


COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

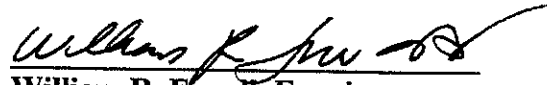
KATHLEEN B. REESE, :
Complainant :
 :
vs. : PHRC Case No. 200405894
 :
CITY OF BETHLEHEM, :
Respondent : EEOC NO. 17FA561401
 :

PROCEDURAL STIPULATIONS

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

1. The Complainant herein is KATHLEEN B. REESE, an adult individual residing within the Commonwealth of Pennsylvania, at all times relevant to this action.
2. The Respondent herein is the CITY OF BETHLEHEM, a municipality located within the Commonwealth of Pennsylvania.
3. The CITY OF BETHLEHEM has employed four or more persons within the Commonwealth of Pennsylvania at all times pertinent to this action.
4. ~~The complaint in this matter was duly filed on or about March 3, 2004 and docketed on March 4, 2004.~~ WJ SGA
5. Probable Cause in this matter was found by Commission staff on or about March 10, 2006.
6. A conciliation conference in this matter was conducted on April 10, 2006.
7. ~~All procedural and statutory requisites were met for the placing of this case on the public hearing docket.~~ WJ SGA


Stephen Hoffman, Esquire
Counsel for Respondent
City of Bethlehem


William R. Fewell, Esquire
Assistant Chief Counsel
PA Human Relations Commission

FINDINGS OF FACT

1. Kathleen B. Reese (hereinafter "Reese") is an adult female individual who resided in the Commonwealth of Pennsylvania at all times relevant to this action. (S.F. 1).
2. The City of Bethlehem (hereinafter "Respondent") is a municipality located within the Commonwealth of Pennsylvania. (S.F. 2).
3. The Respondent is a third class city with a population of approximately 73,000 people. (N.T. 335-336).
4. As a third class city, the mayor has the authority to appoint directors and those appointments must be confirmed by City Council. (N.T. 336).
5. Reese commenced her employment with the Respondent on November 9, 1998 as Director of Water and Sewer Resources (hereinafter "Director of WSR"). N.T. 54).
6. Reese has a Bachelor's of Science Degree from Wisconsin University and Masters Degree in Business Administration from NOVA University in Florida. (N.T. 37).
7. Prior to her appointment with the Respondent, the Reese worked for Hillsborough County, Florida and Broward County, Florida. (N.T. 32).
8. Reese had an A level Florida certification to operate water treatment plants and a B level Florida Certification to operate waste water treatment plants. (N.T. 38).

* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
S.F. Stipulations of Fact
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

9. In November of 1998, Reese was appointed to the position of Director of WSR, a cabinet level position, by then mayor, Donald Cunningham. (N.T. 111).
10. The Director of WSR serves at the pleasure of the mayor of the City of Bethlehem. (N.T. 111).
11. The position of Director of WSR did not exist prior to the Complainant's appointment. (N.T. 361).
12. As Director of WSR, the Reese's duties included managing and administering the Water, Sewer and Resources department and supervising the three bureau chiefs within the department. (N.T. 52).
13. The duties of the Director of WSR also included the supervision of the position of Utility Maintenance Superintendent (hereinafter "UMS"). (N.T. 53).
14. John Callahan (hereinafter "Mayor Callahan"), was elected Mayor of the City of Bethlehem in November of 2003. (N.T. 333-334).
15. Prior to his election, Mayor Callahan served as a Councilman and as Chairman of the Committee on Public Works. (N.T. 333-334).
16. In his capacity as Chairman of the Public Works Committee, Mayor Callahan had the opportunity to work directly with Reese and observe her work habits. (N.T. 340).
17. Mayor Callahan also had the opportunity to confer with other council members in regards to the Reese's abilities. (N.T. 341).
18. In his capacity as Chairman of the Public Works Committee, Mayor Callahan was aware of the complaints and objections of council members regarding the performance of the Complainant as Director of WSR (N.T. 340, 342).
19. Mayor Callahan felt that the Complainant was "her own worst enemy" in her inability to effectively communicate with council members. (N.T. 343).

20. In or around March of 2004, while Reese was acting as Director of WSR, the position of UMS became open due to the retirement of Ronald Dancho (hereinafter "Dancho"). (N.T. B. 5).
21. Even though Reese could have appointed herself as UMS, she appointed Jeffrey Fritz (hereinafter "Fritz"), as acting UMS. (N.T. 70).
22. Reese appointed Fritz to the position based upon his qualifications and the fact that he was the most senior qualified person in the Bureau. (N.T. 70, 117).
23. Five years earlier, in 1999, Reese had appointed Fritz to the position of Supervisor of Sewers based upon his "knowledge... and proactive view of the future". (N.T. 127-28).
24. Reese testified that Fritz had "shown himself to be a creative and motivative thinker, able to work with the staff in moving into new areas of endeavor... and has shown a willingness to learn from new challenges." (N.T. 127-28).
25. Reese also indicated that Fritz did a good job in the position and was a very good employee, with an exceptional work ethic, who had the potential to succeed as a supervisor. (N.T. 73, 118).
26. Reese stated that she would not have appointed an individual who was not qualified for the position to serve as acting UMS. (N.T. 123).
27. Fritz was employed by the Respondent for thirty five years prior to his appointment as acting UMS. (N.T. 319-20).
28. For five years Fritz had been Supervisor of Sewers, had extensive knowledge of the sewer systems, and had an outstanding relationship with the employees. (N.T. 231).
29. Since Fritz was an acting UMS, the Respondent began the process of seeking to hire a permanent UMS. (N.T. 275).

30. Generally, for non-union positions, such as the UMS position, openings are posted internally for 5 days and ads may also be placed in the newspaper. (N.T. 275-76).
31. Reese, Fritz, Richard Ford and John Schneckner applied for the position of UMS. (N.T. 305).
32. Once the resumes were received by Human Resources, the resumes were then forwarded to the office of Mayor Callahan. (N.T. 278).
33. It was the policy of Mayor Callahan to allow department heads to make decisions concerning his/her staff. (N.T. 289)
34. On or around May of 2004, David Brong (hereinafter "Brong") was appointed Director of WSR for the Respondent. (N.T. 209).
35. The hiring of Brong as Director of WSR coincided with Reese's last day of employment. (N.T. 31)
36. Brong, upon his appointment, was aware that the UMS position was temporarily being filled by Fritz. (N.T. 212).
37. Brong was informed by Mayor Callahan that the decision to permanently fill the position was in his (Brong) hands. (N.T. 213-214).
38. In compliance with Respondent's policy of promoting morale and providing present employees with feelings of accomplishment, Brong desired to promote an individual from within, since doing so sends the message that there can be advancement and a future within the organization. (N.T. 218).
39. Shortly after his appointment as Director of WSR, Brong decided to review the performance of Fritz in the UMS position prior to opening the job up to other applicants. (N.T. 223).
40. Brong determined that a qualified applicant would need the ability to manage a large union workforce; the ability to manage those functions that ensured service

- levels regarding ground infrastructure, the ability to associate with strategic initiatives and the ability to be bold and change-oriented enough to be able to take an otherwise slow-to-move enterprise and take it in the direction that clearly needed to move. (N.T. 225).
41. Brong met with Fritz for the purpose of determining whether Fritz was committed to performing the job on a permanent basis. (N.T. 220-221).
 42. Fritz remained in the acting role until September of 2004. (N.T. 222, C. E. 7).
 43. From May 2004 until September 2004, Brong had the opportunity to observe Fritz's performance in the position. (N.T. 222).
 44. Brong also spoke with other Respondent employees and union representatives and all comments regarding Fritz were positive in regard to his character, ability to manage and his experience. (N.T. 222, 254).
 45. Based upon his personal observations and the recommendations he received, Brong determined that Fritz had the knowledge and experience, ability to manage and the support of the workforce necessary to perform the UMS position. (N.T. 222, 254, 260).
 46. Also, Brong based his determination to offer Fritz the permanent UMS position on Respondent's policy of promoting the senior most employees in the department or bureau. (N.T. 257, R. E. 3).
 47. In or around September of 2004, Brong promoted Fritz to the permanent UMS position. (R. E. 7).
 48. Brong made the decision to hire Fritz into the permanent position with the knowledge that Fritz was not certified. (N.T. 315).
 49. Brong had determination that certification was not a requirement to perform the UMS position. (N.T. 23-231).

50. Fritz's predecessor, Dancho, who had directly reported the Reese as UMS also did not hold certification as an operator. (N.T. 239).
51. Mayor Callahan approved and City Council later confirmed Brong's recommendation to hire Fritz into the permanent position. (N.T. 260, 348).
52. Brong did not interview anyone other than Fritz for the position and did not consider anyone else. (N.T. 223).
53. Brong believed that Fritz, a known quantity, was best for the City of Bethlehem. (N.T. 263).
54. In or around September of 2004, all applicants were provided written notice of Brong's decision to hire Fritz for the permanent position. (N.T. 138, 139).
55. Reese testified that, sometime in April of 2004, Mayor Callahan informed her that she would not be hired for the UMS position. (N.T. 138-139).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing.
3. Reese is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The City of Bethlehem is an employer within the meaning of the Act.
5. Reese may establish a *prima facie* case of failure to hire on the basis of sex, female by proving that:
 - a) She is a member of a protected class;
 - b) she applied for and was qualified for the position;
 - c) she was rejected, and
 - d) after her rejection, the Respondent hired an individual with equal or fewer qualifications and not in the Complainant's protected class.
6. Reese has established a *prima facie* case of failure to hire on the basis of sex, female.
7. The Respondent has articulated legitimate non-discriminatory reasons for refusing to hire Reese.
8. Reese has failed to show that the Respondent's reasons are pretextual.

OPINION

This case arises on a complaint filed by Kathleen B. Reese (hereinafter "Reese"), against City of Bethlehem (hereinafter "Respondent"), on or about March 11, 2005. In her complaint, Reese alleged that the Respondent failed to hire her for the position of Utilities Maintenance Superintendent because of her sex, female. Reese further alleges that the Respondent's refusal to hire her is a violation of Section 5 (a) of the Pennsylvania Human Relations Act. Of October 27, 1955, P. L. 744, as amended 43 p.s. §951 *et. seq.* (hereinafter "PHRA").

The staff of the Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated Reese's allegation and, at the conclusion of the investigation, concluded that probable cause existed to credit the allegations raised in the complaint. Thereafter the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified all parties that it had approved the case for public hearing.

The public hearing was held on March 13 and March 14, 2008 in Easton, Pennsylvania before Permanent Hearing Examiner Phillip A. Ayers. The state's interest in the complaint was represented by PHRC Counsel William Fewell. Steven E. Hoffman, Esquire appeared on behalf of the Respondent. Following the public hearing, all parties submitted post hearing briefs.

Section 5(a) of the PHRA, states, in pertinent part, that:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification... for any employer because of the... sex... of any individual to refuse to hire or employ... such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required. 43 P.S. §955(a).

In the instant case, the analytical model to be used was first established in the oft-cited case of McDonnell Douglas v. Green, 411 U.S. 792 (1973) and that standard was later adopted by the Supreme Court of Pennsylvania in General Electric Corporation v. Pennsylvania Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976). Using that analytical model, Reese has the initial burden of establishing a *prima facie* case of unlawful discrimination. Once Reese establishes a *prima facie* case, the burden of production shifts to the Respondent to produce evidence of a legitimate non-discriminatory reason for its action. See Allegheny Housing Rehabilitation Corporation v. Pennsylvania Human Relations Commission, 516 Pa. 124, 532 A.2d 315 (1987). If the Respondent carries this burden of production, then the burden shifts back to Reese to prove that the proffered reason is pretextual. Reese retains the ultimate burden of proving unlawful discrimination.

In order to establish a *prima facie* of unlawful discrimination in the instant case, Reese must show:

- 1) She is a member of a protected class;
- 2) she applied for the position and was qualified;
- 3) she was rejected; and
- 4) after her rejection, Respondent hired an individual with equal or fewer qualifications than Reese and not in Reese's protected class.

On the initial question of whether Reese can establish a *prima facie* case, the first element is clear, Reese is a female. In regard to the second element of the *prima facie* case, Reese applied for the position and was qualified for the position. The record reflects that Reese had the experience and certifications to perform the duties of the position of Utilities Maintenance Supervisor.

Clearly, Reese was not appointed to the UMS position and therefore satisfies the third element of the *prima facie* showing. Lastly subsequent to the rejection of Reese, the

Respondent hired an individual, (Fritz), with equal or less qualification than Reese, and that individual was not in Reese's protected class. Accordingly, Reese has set forth a *prima facie* case in the matter before the Commission.

As aforementioned, once the Complainant has established a *prima facie* case, the burden of production shifts to the Respondent to produce evidence of a legitimate non-discriminatory reason for its action.

The Respondent asserts that its actions in not hiring Reese was in accordance with its hiring procedures and its feelings that the hiring of into a subservient position was not a good business decision, regardless of gender. Specifically, the Respondent asserts their decision was a legitimate non-discriminatory business decision. The Respondent had a policy of promoting from within which was followed throughout the City. (N.T. 302). In fact Reese acknowledged that she believed in promoting from within. In addition the Respondent asserts that the other legitimate non-discriminatory reason for not hiring Reese was the determination that hiring her into a subservient position would have a detrimental effect on the City. As stated, the Respondent has met its burden of production.

As we note in all cases involving allegations of discrimination, Reese retains the ultimate burden of demonstrating that the Respondent intended to unlawfully discriminate against her. Reese may accomplish this by showing that the Respondent's proffered explanation is pretextual. In other words, Reese must prove the Respondent's explanation was not the actual reason for its decision. See Simpson v. Kay Jewelers, 142 F. 3d 639 (3rd Cir. 1998).

Reese's subjective belief of discrimination is insufficient to show discriminatory intent. Rand v. Mannesmann Rexroth Corp., 2002 WL 550 396, 5 (E. D. Pa. 2002) citing Luz Maria Roberts v. GHS – Osteopathic, Inc., 1997 WL 338868 7(E. D. Pa. 1997).

In the instant case, the reasons given by the Respondent for its actions were not rebutted by Reese, but rather support the Respondent's articulated reasons. The Respondent indicated that it hired Fritz based on its policy of promoting the most senior employed from within the bureau. Reese, in her testimony, admitted that Fritz was the most senior employee and that he was qualified for the position. (N. T. 70, 117, 123). During her testimony Reese also confirmed that Fritz performed the job in a satisfactory manner. (N. T. 131-132).

Reese maintained that she had more managerial experience and more certification than Fritz. However, a review of the record does not support Reese's contention. Moreover, Fritz had over 35 year's experience, and was the most senior employee in the bureau. (N. T. 319-320).

The UMS position calls for a degree in either civil/sanitary engineering or a related field or any combination of training and experience. (C.E. 4). Even though Reese has a college degree and Fritz does not, Reese's degree is in meat and animal science, a field wholly unrelated to civil/sanitary engineering.

Reese also raised the issue of Fritz's lack of certification. There is undisputed testimony that an individual can perform the UMS position without certification as long as there are certified operators making the decisions. (N.T. 246). When Fritz was promoted to the, UMS position, there were fifteen (15) certified operators working in the City of Bethlehem. More importantly, during Reese's tenure with the Respondent, she employed a non-certified operator (Dancho) in the UMS position.

In conclusion, the gist of Reese's position is that she believes she was the victim of discrimination because of her gender. She bases her belief on an alleged statement made by Mayor Callahan in a meeting in March of 2004, that the organization could not handle it. (N.T. 83, 136, 137). The entirety of Reese's case is her subjective belief Mayor Callahan's

statement was made because of her gender. However, Reese has not shown that Respondent's actions were due to her gender. Her subjective belief by itself does not establish pretext on the part of the Respondent. The Respondent asserts that Mayor Callahan's statement was made in light of its reasoning that hiring Reese into the subservient position of UMS, after serving as Director of WSR, would have a detrimental effect on the City. Reese has not proven that the Respondent's reason were pretextual.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KATHLEEN B. REESE
Complainant

v.

CITY OF BETHLEHEM
Respondent

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PHRC CASE No. 200405894
EEOC No. 17FA561401

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove 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, and the Permanent Hearing Examiner recommends issuance of the attached Final Order.

May 26 2009
Date

By: Phillip A. Ayers
Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KATHLEEN B. REESE
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v.

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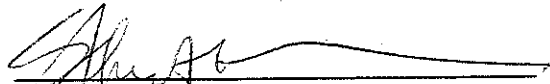
FINAL ORDER

AND NOW, this 23rd day of June, 2009 after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby


ORDERS

that the complaint in this case be, and the same hereby is, dismissed.

BY:


Stephen A. Glassman, Chairperson

Attest:


Dr. Daniel D. Yun, Secretary