COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONALD W. MARTIN, Complainant

v.

LOWER FREDERICK TOWNSHIP, Respondent

PHRC CASE NO. 200306413
EEOC CHARGE NO. 170200400216

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

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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. Donald Martin (hereinafter "Complainant") is an adult male, born February 15, 1947.
2. Lower Fredrick Township (hereinafter, "Respondent"), at all times relevant to the case at hand, employed four or more persons within the Commonwealth.
3. On or about October 17, 2003, Complainant dual filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") and Equal Employment Opportunity Commission (hereinafter "EEOC") against Respondent at Commission docket number 200306413 and EEOC Charge No. 170-2004-00216. A copy of the complaint will be included as a docket entry in this case at time of hearing.
4. On or about April 26, 2005, Respondent filed an Answer in response to the complaint. A copy of the response will be included as a docket entry in this case at time of hearing.
5. In correspondence dated November 2, 2005, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that the Commission believed that probable cause existed to credit the allegations found in the complaint.
6. Subsequent to the determination of probable cause, Commission staff and the parties attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but were unable to do so.
7. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

Charles L. Nier, III
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complainant)

Date

Donald Martin
(Complainant)

Date

Christoper Gerber, Esquire
(Counsel for the Respondent)

Date

FINDINGS OF FACT

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

N.T.	Notes of Testimony
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit
S.D.	Schmidt Deposition
S.F.	Stipulation of Fact

1. The Respondent, Lower Frederick Township, (hereinafter the "Township") is a second-class township that is governed by a three-member Board of Supervisors. (N.T. 368, 377)
2. Board of Supervisors members are elected to six-year terms and have the sole authority to hire and discharge. (N.T. 296, 301, 302-303, 364, 586; S.D. 26)
3. The Board of Supervisors designates one member to serve as Director of Public Safety. (N.T. 364)
4. The Director of Public Safety is the liaison between the Board of Supervisors and the police department. (N.T. 365, 500; S.D. 37)
5. In the early 1990's, the Township's population was approximately 2,900 and there was no police force. (N.T. 402, 494, 501)
6. The Township area is approximately 8.2 square miles and is mainly a "bedroom community". (N.T. 229, 501)
7. Perceiving the Township to be growing, in 1992, the then Board of Supervisors hired Edward J. Kroll, (hereinafter "Kroll) as the Township's first police officer. (N.T. 402, 494)
8. Kroll was born in 1942 and after over 25 years retired from the Pennsylvania State Police (hereinafter "PSP) in 1992. (N.T. 492-493)
9. The Township police station was placed at 53 Spring Mount Road, just up the road from where Kroll lives. (N.T. 501, 502)
10. Upon his hire, Kroll held a management position with the title of "Chief". (N.T. 402)
11. Kroll had the authority to make recommendations to the Board of Supervisors. (N.T. 303; S.D. 26)
12. Between 1992 and 1996, Kroll was the Township's only police officer. (494)
13. In late 1996 to early 1997, for a period of approximately six months, Kroll approached two PSP officers, the Complainant, Donald W. Martin, (hereinafter "Martin"), and Eugene Fried, (hereinafter "Fried"), encouraging them to retire from the PSP and come to work as part-time police officers for the Township. (N.T. 40, 242)
14. Kroll had approached the Board of Supervisors with the recommendation to hire two part-time officers to work nights and weekends. (N.T. 384, 495)
15. Financially, the Township had received a grant to hire two part-time officers. (N.T. 243)
16. Kroll told Martin and Fried that if they applied they were guaranteed the jobs. (N.T. 243, 277)

17. On or about April 1997, Martin was hired approximately one or two months before Fried because, when Kroll first approached Fried, Fried was not eligible to retire from the PSP. (N.T. 43, 242)
18. While the Board of Supervisors had the ultimate decision, Kroll was involved in the hiring process. (N.T. 277, 303, 496)
19. On March 28, 1997, Martin retired after 27 years with the PSP. (N.T. 37, 39)
20. Martin's date of birth is February 15, 1947. (N.T. 37)
21. Before becoming a Township police officer, Fried had been a PSP officer for 25 years. (N.T. 241)
22. Fried's date of birth is December 11, 1947.
23. Initially, Martin and Fried each worked four 10 hour shifts every two weeks. (N.T. 243)
24. After 2 to 3 years a change was made to five 8 hour shifts in a two week pay period. (N.T. 243)
25. While Martin and Fried were part-time, Kroll was full-time. (N.T. 222)
26. Kroll was Martin and Fried's direct supervisor. (N.T. 50)
27. Kroll ran the day-to-day operations of the three-person police department. (N.T. 222, 302, 587)
28. When no Township officer was on duty, the PSP responded to emergency calls and generally patrols the area. (N.T. 224-225)
29. Township non-emergency calls were received by an answering machine and at the beginning of a shift, a Township officer was required to check for calls received. (N.T. 225)
30. The Township has a formal written progressive disciplinary policy that lists possible discipline as verbal reprimands, two levels of written warnings, suspension and termination. (N.T. 305-306; S.D. 29; C.E. 21)
31. The duties of part-time Township police officers encompass the full range of normal police duties: patrols; investigation of accidents, complaints and crimes; emergency response; speed enforcement activities; compiles reports; and generally performs normal police officer functions. (N.T. 45-46, 53; C.E. 1)
32. When on duty, part-time officers were pretty much on their own and had discretion regarding what they had time to do. (N.T. 46, 55)
33. Prior to 2003, it was common practice either for Martin and Fried to tell Kroll they were simply switching scheduled shift assignments or for Kroll to just informally ask an officer if he could take the other officer's shift. (N.T. 62, 71-74, 234, 574)
34. Prior to 2003, all three officers flexibly worked together and tried to help each other. (N.T. 235, 424, 574)
35. Although Kroll may post a schedule a month or two in advance, the schedule frequently changed, sometimes as often as daily. (N.T. 169, 171, 244, 423)
36. Prior to 2003, it was never a problem for an officer to ask for time off. (N.T. 62, 246, 247, 260, 261)
37. When first hired, Martin and Fried were told they could take off as much as they wanted and make up the time later. (N.T. 154, 155, 260)
38. As late as at a meeting between Kroll, Martin and Fried on March 28, 2003, Kroll told Martin and Fried that things were slow in the Township and that if they wanted to take time off he would approve it. (N.T. 58, 231; C-4)

39. Kroll had the power and the authority to either approve or deny an officer's leave request. (N.T. 316; S.D. 28)
40. In a written memorandum dated July 24, 2002 from Kroll to the Board of Supervisors, Kroll advised the Board that money could be saved by hiring "a younger full time dedicated officer." (N.T. 402; C.E. 25)
41. In a written memorandum dated March 31, 2003, Kroll told the Board of Supervisors that Martin and Fried had expressed concern that the Township was attempting to get rid of them and that he had explained to Martin and Fried that he wanted to cut their hours from 24 hours a week to 16 hours a week and "hire a younger officer". (N.T. 403; C.E. 4)
42. In paragraph 4 of a written memorandum dated April 21, 2003, Kroll related to the Board of Supervisors that since August 2002, things in the Township have been continually slowing and that incidents in April 2003 were even slower than March 2003, and that the officers' hours should be cut to 16 hours a week in May 2003 while "a search for a young part-time officer to fill in and eventually take over more hours in the future", should occur. (N.T. 318; 403, 410-411; C.E. 22)
43. On many occasions, Kroll verbally mentioned to Martin and Fried that he wanted to hire a younger officer. (N.T. 111, 259)
44. During meetings with Martin and Fried, Kroll expressed to Martin and Fried that they are getting older and that the Township needed younger officer. (N.T. 59)
45. In a June 4, 2002 memorandum from Kroll to Martin and Fried, Kroll advised Martin and Fried that effective June 7, 2002, officers would no longer be permitted to switch shifts. (N.T. 109-110; R.E. 2).
46. In May 2003, after receiving approval from the Board of Supervisors, Kroll created a formal change in schedule form. (N.T. 65-66, 426; C.E. 9)
47. By memorandum date May 27, 2003, Kroll informed Martin and Fried that the formal change in schedule form had to be used and submitted at least one week prior to the requested change of schedule. (N.T. 426, 427; R.E. 6).
48. In his memorandum dated May 27, 2003, Kroll told Martin and Fried that he would either deny or approve any requests for schedule changes submitted on the newly created formal form. (R.E. 6)
49. By memorandum dated April 25, 2003, Kroll asked Martin and Fried to submit dates in May, June, July, August and September 2003, they anticipated they would not be available for work. (N.T. 66-67, 134; C.E. 6)
50. On May 8, 2003, as requested, Martin timely submitted his anticipated dates of unavailability. (N.T. 136)
51. In 2003, Martin requested leave for the following dates:

    (a) January 31 – February 6 (vacation to Mexico)
    (b) February 13 – 16 (to West Virginia for mother-in-law's birthday)
    (c) Friday, April 18 (extended Easter weekend)
    (d) Saturday, May 17 (Martin participated in a wedding)
    (e) Sunday, June 8 (assist daughter to move)
    (f) June 28 – 29 (extended vacation)

    (N.T. 66, 71-72, 74, 132, 133, 144, 163, 164, 428, 432; C.E. 9, 10, 11, 23; R.E. 3, 4)

52. Although Kroll was authorized to disapprove any or all of Martin's schedule change requests, Kroll exercised his discretion and approved each of Martin's requests. (N.T. 316, 346, 358, 416, 417, 419, 420-421, 422; S.D. 38)
53. Kroll testified that he had no issue regarding Martin's availability prior to 2003. (N.T. 425)
54. When on June 19, 2003, Martin submitted his request for a schedule change for June 28-29, 2003, Martin was brought to a meeting on June 26, 2003 with Kroll and the then Township Manager, Bob Kimmel. (N.T. 76, 83, 434)
55. During the June 26, 2003 meeting, Kimmel asked Martin what he thought about the Township hiring younger officers. (N.T. 77, 83)
56. At the same meeting, Kroll expressed a change from his position in March, 2003 about liberally taking time off. (N.T. 76, 83)
57. Martin told Kroll the change was not a problem for him. (N.T. 83)
58. Kroll approved Martin's request to be off June 28th and 29th. (N.T. 435)
59. On May 25, 2003, Martin reported off in order to travel to Wilkes-Barre to attend to a family medical emergency his brother was experiencing. (N.T. 69)
60. In paragraph 9 of a memorandum dated June 21, 2003 from Kroll to Township Managers, Kroll appears to ask the managers to convey to the Board of Supervisors a renewed request to be permitted to start the process of finding a replacement for Martin. (C.E. 24)
61. After being instructed by the Board of Supervisors to create patrol zones in the Township, on March 10, 2003, Kroll issued a Special Order ordering Martin and Fried to make specific patrol checks and list such patrol checks in their daily activity reports. (N.T. 54, 515; S.D. 13; C.E. 3)
62. Until the Board instructed Kroll to develop a patrol zone checklist, officer daily activity logs often simply reported the officer coming on duty and then going off duty at the end of a shift. (N.T. 553; C.E. 3)
63. Once ordered to list patrol checks by Kroll's special order of March 10, 2003, Martin listed the requisite patrol checks on his daily activity logs. (N.T. 84)
64. Martin and Fried distinguished between orders, directives, and memorandums. (N.T. 56, 62, 84, 279)
65. In paragraph 2 of a memorandum dated May 12, 2003 from Kroll to Martin and Fried, Kroll informed Martin and Fried that he noted a recently implemented GPS system showed the officers parked at various locations in excess of 10 minutes without a corresponding entry on their daily activity logs. (R.E. 5)
66. Paragraph 2 of the May 12, 2003 memorandum further states, "in evaluating this I believe you're (sic) not logging down the time you're (sic) spending on stationary patrol at speed checks or stop sign enforcement etc..." (R.E. 5)
67. Neither Martin nor Fried understood this portion of Kroll's May 12, 2003 memorandum to be an order to list all stops in excess of 10 minutes on their daily activity logs. (N.T. 56, 80-81, 84, 182, 286, 295)
68. Beyond the May 12, 2003 memorandum, Martin was never informed there was an issue regarding what he was required to log on his daily activity reports. (N.T. 83)
69. In a 2002 survey of the average miles driven by an officer on a shift, Kroll discovered that officers drove between 30-32 miles per shift. (N.T. 553; C.E. 25)

70. During a March 28, 2003 meeting with Martin and Fried, Kroll confirmed that the Township intended to implement a Global Positioning System ("GPS") in patrol vehicles to track and record the location of the vehicles during a shift. (N.T. 56, 278; C.E. 4)
71. Already aware that Kroll had verbalized wanting to hire a younger officer, upon learning of the intention to install a GPS system in patrol vehicles, Martin became even more concerned about the status of his employment and requested a meeting with the Board of Supervisors. (N.T. 118-119, 120, 210, 220)
72. Kroll conveyed to the Board of Supervisors Martin and Fried's request to speak with the Board and Martin and Fried's fear that the GPS would be used to fire them.
73. Kroll informed Martin that the Board of Supervisors did not want to talk with him regarding either the GPS or the issue of hiring a younger officer. (N.T. 62)
74. In April 2003, the Township implemented a GPS system. (N.T. 117-118, 370)
75. The GPS system was not connected to the county radio system that is attended at all times but, instead, the GPS was set up to send information directly to the Township's computer that was not manned when Martin and Fried were on duty. (N.T. 61, 238, 254, 445-446, 547)
76. The GPS system generated a report that lists the locations of Township patrol vehicles. (N.T. 368, 371)
77. The accuracy of reports regarding the GPS system was known to be potentially off by at least 300' and addresses reported could be and were known to be incorrect. (N.T. 259, 332, 352, 453, 523, 556, 590)
78. In paragraph 7 of a May 12, 2003 memorandum from Kroll to Martin and Fried, Kroll tells Martin and Fried that he will begin to review their daily activity logs with them whenever "there is an obvious conflict between GPS and your reported activity report." (N.T. 457; R.E. 5)
79. Kroll testified that he felt Martin was patrolling so he did not discuss Martin's reports with him. (N.T. 557)
80. No one ever spoke with Martin about a purported conflict between a GPS report and Martin's daily activity logs. (N.T. 151, 215, 237)
81. In paragraph 6 of a May 27, 2003 memorandum from Kroll to Martin and Fried, Kroll informed Martin and Fried that, in effect, the Board of Supervisors considered the GPS system to have been a success and that the Board recognized there had been a "tremendous" increase in patrol activity. (N.T. 465; R.E. 6)
82. Kroll agreed that after the introduction of patrol zones and the GPS system the Township was being patrolled. (N.T. 465, 466; R.E. 5)
83. By memorandum dated June 27, 2003, Kroll provided Township Managers and the Board of Supervisors with Martin's activity reports and GPS reports regarding Martin's vehicle for June 21 and 22, 2003, a county radio print out regarding a call about juveniles playing street hockey, Kroll's memorandum dated June 25, 2003 to Township Managers purporting to be an analysis of Martin's shift on June 21, 2003, and Kroll's memorandum dated June 27, 2003 to Township Managers purporting to be an analysis of Martin's shift on June 22, 2003. (C.E. 24)
84. Prior to preparing the June 25 and 27 analysis of Martin's June 21 and 22, 2003 activities, Kroll and Board of Supervisor member, Bill McGovern, ("McGovern"), met. (N.T. 373, 375, 489, 520)

85. McGovern testified that he and Kroll reviewed several of Martin's activity logs and GPS reports that Kroll showed him. (N.T. 373, 375)
86. Kroll testified that McGovern instructed him to do an analysis and document instances of inconsistencies between Martin's log entries and the GPS reports. (N.T. 489, 520-521)
87. On July 1, 2003, an executive session meeting was held at which Kroll, the Township solicitor, and the three Board of Supervisor members attended. (N.T. 366, 376, 487)
88. At the July 1, 2003 meeting, Kroll reviewed his analysis of Martin's June 21 and 22, 2003 activity reports and GPS printouts. (N.T. 395, 532; S.D. 58)
89. The Board of Supervisors accepted Kroll's recommendation to terminate Martin. (N.T. 356, 377, 597, 598)
90. On July 17, 2003, the Township manager informed Martin he was terminated and that he had thirty minutes to get out. (N.T. 82, 415)
91. Prior to Martin's termination neither Kroll nor the Board of Supervisors asked Martin for his version of issues that were discussed on July 1, 2003. (N.T. 388, 595, 604)
92. Martin had received no oral or written warnings and was never suspended by either Kroll or the Township. (N.T. 87, 310, 311, 315, 562; S.D. 58)
93. After Martin's termination, Fried was scheduled and worked a minimum of 32 hours a week. (N.T. 284, 294)
94. In or about October 2003, the Board of Supervisors engaged in its yearly budget discussions. (N.T. 361, 380)
95. The Board of Supervisors made the decision to increase taxes and to hire a full-time officer. (N.T. 381)
96. Kroll testified that he did not offer the new full-time position to Fried. (N.T. 490)
97. In early 2004, the Board of Supervisors hired Mark Messinger, (hereinafter "Messinger"), into full-time officer position. (N.T. 268, 361)
98. Messinger was approximately 28 years old at the time of his hire. (N.T. 268, 361)
99. Once Messinger was hired, Fried's hours went back to 24-25 hours per week. (N.T. 294)
100. In January 2005, the Board of Supervisors hired Harold Baird as the second full- time police officer. (N.T. 269, 382, 490)
101. At the time of his hire, Baird was 39 years old. (N.T. 383)
102. Fried testified that Kroll discouraged him from applying for the second full-time position. (N.T. 269-270)
103. After Baird's hire, Fried's hours were cut in half and he was scheduled to work exclusively weekends. (N.T. 272-273)
104. In March 2005, Fried resigned. (N.T. 273)
105. After his termination, Martin decided to try the real estate field. (N.T. 90)
106. In October 2003, Martin attended a two to three month real estate course. (N.T. 90-91)
107. In February 2004, Martin passed the test required for a real estate license. (N.T. 91)
108. Subsequently, Martin became an independent contractor agent with Coldwell Banker. (N.T. 91-92)
109. Prior to his termination, Martin worked approximately 24 hours per week at the rate of $19.00 per hour. (N.T. 317, 404, 590; C.E. 4; R.E. 6)
110. Had Martin remained with the Township he would have wanted to work full-time.(N.T. 101)
111.Martin made at least four trips to the PHRC Philadelphia regional office in connection with his case. (N.T. 101-102)

112.Martin testified that on each occasion he visited the PHRC he incurred a parking expense of $30.00.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant, the Respondent and the subject matter of the complaint under the Pennsylvania Human Relations Act ("PHRA").
2. The parties have fully complied with the procedural prerequisites to a Public Hearing in this matter.
3. Martin is an individual within the meaning of Section 5(a) of the PHRA.
4. The Township is an employer within the meaning of the PHRA.
5. The complaint filed in this case satisfies the filing requirements found in the PHRA.
6. The PHRA prohibits employers from discriminating against individuals because of their age.
7. Martin has established a prima facie case by establishing:
    a. That he is a member of a protected group;
    b. That he was qualified to be a police officer;
    c. That he was terminated; and
    d. That after his termination, the Township had a continuing need for someone to perform the work Martin had done.
8. The Township met its burden of production by offering that Martin was terminated because he was unavailable for work, did not patrol sufficiently, and failed to properly log his patrol activities.
9. Martin has established by a preponderance of the evidence that the Township unlawfully discriminated against him because of his age, fifty-six, by discharging him from his position as a police officer.
10. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the PHRC may issue a cease and desist order and it may order such affirmative action as in its judgment will effectuate the purposes of the PHRA.

OPINION

This case arises on a complaint filed by Donald W. Martin, (hereinafter "Martin"), against Lower Frederick Township, (hereinafter the "Township") on or about October 17, 2003, at PHRC Case No. 200306413. In his complaint, Martin alleged that the Township terminated him from his position as a police officer because of his age, fifty-six. Martin's claim alleges that the Township violated 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")

Pennsylvania Human Relations Commission, (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit Martin's allegation of unlawful discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. However, these efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on August 10 and 11, 2006 before Carl H. Summerson, Permanent Hearing Examiner. Post-Hearing briefs were received on December 11, 2006.

Section 5(a) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice...for any employer because of the...age...of any individual...to discharge from employment such individual... if the individual...is the best able and most competent to perform the services required...

When a Complainant alleges disparate treatment, liability depends on whether age actually motivated the termination decision. Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 141, (2000) citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Generally, Complainants have an opportunity to demonstrate intentional age discrimination in two ways: (1) by presenting direct evidence of discrimination under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); or (2) by presenting indirect evidence of discrimination that satisfies the oft-cited familiar three-step analytical framework of McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973).

The PHRC post-hearing brief on behalf of the complaint and the Respondent's post-hearing brief both address the question of whether sufficient direct evidence has been presented. The Respondent cites Dolly v. Borough of Yeadon, 428 F. Supp. 278, 286 (E.D. Pa. 2006) in support of its general argument that the Complainant failed to produce direct evidence that the decision-makers, the Board of Supervisors, placed "substantial negative reliance" on Martin's age in reaching their decision to terminate him.

The PHRC post-hearing brief on behalf of the complaint asserts that both oral and written comments made by Kroll not only reflect age-based animus but also amount to direct evidence because, although not the ultimate decision maker, Kroll had the authority to make a recommendation to the decision makers and the Board of Supervisors simply rubber stamped Kroll's bias infected recommendation.

While the PHRC post-hearing brief argument succinctly details the legal authorities that support a direct evidence analysis, the particular facts of this case seem a perfect candidate for the methodical approach taken in cases like Rachid v. Jack In The Box, Inc., 93 FEP Cases 1761 (5th Cir. 2004). In Rachid, the court wisely recognized that when direct evidence is presented, employers have the opportunity to present evidence that the same adverse employment action would have been taken regardless of the discrimination. In other words, the mixed-motive theory comes into play where an employer's burden is best viewed as an affirmative defense. A Complainant must persuade the fact-finder on one point, and if the Complainant does so, the employer, if it wants to prevail, must persuade the fact-finder on another. Citing Price Waterhouse, 490 U.S. at 246.

In Rachid, the court, in effect, merged the McDonnell Douglas and Price Waterhouse approaches, and termed this merger an "integrated approach" or "the modified McDonnell Douglas" approach.

Under such an "integrated approach", a Complainant must still demonstrate a *prima facie* case of discrimination; the Respondent then must articulate a legitimate, non-discriminatory reason for

its decision to terminate the Complainant; and, if the Respondent meets its burden of production; "the [Complainant] must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the [Respondent's] reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the [Respondent's] reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the [Complainant's] protected characteristic (mixed-motive[s] alternative).'" Rishel v. Nationwide Mut. Ins. Co., 297 F.Supp.2d 854, 865, 15 AD Cases 377 (M.D.N.C. 2003) (noting that courts need only modify the final stage of the McDonnel Douglas scheme to accommodate principles articulated in Desert Palace Inc. v. Costa, 539 U.S. 90, 91 FEP Cases 1569 (2003). This can be accomplished by framing the final stage in terms of whether a Complainant can meet his or her 'ultimate burden' to prove intentional discrimination, rather than in terms of whether a Complainant can prove 'pretext' (citing and quoting Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F.Supp.2d 1180, 1197-98 [92 FEP Cases 1424] (N.D. Iowa 2003). If a Complainant demonstrates that age was a motivating factor in the employment decision, it then falls to the Respondent to prove, "that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, [Complainant] prevails." Mooney v. Ardamco Serv. Co., 54 F.3d 1207, 1217, 68 FEP Cases 421 (5th Cir. 1995).

While the Respondent's post-hearing brief references McDonnell Douglas, the Respondent offers no argument regarding the requisite elements of a *prima facie* showing. On the other hand, the PHRC post-hearing brief submits there are four elements to a requisite *prima facie* showing. First, the Complainant must establish that he is over forty years of age. Said another way, that he is a member of a protected group. Second, the Complainant must show that he was qualified for the position. Third, the Complainant must establish that he was subject to an adverse employment decision. Finally, that the Complainant can either establish that he was replaced by a sufficiently younger person to create an inference of job discrimination or by showing that, after his discharge, the employer had a continuing need for someone to perform the work the Complainant had been doing.

In McDonnell Douglas, the U.S. Supreme Court observed that the elements of a *prima facie* showing will necessarily vary. 411 U.S. at 802. Indeed, the fourth element of the requisite *prima facie* showing in termination cases has been listed in various ways including:

1. The adverse action occurred under circumstances giving rise to an inference to age discrimination. Mosberger v. CPG Nutrients, 90 FEP Cases 123, 127 (WD Pa. 2002) citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).
2. After the Complainant's termination, the employer had a continued need for someone to perform the same work after the Complainant left. Pivirotto v. Innovative Systems, 80 FEP Cases 1269, 1275 (3rd Cir. 1999), citing Cumpiano v. Banco Somtander, 902 f-2d 148 (1st Cir. 1990), see also Kendrick v. Penske Transportation Services, 83 FEP Cases 959, 964 (10th Cir. 2000).
3. That the Complainant was replaced by someone outside his protected class.

We are mindful that a major purpose of requiring a *prima facie* showing is to eliminate the most obvious, lawful reasons for an adverse action. See Burdine at 253-254. In Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978), the U.S. Supreme Court explained that the *prima facie* showing, was never intended to be rigid, mechanized, or ritualistic. Of the three alternate

fourth elements listed above, courts have been clear that Complainants can make out the requisite fourth element without proving that the vacated job was filled by a person not possessing the Complainant's protected attribute. Cumpiano at 155. While in another case, such a showing might be available, in the present matter we will focus on the second listed alternative of the requisite fourth element since Martin was not immediately replaced and when he finally was replaced in February 2004, the Township hired a full-time officer.

Clearly, Martin is a member of a protected class. At the time of his termination he was fifty-six. Equally clear is the fact that Martin was fully qualified to be a police officer. Martin had been an officer with the Pennsylvania State Police for 27 years and an officer with the Township an additional five years. Fundamentally, Martin certainly suffered an adverse employment action when, on July 17, 2003, he was summarily informed he was fired. Finally, upon Martin leaving, Fried's hours jumped up to 32 hours per week for the next six months until the Township hired Mark Messenger full-time in February, 2004. (N.T. 284, 294; SD 24) Upon his hire, Messenger was approximately 28 years of age. (N.T. 268, 361) Certainly, after Martin left, the Township continued to have a need for someone to perform exactly the same service Martin had been performing.

Since Martin successfully meets his burden of establishing a *prima facie* case, a production burden shifts to the Township to articulate a legitimate non-discriminatory reason for Martin's termination. In the Township's post-hearing brief, three reasons are proffered for Martin's discharge: (1) unavailability to work; (2) inactive patrol activity; and (3) failure to properly log patrol activities. Generally, the Township's post-hearing brief suggests that Martin's entire case relies on Kroll's references to hiring a "younger officer", and that Martin had taken such comments out of context. Further, the Township contends that population growth had increased the need for better police presence and compelled the Board of Supervisors to assume an active role in the management of the Township's police department. The Township points to the Board of Supervisors' direction to create patrol zones and the implementation of a GPS system and argues that it was Martin's refusal to comply with changes being implemented that led to his termination.

These general reasons articulated by the Township satisfy its production burden causing a shift of the burden back to Martin. As noted earlier, it is at this stage of the analysis of the evidence that an integrated approach will be applied. Under this approach, the questions that remain begin with whether Martin can demonstrate that age was a motivating factor in the Township's decision to terminate him. If he can, then it will fall to the Township to establish that Martin would have been terminated regardless of discriminatory animus. Mooney at 1217. At this stage we will also fully evaluate Kroll's oral and written statements about a "younger officer" and what effect, if any, such statements had in the particular circumstances of this case.

The first reason the Township submits motivated Martin's termination was Martin's purported unavailability for work. On this general subject it is without question that Kroll ran the day-to-day operations of the department, (N.T. 302, 587) and that he was responsible for preparing Martin and Fried's schedules.

Prior to June 2002, it was an acceptable common practice for Martin and Fried to simply inform Kroll they were informally switching days they were scheduled. (N.T. 62, 71-74) Further, when either Martin or Fried would ask Kroll for time off, Kroll would just ask the other officer if he could work the shift of the officer who asked for time off. (N.T. 261, 574) Martin and Fried simply worked together and tried to help each other. (N.T. 235, 574) Even Kroll described the process before 2003 as "flexible". (N.T. 424) When Martin and Fried first began, every two weeks they each worked four 10 hour shifts. After 2-3 years, this was changed to each working five 8 hour shifts every two weeks. (N.T. 243) Furthermore, Fried testified that when he was first hired, he was told he could take as much time off as he wanted and he could just make up the time later. (N.T. 260) On this point, Fried testified that neither he nor Martin did that. (N.T. 260) Interestingly, both Kroll and McGovern, the supervisor who was the Board's liaison with the police department, testified that Martin had no availability issues prior to 2003. (N.T. 385, 425)

It is also interesting that there came a time when switching shifts and scheduling in general became more formalized. (N.T. 234) In fact, in a memo dated June 4, 2002, Kroll informed Martin and Fried that "there will no longer be switching of shifts between officers." (N.T. 109-110, 426; RE 2) In the same memo, Kroll informed Martin and Fried that he "would like to hire another part- time officer as soon as possible..." (RE 2)

The following month, in a memo to the Board of Supervisors, dated July 24, 2002, Kroll referenced a July 2, 2002 meeting he had with the Township's Board of Supervisors. In that memo, Kroll offered a cost analysis of Martin and Fried's part-time services and, in effect, recommended that the board, "...hire a younger full-time, dedicated officer..." (CE 25) This memo was the first of Kroll's written comments that tend to demonstrate an age-based discriminatory animus. The fact that it came so close to Kroll's decision to remove the longstanding flexibility in switching schedules enjoyed by Martin and Fried speaks to the genesis of a concerted campaign to replace an older employee with a younger one.

Both Martin and Fried testified that from time to time in meetings, Kroll would tell them they are getting older and the department needs younger officers (N.T. 59, 111, 259) Kroll's continual blatant ageist statements clearly demonstrate that Kroll was intent on facilitating the hiring of a younger officer.

A careful analysis of additional departmental changes implemented in 2003 ultimately leads to the inescapable conclusion that the real goal of the collective changes was the removal of an older officer so he could be replaced with a younger officer. Continuing with the issue of availability, we find that since August 2002, Kroll expressed the impression to both Martin and Fried and the Board of Supervisors that the frequency of incidents and calls in the Township was "slow". (N.T. 58, 231, 318; CE 4, 22) As late as April 21, 2003, Kroll advised the Board of Supervisors that the department had been slow since August 2002 and that April of 2003 was even slower than March 2003. (CE 22) Kroll's April 21, 2003 memo recommended that Martin and Fried's hours be cut back to 16 per week in May and "at the same time let us look for a younger part-time officer to fill in and eventually take over more hours in the future."

On the one hand Kroll would tell Martin and Fried things were slow and if they want time off to just put in a slip and he would approve it. (N.T. 58) On the other hand, Kroll was mounting a campaign to create the impression that Martin was frequently unavailable for his assigned shifts.

It appears that Kroll's June 4, 2002 memo dictating that there would be no further shift switching was being adhered to by Martin because both Kroll and McGovern confirmed there was no perceived problem with Martin until 2003. (N.T. 385, 425) The Township police department was a paramilitary organization, (N.T. 50-51), where Martin prided himself on always following the chain-of-command and orders given to him. (N.T. 51) While Martin may have had, and at times expressed, different views on some of Kroll's changes, ultimately, Martin always complied with policies and procedures and just followed orders. (N.T. 207) The record reveals that prior to 2003, Martin had not only received yearly raises, he had also been consistently given positive feedback and told his performance was great. (N.T. 52, 53, 320; C.E. 2) For instance, both Martin and Fried offered uncontradicted testimony that they made themselves available to be called in on days off and that whenever called, they responded. (N.T. 42, 43, 224, 245) Despite Martin and Fried's obvious commitment, Kroll continued his efforts to formalize leave requests and schedule changes. In March 2003, Kroll developed a formal request for leave form and in May 2003, yet another formal change to the request for a schedule change was implemented. (N.T. 65-66, 133, 426; C.E. 9; R.E. 6)

While Martin did request a schedule change numerous times in 2003, on all but one occasion, Martin's requests were within the parameters of the newly created formal request for schedule change process. The formal request for a schedule change form indicates that the schedule change form was to be submitted "at least seven days prior to any requested change of schedule." (C.E. 9) On June 2, 2003, Martin sought a schedule change for June 8, 2003. (C.E. 9) This request was a day late. Martin's other requests under the new policy were timely.

Clearly, Kroll had the discretionary authority to either approve or deny all leave requests. (N.T. 316; S.D. 28, 38) Every time Martin requested leave or a schedule change in 2003, Kroll approved it. On this point, in a memo dated May 27, 2003 from Kroll to Martin and Fried, Kroll advised Martin and Fried that he "will deny or approve" requests. (R.E. 6) For example, when Martin reported off on May 25, 2003 to attend to a personal problem his brother was experiencing, Kroll approved the time off. On this occasion, it is noteworthy that Kroll also sent a memorandum to the Township manager and assistant manager about Martin taking off on May 25, 2003 for a family emergency. (C.E. 8) This memo was also cc'd to the Board of Supervisors.

Earlier, Kroll had at least twice faxed information to the Township's assistant manager about instances of Martin requesting time off. (R.E. 3, 4) One fax was dated April 15, 2003 and another dated May 8, 2003. What Kroll does not say in those faxes is that although he could have denied Martin's requests, he did not. One has to ask, why did Kroll find it necessary to convey Martin's instances of taking approved time off to those above him? Clearly, Kroll ran the day to day operations of the department yet we find him sending faxes and a memo about an officer who requested and was granted time off. A reasonable inference from the circumstance is that Kroll was keeping the managers and the Board appraised of his efforts to accumulate enough things on Martin to get rid of him and hire a younger officer to replace him.

The Respondent's post-hearing brief argues that Kroll only granted requests for time off out of a concern that if he denied such requests a part-time officer could claim entitlement to full-time status which would entail an officer having certain benefits they would otherwise not have. The Respondent purports to cite the case of Petras v. Township of Union, 409. Pa. 416, 187 A.2d 171 (1963) as the basis for Kroll's purported fear. However, in a one sentence opinion, that citation simply reports the Pennsylvania Supreme Courts affirming the Court of Common Pleas holding in Petras v. Union Township, 28 Pa. D & C 2d 687 (1962). In that case, a former police officer had contended that he was a full-time officer and had challenged the action of a Board of Supervisors suspension of him. If a full-time officer, Petras would have been entitled to written charges being presented to him and a hearing. In deciding when a police officer should be classified as full-time, the Petras court declared that an officer enjoys the status of full-time unless the officer is employed only on account of special circumstances, unusual conditions or emergencies and it is so stipulated at the time of his employment" Id at 694. In Petras, the officer performed normal police duties, was available for duty at all times, and at times worked at unscheduled times. The test for full-time is not the number of days, length of hours, or term of employment but that the duties are such that an office was on call at any and all times.

Reading the precedent set by Petras, Kroll's testimony is not credible when he offered that he did not deny Martin's leave requests or schedule change requests because he feared doing so might result in Martin being classified as a full-time officer. Kroll testified that he did not even seek a legal opinion regarding what constitutes full-time status (N.T. 437). Even under a misreading of Petras, Kroll was clearly free to deny a leave request without fear of Martin's status becoming a full-time officer.

As to a denial of a schedule change, this too would not have resulted in a status change under the authority of Petras. Both Martin and Fried were periodically called in on their days off and more importantly, neither had been hired on account of a special circumstance, unusual condition or emergency. Each clearly performed normal police duties on a regular basis. Under Petras, it appears that Martin and Fried's situation already entitled them to full-time status within the meaning of the Police Tenure Act.

With respect to the reasons for Martin's "unavailability", we find that, Kroll had conveyed to Martin that he could take as much time off as he wanted because it was slow, Kroll never denied any of Martin's requests, Kroll was tightening the process attempting to systematically ensnare Martin in a pattern of apparent unavailability, and Kroll kept managers and Board members advised of instances of leave usage with the goal of terminating Martin and replacing him with a younger officer.

We next turn to the Township's position suggesting that inactive patrol activity and failure to properly log activities contributed to Martin's termination. Prior to 2003, when on duty, both Martin and Fried were pretty much on their own. (N.T. 46) For years, they each had discretion when it came to whether to run a speed trap, patrol the Township, or do other things. (N.T. 46, 55) Furthermore, before March 2003, it was not unusual for daily activity logs to simply reflect an officer came on and, at the end of shift, went off. (N.T. 553; C3)

In a July 24, 2002 memo to the Board of Supervisors, Kroll indicated that he would be instituting a mileage log for each shift. (C.E. 25) Kroll testified that a survey of mileage traveled per shift led to his understanding that on average a police vehicle traveled only 30 to 32 miles per shift. (N.T. 553)

By a memo dated March 10, 2003, Kroll issued a "special order" requiring, when time permitted, conducting checks of newly created patrol zones. (N.T. 442-443; C.E. 3) In this memo, Kroll mandated the listing of patrol zone checks on daily activity logs and indicated that he no longer wanted to see daily activity logs that simply stated an officer came on duty then went off duty without any reference to what an officer did and where the officer patrolled. (C.E. 3) Indeed, Kroll's special order suggested that on a shift where there were no incidents he expected a minimum of 16 patrol zone checks listed on a daily activity log. (C.E. 3)

The Township submits that one reason for development of a patrol zone check list was that Martin had been observed in the Fieglerville Deli too often. There is no dispute that on each shift Martin was allotted 30 minutes for lunch and two fifteen minute breaks. (N.T. 50, 149, 450) It is also clear that the deli was about the only place in the Township where Martin could eat when on duty. (N.T. 129)

It is noteworthy that, on occasion, when on duty, Martin would drive home to eat. (N.T. 206) Martin lived within a mile of the Township. (N.T. 206) However, in March 2003, Kroll told Martin to stop going home to eat. (N.T. 206, 452; C.E. 4) Martin complied with Kroll's direction and was thus left with the option of eating at the deli. Of course, this would increase the opportunity for Martin to be seen at the deli.

The motivation to stop Martin from going home to eat during his shift comes under scrutiny because Martin was allowed to take a Township police vehicle home after his shift was over. (N.T. 125) By having a vehicle at his home, Martin could then respond quicker to instances of being called in for duty on his days off. Clearly, Martin was allowed to remove a police car from the Township for extended periods but was eventually told he could not drive home for lunch. It is as if Kroll wanted to create the appearance that Martin spent too much time at the deli.

Those Board members, who testified that they felt Martin spent too much time at the deli, also confirmed that when Martin was observed at the deli, he was never directly approached and asked why he was there. (N.T. 337, 359) Furthermore, Board members offered conflicting testimony about Martin's frequency at the deli. For example, McGovern generally testified that for six years there had been no problem. (N.T. 340) McGovern offered that he only perceived a problem for the six month period prior to Martin's termination. (N.T. 340) At first, McGovern testified that one day he saw Martin at the deli for periods of 45 minutes, 2-3 times that day. (N.T. 312) McGovern then confirmed that he did not actually see Martin the whole time. McGovern acknowledged that he left and came back later and that Martin might not have been at the deli the whole time.

Board member Schmidt offered that several times she observed the police car parked at the deli. (S.D. 18, 44) and admitted that Martin could have been there having lunch or dinner. (S.D. 45) Schmidt also confirmed that she was unaware that Martin frequently set up a speed trap in the

area near the deli. (S.D. 46) Importantly, Schmidt also offered that after the patrol zones were created in March 2003, there was not as much concern that officers were at the deli. (S.D. 47) Visibility of the officers had increased once the patrol zones were in place. (S.D. 35, 47)

Even Kroll, who lived nearby, confirmed that he had not personally observed Martin at the deli. (N.T. 570) When pressed to say who had complained that officers were at the deli, Kroll acknowledged that, other than McGovern, the only person he had heard this from was his daughter who had related to it as a "joke". (N.T. 536) Otherwise, Kroll had not received complaints from any citizens. (N.T. 546)

Perhaps the most telling aspect of the Township's purported reliance on Martin spending too much time at the deli is the simple fact that, other than Kroll periodically reminding Martin and Fried to patrol rather than hang around the deli too much, Martin was never even given a written warning under the Township's formal discipline policy. (C.E. 21) Initially, McGovern testified that for six months, the Board continually tried to work with Martin to get him to stop hanging around the deli. (N.T. 311, 312) McGovern then confirmed that he never spoke with Martin about performance issues. (N.T. 359) A short while later, McGovern again suggested that for the six months before Martin's termination he had reviewed performance matters with Martin and that Martin was told he had to change and his performance had to be better. (N.T. 388-389) Instances like this reflect McGovern's inconsistent testimony and reveals why McGovern's testimony is considered less than credible. The fact is that no Board member ever spoke with Martin about any perceived problem. Furthermore, Martin never received even the first step of the Township's established formal progressive discipline. (N.T. 87, 310, 311, 315)

In addition to developing a specific list of patrol zone check points and mandating that Martin and Fried list patrol checks on their daily activity logs, the Township also submits that a GPS system was implemented as a proactive patrolling measure. (N.T. 367) However, McGovern specifically testified that the GPS system was a management tool to find evidence for discipline. (N.T. 33)

On March 28, 2003, Kroll first told Martin and Fried about the impending implementation of the GPS. (N.T. 278, 446; C.E. 4) When they were told, both Martin and Fried responded that they believed the GPS would be used to get rid of them so a younger officer could be hired. (N.T. 447; C.E. 4) Martin and Fried asked for a meeting with the Board of Supervisors to ask about the status of their employment, however, Kroll informed them that the Board did not want to talk with them about the GPS and their concern about a younger officer being hired. (N.T. 62, 210, 220, 451, 544, 545) Indeed, Kroll testified that he conveyed to the Board both their request and their concerns, but the Board did not meet with them. (N.T. 544, 545)

Clearly, the GPS was implemented solely to monitor Martin and Fried's activities. Rather than connect the GPS to the continually monitored location at county radio, the GPS was connected directly to the Township computer that was not monitored when Martin and Fried were on duty. (N.T. 61, 238, 254, 445-446, 547) When an officer requires immediate assistance, a GPS can generally pinpoint where that officer is located. This critical safety feature appeared to be of no concern when compared to efforts to systematically search for reasons to discipline Martin.

Curiously, despite the Township's contention that inactive patrol activity contributed to Martin's termination, the record reveals that the Board had actually considered the GPS a success. (N.T. 465; R.E. 6) By a memo dated May 27, 2003 from Kroll to Martin and Fried, Kroll informed Martin and Fried that the Board had considered there to have been a "tremendous" increase in patrol activity and the GPS was considered a success (CE 8).

Earlier, in a memo dated May 12, 2003, Kroll informed Martin and Fried that he would be comparing daily activity logs with GPS reports and, should there be any discrepancies, he would review obvious conflicts with them. (N.T. 457; R.E. 5) However, Kroll never once spoke with Martin about any purported conflicts. (N.T. 151, 215, 237, 560) Instead, Kroll showed McGovern what appeared to be discrepancies between Martin's daily activity log and GPS reports. (N.T. 373)

After McGovern was shown these purported conflicts, McGovern asked Kroll to do an analysis and to document discrepancies. (N.T. 375, 489, 520) McGovern's testimony about this situation contributes to a finding of pretext. McGovern testified that when he was shown the purported conflicts, he instructed Kroll to get with Martin and see if the situation could be corrected. McGovern then said when the reports were received it seemed that the situation was not able to be corrected. Clearly, neither McGovern nor Kroll had any interest in rectifying any purported failure to properly log Martin's activities. Instead, no one ever spoke with Martin to get his version of what appeared to be log entry discrepancies.

Obviously, the reports Kroll initially shared with McGovern were the June 21 and 22, 2003 reports. By June 27, 2003, Kroll had prepared a memo to the Board of Supervisors and Township Managers about "...Martin's disobedience to orders and violations of official duties..." Absolutely no effort had been made to get with Martin and attempt to correct the perceived situation. The only effort made was to systematically gather evidence of purported conflicts between Martin's June 21 and 22, 2003 daily activity logs and the corresponding GPS reports. Clearly, no one ever intended to find out any details which might indicate whether a problem existed and, if so, whether it could be corrected. Instead, the Board of Supervisors simply met on July 1, 2003, only days after the revelation of purported discrepancies, and decided to terminate Martin.

Testimony regarding Kroll's involvement in the actual July 1, 2003 decision to terminate Martin reveals yet another glaring series of inconsistencies. McGovern testified that the Board and Kroll together concluded that Martin needed to be terminated. (N.T. 356) Conversely, Kroll submitted that he did not recommend Martin's termination. (N.T. 487)

At first, Board member Ladley's testimony at the Public Hearing agreed with Kroll on this point. (N.T. 595) However, when Ladley was reminded that at a prior deposition he had indicated Kroll had recommended Martin's termination, Ladley confirmed that Kroll had indeed recommended Martin's termination. (N.T. 597, 598) The remaining Board member, Schmidt at first indicated that Kroll never made a recommendation regarding hiring or firing anyone. (S.D. 26) Later, when asked whether Kroll recommended Martin's termination, Schmidt indicated she could not recall. (S.D. 57)

Quite clearly Kroll had the authority to make recommendations to the Board, (S.D. 26) and did, in fact, sit with the Board and give his advice and make recommendations. (N.T. 303) Without question, Kroll's desire to hire a younger officer had a determative influence on the July 1, 2003 Board decision to terminate Martin. As early as a memo from Kroll to the Board dated July 24, 2002, Kroll advised the Board that money could be saved by hiring a "younger full-time dedicated officer." (C.E. 25) Again, in a memo dated March 31, 2003, Kroll suggested to the Board that Martin and Fried's hours be cut and a "younger officer" be hired. (C.E. 4) Yet again, in a memo to the Board dated April 21, 2003, Kroll recommended cutting Martin and Fried's hours and looking for a "young part-time officer to fill in and eventually take over more hours in the future." (C.E. 22) On June 21, 2003, only 9 days before Martin's termination, in a memo to the Township Managers, Kroll requested that the Board permit him to begin "the process of finding a replacement for Officer Martin." (C.E. 23)

Unquestionably, the Board was conversant with Kroll's stated preference to hire a younger officer when the Board received Kroll's June 27, 2003 memo purporting to outline Martin's "Disobedience to Orders and Violating of Official Duties." (C.E. 24) Kroll's unambiguous declarations of his ageist views permeated the information Kroll brought to the Board. Nearly everything Kroll was doing was done in an effort to provide leverage for and to justify Martin's replacement with a younger officer. The decisional process began with the Board's receipt of information from Kroll who had clearly and repeatedly made it known to the Board that he wanted to hire a younger officer. Certainly, Kroll was meaningfully involved in the Board's decision to terminate Martin. Kroll's tainted information influenced the Board's deliberations by portraying Martin's performance in the worst possible light. Ultimately, the Board depended on and deferred to the one-sided information provided by Kroll. Indeed, Kroll was the primary source of information regarding Martin's actions and the information he provided was decisive. Under such circumstances, it is proper to impute Kroll's discriminating attitude to the Board of Supervisors. See Russell v. McKinney Hospital Venture, 84 FEP Cases 941, 946 (5th Cir. 2000).

While the Board could have, and should have provided Martin with an opportunity to tell his version of what Kroll presented, the Board did not. Looking back, in March of 2003, when Kroll informed the Board that Martin wanted to speak with the Board about his fear that the GPS would be used to get rid of him so a younger officer could be hired, the Board would not even speak with Martin. It appears that the Board supported Kroll's efforts to document Martin's purported shortcomings and when they accepted the content of Kroll's June 27, 2003 memo, they provided Kroll the opportunity to purge an older officer from the department and hire a younger officer by unquestionably accepting Kroll's subjective jaded version.

Had the Board initiated their own untainted independent investigation, or at a minimum, called Martin in to afford him an opportunity to give his version of what Kroll was presenting, perhaps the casual link between Kroll's animus and Martin's termination would have been broken. However, under the circumstances here, the casual link between Kroll's illicit desire to hire a younger officer and Martin's termination remains intact and can be imputed to the Board. An employer cannot escape responsibility for discrimination when the facts on which reviewers rely have been filtered by a manager determined to purge the labor force of an older worker. See Kientzy v. McDonnell Douglas Corp, 990 F-2d 1051, 1057, 61 FEP Cases 735 (8th Cir. 1993).

In this case, the Board of Supervisors had every reason to and should have considered that Kroll's blatant ageist expressions might explain his criticism of Martin and might undermine the objectivity of Kroll's report and recommendation.

Furthermore, the Board of Supervisors cannot be shielded from liability by any alleged misconduct when neither an independent evaluation nor an investigation was done and Martin was not so much as given a written warning for alleged wrongdoing.

Under the full circumstances presented in this case, we find the Township liable for an age-based termination of Martin. Accordingly, we turn to the question of an appropriate remedy.

The PHRC has broad equitable power to fashion relief. Section 9 of the Pennsylvania Human Relations Act (hereinafter, "PHRC") states in pertinent part:

> (f)(1) 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 to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, reimbursement of certifiable travel expenses in matters involving the complain, compensation for loss of work in matters involving the complaint, hiring, reinstatement or upgrading of employees; with or without back pay,…and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice,…as, in the judgment of the Commission, will effectuate the purposes of this act,…
> 43 P.S. § 959(f)(1).

In Murphy v. Cmwlth., PA Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985) the Pennsylvania Supreme Court commented on the extent of the Commission's power by stating: "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court." Murphy, at 486 A.2d 393. The expertise of the Commission in fashioning a remedy is not to be lightly regarded. The only limitation upon the Commission's authority is that its award may not seek to achieve ends other than the stated purposes of the Act. Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 136 Pa. Commonwealth Ct. 147. 152. A.2d 702 708 (1990).

The purpose of the remedy awarded under the PHRA is twofold. First, the remedy must insure that the Commonwealth's interest in eradicating the unlawful discriminatory practice found to exist is vindicated. Vindication of this interest is non-discretionary. It necessitates entry of an order, injunctive in nature, which requires the Respondent to cease and desist from engaging in unlawful discriminatory practices.

The second purpose of any remedy focuses on entitlement to individual relief. Its purpose is not only to restore the injured party to his pre-injury status and make him whole, but also to discourage future discrimination. Williamsburg Community School District v. Pennsylvania Human Relations Commission, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (1986). As a

deterrent, a back pay award provides the catalyst to cause a self examination and evaluation of an employer's employment practices.

With respect to entitlement to individual relief, several other matters must be addressed. First is the fact that where a complainant demonstrates that economic loss has occurred, back pay should be awarded absent special circumstances. See: Walker v. Ford Motor Co., Inc., 684 F.2d 1355 (11th Cir. 1982). In fact, once liability is established, the burden of proof shifts to the employer to demonstrate that monetary relief is not proper. U.S. v. International Brotherhood of Teamsters, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed.2d 396 (1977); Franks v. Bowman Transportation Co., 424 U.S. 474, 96 S. Ct. 1251, 47 L. Ed.2d 444 (1976). It is axiomatic that the calculation of the back pay award need not be exact. It is only necessary that the method used be reasonable. Uncertainties, in general, should be resolved against a discriminating employer. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). The question of mitigation of damages is a matter that lies within the sound discretion of the Commission. Consolidated Rail Corporation, cited *Ingra*, 582 A2d at 708. Moreover, the burden is on the employer to demonstrate any alleged failure to mitigate. Cardin v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3rd Cir. 1988). See generally, State Public School Building Authority v. M.M. Anderson Co., 410 A 2d 1329 (Pa. Cmwlth. 1980) (Party who has caused the loss has the burden of showing that the losses could have been avoided through the reasonable efforts of the damaged party).

In this case, the Township generally argues that Martin should not be awarded back pay because he enrolled in a school after his termination. In effect, the Township submits that Martin abandoned the job market when he began training for a real estate license, and made no effort to find comparable police work. The Township asserts that together these factors amount to a failure to mitigate damages.

The Township cites the case of Keller v. Connaught, Inc, 73 F.E.P. Cases 280 (E.D. Pa. 1997), in which the court outlined two theories that can be used to limit back pay awards in education-after-termination cases: the double benefit analysis, and the read, willing and able analyses. Under the double benefit analysis, courts have precluded a "double benefit" for a Complainant who refuses substantially equivalent employment in favor of educational alternatives. The key word here is "refuses".

Here, the Township submits that Martin simply did not look for a comparable police job, but instead simply chose to attend an educational program in an entirely different field. This position is only half the equation. To prevail on this argument, the Township must also show that there were substantially equivalent police officer positions available to Martin after his termination. See e.g. Sangster v. United Airlines, 2n FEP Cases 845 (9th Cir. 1980), cert. denied, 451 U.S. 971 (1981). Here, the Township made no such showing. The idea that Martin chose to change from police work to real estate work may have been attributable to the possibility that no comparable police jobs were available. Furthermore, Martin was 57 years old at the time of his termination and perhaps was of the impression that it would have been fruitless to attempt to find a comparable police position. See Scofield v. Bolts and Bolts Retail Stores, 21 FEP Cases 1478 (S.D.N.Y 1979).

The second theory outlined by Keller is the "ready, willing and able analysis". We must remember that the educational program Martin took was only two months. Usually, cases deal with individuals who elect to attend schools on a full-time basis where, effectively, they are removed from the employment market. Once again, the Township has failed to show that during the two months Martin attended an educational program, there were comparable employment opportunities. Without such a showing, the Township cannot overcome the principle that in certain circumstances attending an educational program is the only available path to mitigation. Often, attending an education program is done to acquire marketable skills that enables one to find work rather than abandonment of the job market.

Under the circumstances of this case, we find that it was not unreasonable for Martin to have attended an educational program and by doing so, he cannot be said to have failed to mitigate his damages. Accordingly, we turn to calculations of a proper back pay award.

Both the Township and the PHRC post-hearing briefs offer back pay calculations. We find the Township's proposed calculations acceptable. These include:

Lost wages

July 18, 2003 - July 12, 2004	-- $25,020.83
July 18, 2004 – July 17, 2005	-- $25,020.83
July 18, 2005 – July 17, 2006	-- $25,020.83
July 18, 2006 – December 8, 2006	-- $9,871.23
Total	$84,933.72

Interim earnings

2004 --	$0
2005 --	$20,693.48
2006 --	$9,174.43
Total	$29,867.91

Lost wages of $84,933.72 minus interim wages of $29,867.91 equals a $55,065.81 back pay award. Additionally, the PHRC is authorized to award interest on back pay awards. Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975).

Next the PHRC regional office post-hearing brief correctly observes that a cease and desist order is appropriate. Additionally, the PHRC post-hearing brief seeks an offer of reinstatement into the next available police officer position. Martin also provided testimony regarding out of pocket expenses he incurred as a result of this case. On this account Martin should be awarded $248.00.

Finally, the PHRC regional office post-hearing brief seeks an order requiring training of Township Board of Supervisors and Kroll designed to educate them about the protection afforded by the PHRA.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONALD W. MARTIN, Complainant

v.

LOWER FREDERICK TOWNSHIP, Respondent

PHRC CASE NO. 200306413
EEOC CHARGE NO. 170200400216

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

UPON CONSIDERATION OF THE ENTIRE RECORD IN THE ABOVE-CAPTIONED MATTER, THE Permanent Hearing Examiner finds that Martin 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.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

May 8, 2007
Date

By: _____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONALD W. MARTIN, Complainant

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LOWER FREDERICK TOWNSHIP, Respondent

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FINAL ORDER

AND NOW, this 26th day of June, 2007, after 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, Opinion and Recommendation of Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion and Recommendation of Permanent Hearing Examiner as its own finding in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion and Recommendation of Permanent Hearing Examiner into the permanent record of this proceeding, to be served on the parties to the compliant and hereby

ORDERS

1. The Township shall cease and desist from age-based discrimination with regard to termination decisions.
2. That the Township shall pay to Martin within 30 days of the effective date of this Order the lump sum of $55,065.81, which amount represents back pay lost for the period between July 18, 2003 and December 8, 2006.
3. That the Township shall pay additional interest of 6% per annum on the back pay award, calculated from July 18, 2003 until payment is made.
4. That the Township shall offer Martin reinstatement into the next available police officer position.
5. That the Township shall reimburse Martin $248.00, which represents the certifiable travel expenses incurred by Martin in matters involving his complaint.

6. That the Township shall facilitate training of Kroll and Board of Supervisors that is designed to educate them about their responsibility to fully comply with the protections afforded by the PHRA.
7. That the Township shall report the means by which it will comply with this Order, in writing, to Charles L. Nier, III, PHRC Assistant Chief Counsel, within thirty days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By _____
Stephen A. Glassman
Chairperson

ATTEST:

_____
Dr. Daniel D. Yun
Secretary