if Ralston had been continuously working since March 1981.

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

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

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

MARY S. RALSTON, Complainant

v.

BOROUGH OF NORRISTOWN, Respondent

DOCKET NO. E-36609

RECOMMENDATION OF HEARING COMMISSIONER

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



Carl H. Summerson
Permanent Hearing Examiner

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

MARY S. RALSTON, Complainant

v.

BOROUGH OF NORRISTOWN, Respondent

DOCKET NO. E-36609

FINAL ORDER

AND NOW, this 29th day of April, 1993, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby


ORDERS

1. That the Respondent shall cease and desist from sex-based discrimination with regard to hiring.
2. That the Respondent shall pay to the Complainant within 30 days of the effective date of this Order the lump sum of \$186,727.03, which amount represents back pay lost for the period between January 6, 1983 and March 15, 1992.
3. That the Respondent shall pay additional interest of six percent per annum on the back pay award, calculated from January 6, 1986 until payment is made.
4. That the Respondent shall offer Ralston reinstatement into the position of Director of Finance.
5. That, in the event Ralston accepts the Respondent's offer of reinstatement, the Respondent shall make appropriate contributions to the Respondent's retirement plan as if Ralston had been continuously working for the Respondent since March 1981.
6. That, in the event the position of Director of Finance is not currently being performed by an acting director, and the Respondent is therefore unable to make an immediate offer of reinstatement, the Respondent shall pay Ralston front pay in an amount equal to the current salary of the Director of Finance, minus amounts earned by Ralston from other employment and amounts received as Social Security benefits. Such front pay shall be paid from the date of this Order until such time as Ralston is offered reinstatement into the position.

7. That, within 30 days of the effective date of the Order, the Respondent shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Pamela Darville, Esquire, in the Commission's Philadelphia Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:


Robert Johnson Smith, Chairperson

ATTEST:


Gregory J. Zelia, Jr., Secretary