

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DANIEL BUTLER, Complainant	:	PHRC CASE No. 200600473 EEOC No. 17FA662793
EDWARD GARDNER, Complainant	:	PHRC CASE No. 20060755 EEOC No. 17FA662792
SAMUEL GOLLAPALLI, Complainant	:	PHRC CASE No. 200600941 EEOC No. 17FA662791
GERARD KERSHAW, Complainant	:	PHRC CASE No. 200600769 EEOC No. 17FA662789
DAVID LEWIS, Complainant	:	PHRC CASE No. 200505979 EEOC No. 17FA661513
MARK ST. MARIE Complainant	:	PHRC CASE No. 200600939 EEOC No. 17FA662790
and,	:	
DAVID THUMMEL, Complainant	:	PHRC CASE No. 200600474 EEOC No. 17FA662997
v.	:	
CITY OF PHILADELPHIA, Respondent	:	

STIPULATIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

David Lewis v. City of Philadelphia  
PHRC Case No. 200505979, EEOC No. 17FA661513

Gerard Kershaw v. City of Philadelphia  
PHRC Case No. 200600769, EEOC No. 17 FA662789

Mark St. Marie v. City of Philadelphia  
PHRC Case No. 200600939, EEOC No. 17FA662790

David Thummel v. City of Philadelphia  
PHRC Case No. 200600474, EEOC No. 17FA662997

Edward Gardner v. City of Philadelphia  
PHRC Case No. 200600755, EEOC No. 17FA662792

Daniel Butler v. City of Philadelphia  
PHRC Case No. 200600473, EEOC No. 17FA662793

Samuel Gollapalli v. City of Philadelphia  
PHRC Case No. 200600941, EEOC No. 17FA662791

**STIPULATIONS**

The following facts are admitted by all parties to these cases and no further proof thereof is required.

1. Daniel Butler, Edward Gardner, Samuel Gollapalli, Gerard Kershaw, David Lewis, Mark St. Marie, and David Thummel ("Complainants"), applied for the position of firefighter in Respondent City of Philadelphia's Fire Department ("Respondent"). They took and passed the City's Civil Service Test, Examination No. 06Q36B01, in November 2005 ("2005 Examination") and received their respective test scores. They were placed on the certified eligibility list ("2006 List"). Exhibit "1."

2. In Respondent's Application for Firefighter that Complainants completed, it states that:

To be hired for the position:  
[You] must have reached Eighteenth (18th) birthday, but not have reached fortieth (40th) birthday by date of appointment.

Exhibit "2."

3. Complainants paid Respondent's \$35 application fee and Respondent accepted same, permitting Claimants to take Civil Service Examination ("CSE") Number 06Q36B01.

4. In order to be hired as a Firefighter, Complainants, like all applicants, were required to take and pass the written examination.

5. Once applicants complete the written examination, the examinations are scored and the applicants who pass the examination are placed on an eligible list of hires.

6. Based on their respective placement on the eligible list of hires, applicants are required to undergo a background screening and physical examination.

7. Applicants who successfully complete the background screening and physical examination may be selected to enter the Fire Academy based on their respective placement on the eligible list of hires.

8. Respondent certified the Eligible List for Civil Service Examination 06Q36B01 in January 2006 ("2006 List").

9. Applicants who had successfully passed the 2005 Examination were placed on the 2006 List and began to be appointed to the Fire Department after successfully completing the remainder of the screening process.

10. Complainants received the following examination scores and certified eligible ranks:

	<u>Name</u>	<u>Score</u>	<u>Rank<sup>1</sup></u>
a.	Gerard Kershaw	107	10
b.	Samuel Gollapalli	104	28
c.	Mark St. Marie	100	74
d.	David Thummel	97	193
e.	Edward Gardner	96	263 (V)
f.	Daniel Butler	94	448
g.	David Lewis	93	496.7 (V)

11. On or about February 2, 2006, Respondent sent each Complainant a letter stating:

Congratulations, you passed the examination for the position of Firefighter, (06Q36B01). ...If vacancies occur, our staff will contact you by mail to make an appointment for a job interview when we reach your rank. Good luck with your career.

Exhibit "3" (Exemplar).

12. Complainants have dates of birth and ages as follows:

	<u>Name</u>	<u>DOB</u>	<u>Age on Exam 11/19/05</u>	<u>Age as of 2/2/06</u>	<u>Age Now</u>
a.	Gerard Kershaw	5/8/65	40	40	42
b.	Samuel Gollapalli	8/3/65	40	40	42
c.	Mark St. Marie	9/17/61	44	44	46
d.	David Thummel	11/5/64	41	41	43
e.	Edward Gardner	11/24/61	44	45	46

<sup>1</sup> Veteran's preference ("V") is awarded to Candidates with military service pursuant to the Pennsylvania Military Affairs Act.

f.	Daniel Butler	5/28/65	40	40	42
g.	David Lewis	7/30/64	41	41	43

13. On or after February 16, 2006, Respondent sent each Complainant a letter stating that they were "examined in error for the position of Firefighter" and did not meet the eligibility requirements for the position of Firefighter. Exhibit "4" (Exemplar).

14. On or about April 27, 2006, Respondent sent Complainant David Lewis and additional letter stating

"You recently passed the examination for the position of Firefighter, (06Q36B01). We have received and processed your claim for Veteran's Preference. Your new score is 93.00, V and your new rank on the eligible list is 496.700...If vacancies occur, our staff will contact you by mail to make an appointment for a job interview when we reach your rank. Good luck with your career."

Exhibit "5."

15. Complainants had all reached their 40<sup>th</sup> birthdays before the date they were placed on the eligible list of hires.

16. Had Complainants names not been removed from the eligibility list because of their ages they would have been scheduled for medical exams and the remainder of the steps necessary to complete the screening process to become Philadelphia Firefighters.

17. Had the Complainants been determined as qualified (on a pass/fail basis) following the medical examinations and the background investigations, their ranks on the eligibility list would have been determined based solely on the written test results and applicable veterans preference.

18. Had Complainants passed the remaining steps in the hiring process, they would have been eligible for hire in the position of Firefighter and would have been scheduled

to begin training at the Fire Academy no later than January 2007 based on their placement on the 2006 List.

19. Respondent did not permit Complainants to complete the applicant screening process to be hired as Firefighters because they were all age 40 or over.

20. Complainants each timely filed separate complaints with the Pennsylvania Human Relations Commission alleging that Respondent has discriminatorily refused to hire them based on their age.

21. Complainants' Complaints were consolidated by the Pennsylvania Human Relations Commission because of the commonality of their allegations and of the Respondent.

22. Respondent filed Answers to each Complaint. In its Answer, Respondent admits that "Firefighters who are over 40 years of age are rejected automatically." Exhibit "6" (Exemplar).

23. In its Answer, Respondent also admits that it has hired individuals over the age of 40 in the past. Id.

24. On December 5, 2006 and February 6, 2007, the Pennsylvania Human Relations Commission issued letters stating that it found probable cause to support a finding of discrimination on account of Claimants' age in violation of the Pennsylvania Human Relations Act. Exhibit "7" (Exemplar).

25. The application form from August 1982 read as follows: applicants "must have reached nineteenth (19) birthday but not have reached thirty-first (31) birthday at date of appointment. Candidates must be within these age limits on the date of appointment. The date of appointment is the date on which a person actually enters the Fire Academy for training." Exhibit "8."

26. The application form from August 1984 read as follows: applicants "must have reached nineteenth (19) birthday as of the date of appointment. The date of appointment is the date on which a person actually enters the Fire Academy for training. Also, candidates must not have reached the thirty-sixth (36) birthday as of the date of the written test. The written test is scheduled for November 17, 1984." Exhibit "9."

27. On September 30, 1996, the Pennsylvania Commonwealth Court issued its decision in City of Philadelphia v. Pennsylvania Human Relations Commission, 684 A.2d 204 (Pa. Commw. Ct. 1996), striking down the Philadelphia Police Department's maximum hiring age restriction.

28. Firefighters employed by Respondent do not have a mandatory retirement age.

29. Respondent does not currently have any records showing that any applicant was disqualified from the position of Firefighter based on his or her age before the November 2005 Examination.

30. Before this Certified List, Respondent hired candidates who had passed the Civil Service Examination for Firefighter who had reached their Fortieth (40th) birthday before their respective date of hire for this position. Specifically, among others, Respondent had hired:

<u>Name</u>	<u>DOB</u>	<u>Class(Date)</u>	<u>Age in Class</u>
Denis McCaig	6/17/1948	(Nov.1988)	40
John Smith	8/1/1949	(Nov.1989)	40
Eugene Worth	2/1/1949	(Nov.1989)	40
William Brown	1/15/1954	(Dec. 1994)	40
Michael Lashley	2/1/1953	(Dec. 1994)	41
Antonio Lieggi	8/21/1952	(Dec. 1994)	42
Daniel Morgan	3/11/1952	(Dec. 1994)	42
Stephen Boub	8/2/1951	(Dec. 1994)	43

Joseph Duff	11/10/1948	(Dec.1994)	46
Larry Williams	10/24/1955	(Mar. 1996)	40
Ralph Keys	5/8/1953	(Mar.1996)	42
Richard Benditt	8/29/1950	(Mar.1996)	45
Thomas Coyle	1/14/1951	(Mar. 1996)	45
Ronald Gabor	6/26/1949	(May 1996)	46
Michael Creswell	4/11/1956	(Dec. 1996)	40
Farris Young	4/9/1956	(Dec. 1996)	40
Michael Hagan	10/28/1954	(Dec. 1996)	42
Michael Janits	7/27/1952	(Dec.1996)	44
Rodney Shepphard	12/28/1951	(Dec.1996)	44
Eric Stukes	9/12/1952	(Dec. 1996)	44
Ronald Hipple	8/2/1940	(Dec.1996)	56
Prince Gilliard	12/22/1954	(Apr.1997)	45
Neil Mullen	1/7/1951	(Apr. 1997)	46
Edward Thomas	12/9/1955	(June 1998)	42
Waverly Settles	5/25/1953	(Sept. 1998)	45
John Rivera	6/26/1958	(Mar.1999)	40
David Goble	11/17/1956	(Mar.1999)	42
Donald Woods	9/12/1955	(Mar.1999)	43
Wynnefield Smith	1/15/1953	(Mar.1999)	46
Robert Simmons	10/23/1946	(Mar.1999)	52
Dennis Meehan	12/29/1951	(Aug.1999)	47
James Gillespie	5/31/1958	(Feb.2000)	41
Kenneth Legions	3/10/1957	(Feb. 2000)	42
Gary Weisler	3/1/1956	(Feb. 2000)	43
Ralph Smith	9/5/1940	(Feb. 2000)	59
Edward Birtwistle	9/8/1949	(Nov. 2000)	51
Clay Finley	10/28/1957	(Mar.2001)	43
Manuel Gonzalez	12/11/1955	(Mar.2001)	45
William Armstrong	5/4/1948	(Mar.2001)	52
Stacey Harley	8/30/1960	(Jun. 2002)	41
William Smith	9/19/1960	(Jun. 2002)	41
Ira Dixon	6/3/1960	(Jun. 2002)	42
Gregory Fair	4/28/1958	(Jun.2002)	44
Gerald Bumpars	5/12/1956	(Jun.2002)	46
Eugene Mears	12/28/1954	(Jun.2002)	47
Eric Scott	3/22/1963	(Jun.2003)	40
Judith Brown	10/7/1960	(Jun.2003)	42
Luther Graves	8/23/1959	(Jun.2003)	43
Richard Pfeiffer	12/10/1957	(Jun.2003)	45
Michael Farrell	1/24/1950	(Jun.2003)	53
Paige Taylor	8/1/1963	(Dec.2003)	40
Donna Swallow	12/21/1961	(Dec.2003)	41
George Savoy	4/22/1959	(Dec.2003)	44
Daniel Grosser	2/22/1957	(Dec.2003)	46



Jean Werner	11/21/1955	(Dec.2003)	48
Clarence Young	8/11/1955	(Dec.2003)	48
Gary Boyd	6/9/1949	176 (Feb. 2003)	53
Tyrone Gatewood	3/15/1959	176(Feb. 2003)	43
Kurt Green	4/25/1959	176(Feb. 2003)	43
James Halligan	8/22/1955	176(Feb. 2003)	47
Paul Kotasenski	4/27/1954	176(Feb. 2003)	48
Sharon Backett	8/25/1959	177(June 2003)	43
Wayne Gentner	8/3/1949	177(June 2003)	53
Dennis Harte	2/25/1961	177(June 2003)	42
Gary Rebstock	3/31/1953	177(June 2003)	50
Larry Shaw	6/17/1961	177(June 2003)	42
Joe Ryan	4/10/1962	179(Jan. 2005)	41
John Spencer	6/26/1962	179(Jan.2005)	41
Christopher Willing	3/3/1963	179(Jan.2005)	41
Dennis McClernand	12/14/1960	179(Jan 2005)	44
Angelo Esposito	8/1/1959	179(Jan.2005)	45
Michael Kumor	10/1/1959	179(Jan.2005)	45
John Mahan	7/04/1953	180(July 2005)	52
David Alequin	9/25/1964	180(July 2005)	40
Gino Arroyo	6/2/1965	180(July 2005)	40
Charles Benzenhafer	11/16/1965	180(July 2005)	40
Ernest Foley	2/21/1965	180(July 2005)	40
Kevin Hopkins	2/9/1965	180(July 2005)	40
Joseph Iannacone	1/19/1965	180(July 2005)	40
Edmonde Sestini	9/19/1963	180(July 2005)	41
Carl Neuber	1/17/1961	180(July 2005)	44
Thomas Schuhl	1/8/1961	180(July 2005)	44
Patrick Meehan	11/22/1959	180(July 2005)	45
Barbara Driscoll	2/3/1957	180(July 2005)	48

31. Since February 2, 2006, there have been four (4) Fire Academy Classes,

**Class Numbers 181-184.** These classes and their appointment dates, with the last non-consent

**decree appointment ranks for accepted candidates, are listed below:**

<u>Class</u>	<u>Size</u>	<u>Appointment Date</u>	<u>Last Rank Hired</u>
181	79	May 8, 2006	126
182	90	July 6, 2006	238
183	91	January 8, 2007	360
184	91	January 12, 2007	532

32. The next Fire Academy class is currently scheduled for February 24, 2008, Class Number 185.
33. No applicants have been appointed to the Fire Department from the 2006 List who have reached their 40<sup>th</sup> birthday by the date of appointment except Roman Baczara.
34. Roman Baczara took and passed the 2005 CSE 06Q36B01, receiving a score of 99 and a rank of 94 on the 2006 List.
35. Mr. Baczara was hired as a Firefighter on May 8, 2006. His date of birth is May 12, 1965. His payroll number is 207419.
36. At the time he was hired as a Firefighter, Mr. Baczara was 40 years old.
37. Mr. Baczara was working as a Fire Service Paramedic for the City of Philadelphia at the time he took the Firefighter examination in October 2001 ("2001 examination").
38. Respondent has continued to process younger Firefighter applicants whose certified scores and ranks are below Complainants. Specifically, had Respondent not used age as a basis for disqualification, it would have placed Fire Service Paramedics ("FSP") Kershaw, Gollapalli and St. Marie in Fire Academy Class 181, which commenced on May 8, 2006, if they successfully completed the remainder of the screening process. It would have placed Mr. Thummel in its 182<sup>nd</sup> Class, which commenced on July 6, 2006, if he successfully completed the remainder of the screening process. It would have placed Mr. Gardner in Class 183, which commenced on January 8, 2007, if he successfully completed the remainder of the screening process. Respondent would have placed Messrs. Butler and Lewis in Class 184, which commenced on January 12, 2007, if they successfully completed the remainder of the screening process.

39. Had Complainants been hired as Firefighters they would have been paid in accordance with the relevant pay schedule then in effect, for pay range \$34,877.00.

40. Pay schedule step increases occur once every year on the anniversary date of employment for the employee for the first four years of service as a Firefighter.

41. Had the Complainants been hired as Firefighters, each would be eligible for all employment related benefits provided in applicable collective bargaining agreements, including, but not limited to: longevity pay, opportunity for overtime pay, stress (shift) differential, health and welfare benefits, pension, life insurance benefits, accrued vacation and sick time allowances, legal services and promotion possibility.

42. Respondent continues to refuse to hire Claimants or process them into Fire Academy classes.

\_\_\_\_\_  
Norman G. Matlock  
Assistant Chief Counsel  
(Counsel for the Commission)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Shannon D. Farmer, Esquire  
(Counsel for Respondent)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Alice W. Ballard, Esquire  
(Counsel for David Lewis)

\_\_\_\_\_  
Date



\_\_\_\_\_  
Arthur L. Bugay, Esquire  
(Counsel for Daniel Butler, Edward Gardner, Samuel Gollapalli,  
Gerard Kershaw, Mark St. Marie, and David Thummel)

\_\_\_\_\_  
Date

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Norman G. Matlock  
Assistant Chief Counsel  
(Counsel for the Commission)

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Shannon D. Farmer, Esquire  
(Counsel for Respondent)

\_\_\_\_\_  
12/10/07  
Date

\_\_\_\_\_  
Alice W. Ballard, Esquire  
(Counsel for David Lewis)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Arthur L. Bugay, Esquire  
(Counsel for Daniel Butler, Edward Gardner, Samuel Gollapalli,  
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Norman G. Matlock  
Assistant Chief Counsel  
(Counsel for the Commission)

10 Dec 2007  
Date

Shannon D. Farmer, Esquire  
(Counsel for Respondent)

Date

Alice W. Ballard, Esquire  
(Counsel for David Lewis)

Date

Arthur L. Bugay, Esquire  
(Counsel for Daniel Butler, Edward Gardner, Samuel Gollapalli,  
Gerard Kershaw, Mark St. Marie, and David Thummel)

Date

## FINDINGS OF FACT \*

1. The seven applicants, Daniel Butler, Edward Gardner, Samuel Gollapalli, Gerald Kershaw, David Lewis, Mark St. Marie and David Thummel (hereinafter "Complainants") applied for the position of firefighter in Respondent City of Philadelphia's Fire Department. (S. 1)
2. The Complainants took the Respondent's Civil Service Test Examination, received their respective scores and were placed on the certified eligibility lists. (S. 1).
3. Applicants who successfully complete the written examination, background screening and physical examination may be selected to enter the Fire Academy based on their placement on the eligible tests of hires. (S. 7).
4. Complainants Kershaw, St. Marie and Gallapalli are employed as Fire Service Paramedics in Respondent's Fire Department. (CE 10, 14-17).
5. These three Complainants have submitted affidavits with commendations to document their success as paramedic's and in addition, Complainant St. Marie has taught at the Fire Academy. (CE 4, 10).
6. Complainant Lewis is a veteran and submitted an affidavit summarizing his history and ability to perform the work of a firefighter. (CE 19).

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

S.F. Stipulations  
C.E. Complainant's Exhibit

7. Complainant Butler is employed by the Respondent as a Philadelphia Police Officer and is regularly engaged in the job of enforcing the laws of the Commonwealth and of the City of Philadelphia. (CE 14-17).
8. Complainant Butler submitted an affidavit summarizing his background and his abilities to perform the job of firefighter. (CE 14-17).
9. Complainant Thummel is a landscaper and owns his own business. (CE 10).
10. Complainant Thummel has submitted an affidavit summarizing his background and qualifications to perform the job of a firefighter. (CE 10).
11. Complainant Gardner is a Marine Corps veteran and is employed as a maintenance supervisor at the Philadelphia International Airport. (CE 10).
12. On May 2, 2007, each of the named Complainants performed the Philadelphia Fire Department's Skills Proficiency Course Standards Test for Fire Academy Cadets. (CE 14-17).
13. The testing took place at the Burlington County Emergency Services Training Center. (CE 14-17).
14. The Respondent was invited to observe and participate in the testing. (CE 17).
15. Each of the named Complainants performed and satisfactorily completed the Fire and Proficiency Skills without any difficulty even though they have not had any formal Academy training for the test. (CE 14).
16. John Mahan is employed as a Philadelphia firefighter and his date of birth is July 4, 1953. (CE 25, 26).
17. Mr. Mahan was hired as a firefighter when he was 52 years old. (CE 23).
18. Mr. Mahan has not encountered any difficulties performing his duties as a firefighter. (CE 6).

19. Roman Baczara is employed as a Philadelphia firefighter and his date of birth is May 12, 1965. (CE 23).
20. When Baczara was hired, he was nearly 41 years old, and older than Complainant's Gollapalli's and Butler. (SE 1).
21. The Respondent hired Mr. Baczara on May 8, 2006 when he was nearly 41 years old. (S. 12; C.E. 3).
22. Mr. Baczara was older than Complainants Gollapalli and Butler. (S.E. 1).
23. On September 28, 2007 Karen Hyers, Respondent's personnel liaison for the Fire Department, was deposed and testified that Civil Service Regulation 11.17 was ignored by Respondent. (C.E. 13).
24. The Respondent has no record of any prior firefighter applicants being disqualified on account of age pursuant to CSR 11. 17 (S. 29)



## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of the instant complaint pursuant to the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. The parties have complied with all procedural requisites to a public hearing.
3. The Complainants are persons within the meaning of the PHRA.
4. The Respondent is an employer in the Commonwealth of Pennsylvania within the meaning of the PHRA.
5. Each of the seven Complainants satisfies the filing requirements set forth in Section 9 of the PHRA.
6. The PHRA prohibits employees from refusing to employ individuals because of their age unless age is a bonafide occupational qualification for the position.
7. The PHRA defines "age" to include any person chronologically 40 years or older.
8. The Complainants herein are entitled to protection from age discrimination by the PHRA.
9. The Pennsylvania Human Relations Act is not pre-empted by the ADEA.
10. The Complainants have established by direct evidence that the Respondent unlawfully discriminated against them because of their age when it disqualified them from consideration as firefighters because of their age.
11. The Respondent failed to establish that age is a bona fide occupational qualification for the position of firefighter.
12. The Respondent withdrew its BFOQ defense in the instant matter.
13. The Respondent has failed to establish that its policy of automatic disqualification of individuals age 40 or over from consideration is based on either applicable state or local law in effect on February 16, 2006.

14. Philadelphia Civil Service Regulation 11.17 is preempted by the PHRA to the extent it is in conflict with the purposes of the PHRA.
15. The Respondent is precluded from relying on Civil Service regulations that purport to allow age-based restrictions regarding the hiring of firefighters to the extent that such regulations are inconsistent with the provisions found in the PHRA.
16. Whenever the Commission has concluded that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order and it may order such affirmative relief that will effectuate the purposes of the PHRA.

## OPINION

This matter arise out of a series of complaints filed by Complainants Daniel Butler, Edward Gardner, Samuel Gollapalli, Gerard Kershaw, David Lewis, Mark St. Marie and David Thummel (hereinafter "Complainants") against the City of Philadelphia (hereinafter "Respondent"). The Complainants alleges that the Respondent discriminated against them on account of their age in violation of the Pennsylvania Human Relations Act. ("PHRA"). Specifically the Complainants allege that Respondent's actions in refusing to consider them for the position of firefighter is a violation of Section 5(a) of the PHRA, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951, et seq.

PHRC staff conducted an investigation and found probable cause to credit the allegations raised in the instant complaints. Thereafter Commission staff attempted to conciliate these matters and such efforts were unsuccessful. Subsequently a public hearing was approved in these matters. After the approval of a public hearing and prior to the convening of a public hearing, the Complainants and the Respondents agreed to submit these matters to the Commission on briefs. In addition, the Complainants and the Respondent have agreed upon an extensive set of stipulated facts in these matters.

The long and detailed facts stipulated to by the parties present a situation where no material facts are in dispute. However, the stipulated facts serve to illustrate the legal issues presented in this case.

The initial issue on this matter, stated succinctly, is whether the Respondent's action in removing the Complainants from the process of applying for the position of firefighters because of their age, violates the Pennsylvania Human Relations Act. It is undisputed that the Respondent ceased processing Complainants' applications once the Complainants had reached the age of 40.

The Pennsylvania Human Relations Act (hereinafter "PHRA") states, in pertinent part:

“It shall be an unlawful discriminatory practice, unless based upon a *bona fide* occupational qualification. . . (a) for any employer because of the. . . age. . . of any, any individual. . . to refuse to hire or employ. . . such individual. . . if the individual, is the best able and most competent to perform the services required.”

In addition, the PHRA defines the term “age” to include any person forty years of age or older. There is no dispute that all of the Complainants are within this protected class and there is no dispute that the Respondent refused to hire the Complainants to the position of firefighter because of their age.

As noted, there is no argument that the Respondent refused to hire the Complainants herein because of their age. The Respondent seeks to rely on Civil Service Regulation 11.17 which sets a maximum age for firefighter. The Respondent also admits that it has no *bona fide* occupational qualification defense in this matter. Clearly the scenario before the Commission is a situation where the Respondent is intentionally discriminating against the Complainants because of their age.

In the instant case, Respondent asserts that Civil Service Regulations 11.17 permits the Respondent to discriminate against police and fire applicants. However, this argument is without merit because it conflicts with the Pennsylvania Human Relations Act. (“PHRA”). The PHRA does not provide an exemption for municipalities in the area of law enforcement or firefighting. In fact, case law has determined that such ordinances are invalidated by state law, Ortiz v. Commonwealth of Pennsylvania, 454 Pa. 279, 681 A.2d 152, 156 (1996). It is interesting to note that, prior to the Complainants being involved in this case, the Respondent has no record of rejecting firefighter applicants pursuant to policy set forth in the Civil Service regulation. Clearly, regardless of Respondent’s reliance on CSR 11.17, the regulation violates the PHRA.

Next, the Respondent asserts that the federal Age Discrimination in Employment Act ("ADEA") preempts the PHRA and allows the Respondent to discriminate on the basis of age against firefighter applicants. The relevant section of the ADEA provides:

- "(j) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State, or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –
- "(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
- "(2) pursuant to a *bona fide* hiring or retirement plan that is not a subterfuge to evade the purposes of this Act."

Generally the concept of federal preemption operates to prevent the state from legislating where the federal government has elected to exclusively occupy the entire area. Carolina Freight Carriers v. Commonwealth, Human Relations Commission, 99 Pa. Cmwlth. 428, 513 A.2d 579 (1986); Jones v. Rath Packing Co., 430 U.S. 519, 525 97 S. Ct. 1305, 51 L.Ed. 2d. 604 (1977); and Fidelity Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L.Ed. 2d. 664 (1982). There are three instances where a federal law may preempt a state or local law; 1) where Congress explicitly states it intends to preempt state law; 2) where preemption is implied because the local law regulates conduct in a field that Congress intended the federal government to occupy exclusively; and 3) where preemption is implied because there is an actual conflict between federal and state law. In the instant case, it is the Respondent's burden to show that the ADEA preempts the PHRA in one of three aforementioned ways.

First, as noted in Section 633(a) of the ADEA, the scope of its preemption was clearly defined by the legislation. Section 633(a) provides:

“Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.”

The PHRC is the state agency that is authorized to perform the “like functions” to those of the corresponding federal agency in regard to discriminatory practices on the basis of age. In fact, the EEOC regulations recognize the ability for the state to have greater protection than those affected under federal law.

“The ADEA does not preempt State age discrimination in employment laws. . . .” 29 C.F.R. Sec 1625 10(g) (emphasis supplied).

Next, we look at whether these cases are situations where Congress intended to “fill the field” on the issue of maximum age limits on applicants for the position of firefighter. When a local government cannot satisfy the statutory prerequisites, it is expressly unlawful under the ADEA to discriminate against firefighter applicants in the basis of age. There are cases where EEOC has enforced the ADEA against states and municipalities that discriminate on the basis of age where the statute or ordinance did not meet the requisite criteria to fit within the exemption. See, e.g. EEOC v. Illinois, 788 F. Supp. 373, (D.C. Ill. 1992). The Respondent in the instant case has not presented any evidence that Congress intended to “fill the field” regarding the issue before the Commission.

Lastly, we move to the Respondent’s argument that the PHRA is conflict preempted because the scope of protection in the two statutes is different. Simply stated, this argument is without merit. Courts have held that Title VII, for example, (similar to the ADEA) does not preempt more expansive state anti discrimination legislation. See Galiardo v. Connaught Laboratories, Inc., 311 F.2d 565, 570-1 (3<sup>rd</sup> Cir. 2002). In the matter before the Commission, there is no conflict preemption since the PHRA, unlike federal law, does not

make an exception for age discrimination pursuant to the exercise of its police power under the PHRA.

Next, we move to the Respondent's argument that Civil Service Regulation 11. 17 meets the prerequisite for exemption under 29 USC Sec. 623(j). Stated succinctly, the Respondent's plan is not valid because the Respondent has never made any hiring decisions pursuant to this Civil Service Regulation. In fact, the Respondent has stipulated to this position. The Respondent is now in the precarious position of asserting a "*bona fide*" plan but never followed the plan. For the purposes of Sec. 623(j), a plan is "*bona fide*" if it is constantly followed. See Kopec v. Elmhurst, 193 F.3d 894, 901 (7<sup>th</sup> Cir. 1999). In these cases, the Respondent expressly chose not to follow this Regulations (CE 13, SN 29). Since the Respondent has heretofore ignored CSR 11. 17, the Respondent cannot argue that it has been hiring "pursuant to it." The Complainants have clearly shown that the Respondent has not followed CSR 11. 17 in that: 1) each Complainant's application was accepted; 2) the Respondent accepted application fees which were never returned; and each Complainant was in fact permitted to take the test, even though each Complainant was over 40 years of age at the time. It is abundantly clear that the Respondent was prepared to proceed with Complainants' applications despite the age of the Complainant without any regard to the Civil Service Regulation. It is disingenuous for the Respondent to now attempt to rely on a regulation that it has historically ignored. In fact, in the case of Mr. Baczara, the Respondent not only disregarded the regulations, the Respondent violated its own Home Rule Charter when it hired someone ranked lower on the list than another higher ranked candidate. Complainants Kershaw and Gollapalli are ranked higher on the list than Mr. Baczara. The relevant portion of the Home Rule Charter provides:

The establishment of eligible lists for appointment and promotion upon which lists shall be placed the names of successful candidates in the order of their relative excellence on the respective examinations. . .

Section 7- 401 (f), Philadelphia House Rule Charter clearly shows that any reasons proffered by the Respondent simply mask the expressed and admitted disregard of the civil service regulation.

Upon review of the record in these matters, the Complainants have shown that the Respondent has unlawfully discriminated against them. The Respondent has admitted to not having a BFOQ to justify its actions. All of the Complainants are qualified for the position of firefighter and have passed, on the first try, a skills test designed by the Respondent. Several of the Complainants, Kershaw, Gollapalli and St. Marie, are already employed by the Fire Department and have performed in an admirable fashion. It is undeniable that CSR 11.17 was never in effect and was never heretofore used to disqualify any firefighter applicant on account of age.

We now move to the issue of appropriate remedy. Section 9 of the PHRA provides, in pertinent part:

“If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practices as defined in this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to *cease and desist* from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay. . . 43 P.S. §959(f).

This particular section of the PHRA has always been broadly interpreted. In Murphy v. Commonwealth, PA Human Relations Commission., 506 Pa. 549, 486 A.2d 388 (1985), the Pennsylvania supreme Court said, “We have consistently held that the Commissioners, when fashioning an award, have broad discretion. . .” The Commission, in awarding any remedy, has two purposes. The first purpose is to insure that the unlawful practice is completely eradicated. The second purpose is to restore the injured party to their pre-injury status and make them whole. Williamsburg Community School District v. Commonwealth, PA Human Relations Commission., 99 Pa. Cmwlth. 206, 512 A.2d 1339 (1986). Certainly in



the instant case, the cease and desist portion of Section 9 is especially relevant. The Respondent should be directed to cease and desist from discriminating against any individuals because of their age with respect to employment as fire fighters. The Respondent should also cease and desist from utilizing any pre-employment selection that mandates automatic rejection of applicants over 40 years of age for the position of fire fighter because of the applicant's age or which otherwise imposes different qualification criteria based on the age of the applicant.

With regard to the relief that each of the named Complainants is entitled to, each Complainant should be allowed to complete the process. Pa State Police v. Cmwlth of PA, Pennsylvania Human Relations Commission, 512 Pa. 534, 517 A.2d 1253(1986) The Respondent should place each Complainant back in the position in the hiring process they were in before the Complainants were removed because of their age which shall include the medical examination and background investigation and entrance into a fire training class within the next three months. Regarding each Complainant who successfully completes the hiring process, the Respondent should offer the successful Complainants instatement. Furthermore, the Respondent should, upon each Complainant's successful completion of the hiring process, give each successful Complainant a constructive date of appointment for all employment related matters as if that Complainant had been appointed from a list of eligibles commensurate with that Complainant's ranking at the time of his removal from the process. The Respondent should, upon the instatement of each successful Complainant, pay that Complainant an amount equal to that which that Complainant would have earned had he not been not been removed from the process. Because it is likely that the reasons why individual Complainants might choose to decline an offer of instatement may vary considerably, the PHRC retains the option of reopening the public hearing to fully assess the circumstances of individual cases to determine whether any remedy is appropriate.

Also, any payments owed to a successful Complainant should be reduced by any amount earned by that Complainant in the interim to the extent that such earning could not be earned had the Complainant been working as a fire fighter subsequent to February of 2006. In addition, interest shall be computed at 6% per annum from the date of constructive appointment through the date the payment is made.

The Respondent should provide all successful Complainants who accept instatement with all benefits that an individual would have otherwise had from the time that individual should have been hired and the Respondent shall make payments into the pension system thereby making each successful Complainant's pension status equal to the status they would have had but for the unlawful discrimination. Lastly, if a Complainant is rejected after being placed back into the hiring process, the Respondent shall provide the named Complainant and the Commission with a written explanation specifying the reason for the rejection.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DANIEL BUTLER, Complainant	:	PHRC CASE No. 200600473 EEOC No. 17FA662793
EDWARD GARDNER, Complainant	:	PHRC CASE No. 20060755 EEOC No. 17FA662792
SAMUEL GOLLAPALLI, Complainant	:	PHRC CASE No. 200600941 EEOC No. 17FA662791
GERARD KERSHAW, Complainant	:	PHRC CASE No. 200600769 EEOC No. 17FA662789
DAVID LEWIS, Complainant	:	PHRC CASE No. 200505979 EEOC No. 17FA661513
MARK ST. MARIE Complainant	:	PHRC CASE No. 200600939 EEOC No. 17FA662790
and,	:	
DAVID THUMMEL, Complainant	:	PHRC CASE No. 200600474 EEOC No. 17FA662997
v.	:	
CITY OF PHILADELPHIA, Respondent	:	


**RECOMMENDATION OF HEARING PANEL**

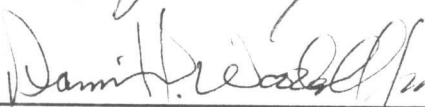
Upon consideration of the entire record in the above entire record in the above captioned matter, the Hearing Panel finds that the Complainants herein have proven discrimination in violation of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Panel's Recommendation that the attached Stipulations, Findings of Fact,

Conclusions of Law and Opinion be approved and adopted by the full Commission. If so approved and adopted, the Hearing Panel recommends the issuance of the attached Final Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

  
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**Commissioner Stephen A. Glassman**

  
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**Commissioner J. Wyatt Mondesire**

  
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**Commissioner Daniel L. Woodall, Jr.**

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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and,	:	
DAVID THUMMEL, Complainant	:	PHRC CASE No. 200600474 EEOC No. 17FA662997
v.	:	
CITY OF PHILADELPHIA, Respondent	:	

FINAL ORDER

AND NOW, this 26<sup>th</sup> day of JANUARY, 2009, following review of the entire record in this case, including the briefs, exhibits and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations, Findings of Fact,

Conclusions of Law and Opinion, and in accordance with the Recommendation of Hearing Panel, pursuant to Section 9 of the Pennsylvania Human Relations Act, therefore

## O R D E R S

1. Respondent shall cease and desist from discriminating against the Complainants and others because of their age with respect to employment as fire fighters.
2. Respondent shall cease and desist from utilizing any pre-employment selection that mandates automatic rejection of applicants over 40 years of age for the position of fire fighter because of the applicant's age or which otherwise imposes differing qualification criteria based upon the age of the applicant.
3. The Respondent shall place each Complainant back into the position in the hiring process they were in before the Complainants were removed because of their age which shall include the medical examination and background investigation and entrance into a fire training class within the next three months.
4. Regarding each Complainant who successfully completes the hiring process, the Respondent shall offer the successful Complainants instatement.
5. Upon a Complainant's successful completion of the hiring process, the Respondent shall give that Complainant a constructive date of appointment for all employment related purposes as if that Complainant had been appointed from the list of eligibles commensurate with the Complainant's ranking at the time of his removal from the hiring process.
6. Upon the instatement of a successful Complainant, the Respondent shall pay each successful Complainant an amount equal to that which that Complainant would have earned had he not been removed from the process.
7. Because it is likely that the reasons why individual Complainants might choose to decline an offer of instatement may vary considerably, the PHRC retains the option of

reopening the Public Hearing to fully assess the circumstances of individual cases to determine whether any remedy is appropriate.

8. Any payment owed to a successful Complainant who accepts instatement shall be reduced by amounts earned in the interim to the extent that such interim earning could not be earned had the Complainant been working as a fire fighter subsequent to February of 2006. Interest shall be computed at 6% per annum from the date of constructive appointment through the date payment is made.

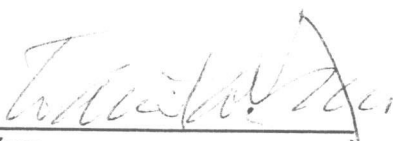
9. The Respondent shall provide all successful Complainants who accept instatement with all benefits that an individual would have otherwise had from the time that individual should have been hired and the Respondent shall make payments into the pension system thereby making that Complainant's pension status equal to the status they would have had but for the age based discrimination.

10. If a Complainant is rejected after being placed back into the hiring process, the Respondent shall provide the named Complainant and the Commission with a written explanation specifying the reason for the rejection.

11. The Respondent shall report the manner and means of its compliance with this Order, in writing, to Norman Matlock, Assistant Chief Counsel, Philadelphia Regional Office, within thirty days of the date of this Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

  
\_\_\_\_\_  
**Stephen A. Glassman**  
**Chairperson**

  
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**Daniel D. Yun**  
**Secretary**