

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

LEATRICE STEWART, COMPLAINANT

v.

CHARTIERS-HOUSTON SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-26636

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSION OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

ALTERNATE OPINION

RECOMMENDATION OF HEARING PANEL COMMISSIONER

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

LEATRICE STEWART, COMPLAINANT

v.

CHARTIERS-HOUSTON SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-26636

STIPULATIONS OF FACT

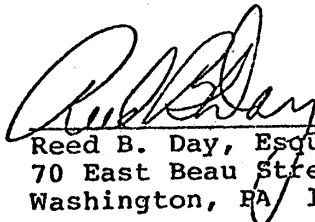
1. The Complainant, Leatrice Stewart, is a black female residing at 316 Hickman Street, Apartment 19, Bridgeville, Pennsylvania 15017.
2. The Respondent, Chartiers-Houston School District, is a body corporate and politic created and existing pursuant to the provisions of "the Public School Code of 1949" Act of March 10, 1949, P.L. 30, as amended 24 P.S.A. §§101 et seq.
3. The Respondent, in 1983 and specifically, at the time the above-captioned complaint was filed, had a place of business located at 2050 West Pike Street, Houston, Pennsylvania 15342.
4. In 1983 and specifically, at the time the above-captioned complaint was filed, the Respondent was an employer of four or more persons in the Commonwealth of Pennsylvania.
5. The Pennsylvania Human Relations Commission, (hereinafter "PHRC") has jurisdiction over the parties and subject matter of the complaint filed at the above-captioned docket number E-26636.
6. On or about September 21, 1983, Leatrice Stewart filed a notarized complaint with the PHRC at PHRC Docket No. E-26636D, (a true and correct copy of the formal complaint is attached hereto as Exhibit "A") alleging that Respondent's refusal to hire her as a full time permanent substitute teacher of special education classes was unlawfully discriminatory because the decision not to hire her was based on her race, black.
7. The complaint, filed on September 21, 1983, was duly served upon Respondent by certified mail on or about September 27, 1983.
8. The PHRC found probable cause to credit the allegations of the complaint in this case and Respondent was notified of this by a letter dated March 16, 1984 from Belinda Stern, a PHRC Human Relations Representative to John K. Abraham, Superintendent of the Chartiers-Houston School District. (A true and correct copy of this March 16, 1984 letter is attached hereto as Exhibit "B").
9. Subsequent to the determination of probable cause, the Respondent, PHRC staff and the Complainant attempted to conciliate this matter but their efforts at conciliation failed.

10. On or about January 28, 1985 this case was approved for public hearing by the PHRC and Respondent was notified of this by letter dated February 1, 1985 from Homer C. Floyd, the PHRC's Executive Director, to George Stegenga, Solicitor for Respondent. (A true and correct copy of this January 28, 1985 letter is attached hereto as Exhibit "C").
11. In the summer of 1983, a position of long-term substitute teacher of special education classes at Respondent's high school became available.
12. It is the practice of Respondent to post such positions when they become available in accordance with Article XXXIII of its Collective Bargaining Agreement.
13. The Respondent's hiring procedure is to pull eligible candidates' files for review
14. The relevant administrators will then conduct interviews and rate the candidates and recommend several individuals to the Superintendent.
15. The Superintendent will then interview the recommended individuals and will rank them.
16. The Superintendent then meets with the relevant administrators and together they make their recommendations to the Board of Education.
17. The Board of Education must formally approve the hiring of the recommended individuals.
18. In July 1983, Complainant was notified by Thomas Zellars, the High School Principal, that a position as a long-term substitute for Special Education classes would be available for the 1983-84 school year.
19. Prior to July 1983, the Complainant had been a part-time substitute teacher for various school districts including the Respondent and intermediate units for the previous five (5) years.
20. The Complainant applied for the position of Permanent Substitute Teacher on or about July 30, 1983.
21. The Complainant was certified by the Pennsylvania Department of Education to teach the position in question.
22. The Complainant failed the course "Introduction to Exceptional Children" at Clarion State College in the 1973-74 school year and repeated the course without credit in the 1974-75 school year.
23. The Complainant received a "D" in "Abnormal Psychology" at Clarion State College in the school year 1973-74 and repeated the course without credit in the 1976-77 school year.
24. Complainant was initially interviewed for the position of substitute teacher by Mr. Zellars and Dr. Paul Lapcevic, the Middle School Principal and Special Education Coordinator.
25. Complainant was interviewed by John K. Abraham, the Superintendent of the Chartiers-Houston School District.
26. In addition to Complainant, three (3) other individuals were interviewed for the position of substitute teacher and were recommended for interviews with the Superintendent.
27. The other individuals were Brenda Thornburg, a white female, Shirley Arnold, a white female and Robert Conwell, a white male.
28. Although the applicant Shirley Arnold was related to a board member, she was not selected.
29. Ms. Thornburg, Ms. Arnold and Mr. Conwell were interviewed by the Superintendent.
30. On or about August 15, 1983, Brenda Thornburg was hired by the Respondent as the substitute teacher.

31. On or about August 16, 1983, the Complainant telephoned John K. Abraham and was told that she did not get the job.
32. At the time the Complainant applied for the position of substitute teacher with the Respondent, she had five (5) years experience as a substitute teacher in special education in two different school districts, and two different intermediate units.
33. During the 1982-83 school year the Complainant was a regular substitute teacher in the Respondent's Special Education classes.
34. Brenda Thornburg took a dual major in special education and elementary education at California State College graduating in 1982 with a straight "A" average, Summa Cum Laude.
35. In July-September of 1983 and at all times relevant to this action, the Respondent employed 89 full-time teachers.
36. Of the 89 full-time teachers employed by Respondent during the relevant time period, one of the teachers was black.
37. In July-September of 1983 and at all times relevant to this action, four (4%) percent of the Respondent's student population was black.
38. Brenda Thornburg was hired by Respondent at a starting salary of \$10,500 per school term.
39. In 1983 Ms. Thornburg's earnings from her employment as a substitute teacher with Respondent were \$4,166.11.
40. Complainant is seeking lost wages for the school year only of 1983-84 less a set-off for wages which she received during that year.
41. The document identified in these stipulations and/or attached hereto are authentic documents or true and correct copies thereof and/or can be admitted without further proof.


The undersigned agree that the facts set forth above are true and correct and that proof of these facts will not be required at any Public Hearing on this matter.

ON BEHALF OF RESPONDENT
Chartiers-Houston School
District



Reed B. Day, Esquire
70 East Beau Street
Washington, PA 15301

ON BEHALF OF COMPLAINANT
Leatrice Stewart



Michael L. Foreman
Assistant General Counsel
Pa. Human Relations Commission
11th Floor, State Office Bldg.
300 Liberty Avenue
Pittsburgh, PA 15222-1210

DATE: Feb 13, 1986

DATE: 2-14-1986

FINDINGS OF FACT

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

N.T. Notes of Testimony
S.D. Stipulations as to Documents
C.E. Complainant's Exhibit
S.F. Stipulations of Fact

1. The Complainant, Leatrice Stewart, graduated in 1977 with a Bachelor of Science Degree in special education. (N.T. 15, 18)
2. Following Stewart's graduation, she intermittently taught as a substitute teacher for five years. (N.T. 19-32)
3. During the school years between 1978 and 1983, Stewart taught as a substitute in numerous school districts including the Respondent district. (N.T. 26-31)
4. On several occasions, Stewart was a long term substitute in the Respondent school district. As a long term substitute, Stewart fulfilled the same duties of a regular full time teacher. (N.T. 26, 30, 31)
5. Stewart was a good substitute teacher and had not received complaints with regard to her work. (N.T. 32, 140, 158; C.E. 1 at p. 11)
6. In approximately July of 1983, Mr. Thomas Zellars, the Principal of Chartiers-Houston High School, contacted Stewart and informed her that there was a permanent substitute teacher position available with the Respondent and encouraged her to apply for that position. (N.T. 33, 134)
7. Stewart submitted an employment application along with a cover letter and a sheet describing her employment experience to the Respondent. (N.T. 32-35)
8. Stewart's application contained several spelling errors and fundamental grammatical errors. (N.T. 35; S.D. 1) These errors had a minor negative impact on the decision not to hire Stewart. (N.T. 136, 159)
9. In early August of 1983, Stewart was called by Dr. Paul Lapcevic, Respondent's employee, and asked to appear for a job interview sometime later in the month. (N.T. 36)
10. Stewart was interviewed by Mr. Zellars, the high school Principal and Dr. Lapcevic, the Coordinator of Respondent's special education program. (N.T. 37, 38)
11. Zellars and Lapcevic completed forms on which they rated Stewart in several categories, including: educational background, expression, references, work experience and use of language. (N.T. 139, 156; S.D. 3, 5)
12. Zellars and Lapcevic did not have Stewart's college transcript available at the time of Stewart's interview. The transcript was also unavailable at the time Zellars and Lapcevic completed Stewart's rating form. (N.T. 38, 145, 156; C.E. 1 p. 16)
13. During her interview with Zellars and Lapcevic, Stewart was asked about her knowledge of computers. (N.T. 39, 139)
14. Stewart told Lapcevic and Zellars that she did not have much experience with computers.
15. Respondent considered four people to fill the position of permanent substitute: Brenda Thornburg, Leatrice Stewart, Shirley Arnold, and Robert Conwell. (S.F. 26, 27)

16. The successful applicant, Brenda Thornburg, is the mother of three children who chose to attend college after her children had grown. (N.T. 107)
17. Thornburg worked full time with special education students during the day and attended college at night until graduation in April of 1983. (N.T. 112)
18. Thornburg had experience working with trainable students, physically handicapped, children with learning disabilities, and profoundly retarded students. (N.T. 108-109)
19. As a teachers aide, Thornburg assisted with the instruction of reading, language arts, and fundamental self-help matters. (N.T. 110)
20. Thornburg graduated Summa Cum Laude and achieved straight "A's". She graduated with a dual major in special education and elementary education. . (N.T. 111, 113, 115)
21. Zellars, Lapcevic and Abraham, the District Superintendent, were particularly interested in Thornburg's 18 credits in computer science. (N.T. 114, 139; C.E. 1 at p. 13)
22. Following Thornburg's selection, she used computers in her special education classes in the Chartiers-Houston School District. (N.T. 122)
23. Thornburg has also lectured on the subject of computers in special education classes. (N.T. 124)
24. Zellars, although he had invited Stewart to apply for the job, (N.T. 134) rated Thornburg higher. (N.T. 143)
25. Lapcevic rated Thornburg higher than Stewart and recommended Thornburg for employment because he believed she was the best candidate for the position. (N.T. 156)
26. Abraham also considered Thornburg an exceptional candidate. (C.E. 1 at p. 20)
27. Zellars offered to recommend Leatrice Stewart to another school district after she was not selected at Chartiers-Houston but Stewart declined Zellars' recommendation. (N.T. 45)
28. Thornburg was the best applicant for the position of permanent substitute teacher.

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 PHRC have fully complied with all of the procedural prerequisites to a public hearing in this case.
3. The Complainant herein, Leatrice Stewart, is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Respondent herein, Chartiers-Houston School District, is an employer within the meaning of the Act.
5. The Complainant has established a prima facie case of unlawful employment discrimination by showing that:
 - a. She belongs to a protected group;
 - b. She applied for a position she was qualified to fill;
 - c. Despite her qualifications she was rejected; and
 - d. The position in question was awarded to an individual not in Stewart's protected group.
6. Once a prima facie case has been established, the Respondent has the burden to demonstrate that the Complainant was not the best able and most competent to perform the services required.
7. The Respondent has shown by a preponderance of the evidence that Thornburg had superior qualifications which made her the best able and most competent applicant.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Leatrice Stewart, (hereinafter either "Stewart" or "Complainant"), against Chartiers-Houston School District, (hereinafter "Respondent"). The complaint, filed on September 21, 1983, alleged that the Respondent refused to hire the Complainant for a full-time permanent substitute teacher position because of her race, Black, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq., (hereinafter the "PHRA").

The Complainant's allegations were investigated and by a letter dated March 16, 1984, the Respondent was notified that probable cause existed to credit the allegations. Thereafter, the Commission endeavored to eliminate the practice complained of by conference, conciliation and persuasion. These efforts were unsuccessful. Accordingly, a public hearing was approved.

The public hearing was held on June 10, 1986, before Commissioners John P. Wisniewski, Hearing Panel Chairperson; and Elizabeth M. Scott. Commissioner Carl E. Denson was unable to attend the hearing, however, the parties agreed to hold the hearing before Commissioners Wisniewski and Scott so long as Commissioner Denson would subsequently read the entire record prior to submitting his recommendation to the full Commission. In compliance, prior to submitting his recommendation, Commissioner Denson read the record.

II. ANALYSIS

In the leading case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973), the U.S. Supreme Court set forth the basic allocation of burdens and the order of presentation of proof in a Title VII case alleging disparate treatment. Under this formula, which has been adopted by the PA Supreme Court for analyzing evidence in a case under the PHRA, General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976), the Complainant has the initial burden of proving a prima facie case of discrimination. If the Complainant succeeds, the burden then shifts to the Respondent to produce evidence which demonstrates a legitimate, non-discriminatory reason for the adverse employment decision. If the Respondent is successful, the Complainant must have a full and fair opportunity to prove by a preponderance of the evidence that the proffered reasons are a pretext for discrimination. This burden merges with the Complainant's ultimate burden of persuading the fact finder that he has been the victim of discrimination. See Texas v. Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 25 FEP 113 (1981); United States Postal Service Board of Governors v. Aikens, 450 U.S. 711, 31 FEP 609 (1983).

A prima facie case of discrimination, identifying the discriminatory criterion "as the likely reason for the denial of a job opportunity", White v. City of San Diego, 605 F.2d 455, 458, 20 FEP 1649 (9th Cir. 1979), must be established by a preponderance of the evidence. Burdine, 450 U.S. at 252-53. A properly established prima facie case allows an inference of illegal discrimination, creating a legally mandatory, rebuttable presumption against the Respondent. Id. at 254 n. 7; Casillas v. United States Navy, 735 F.2d 338, 343, 34 FEP 1493 (9th Cir. 1984).

McDonnell Douglas set forth the specific elements of a prima facie case of disparate treatment. Under its oft repeated test, a Complainant must show: (1) that she belongs to a protected group; (2) that she applied for and was qualified for a job for which the Respondent was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the Respondent continued to seek applicants from persons of her qualifications. McDonnell Douglas, 411 U.S. at 802. It has repeatedly been emphasized that this four part test is not rigid; its satisfaction depends on the facts of each case. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 575-76, 17 FEP 1062 (1978); Spaulding v. University of Washington, 740 F.2d 686, 700, 35 FEP 217 (9th Cir. 1984); White, 605 F.2d at 458; Reed v. Printing Equipment Division of Western Gear, 75 Pa. Cmwlth. 360, 462 A.2d 292 (1983).

Although both this case and McDonnell Douglas involved a refusal to hire, the fourth prong of the McDonnell Douglas formula must be adapted here. In McDonnell Douglas, the Respondent continued to interview applicants after the Complainant's rejection. In this case, the Respondent's decision was not made until all applicants were interviewed. The fourth element of a prima facie case is frequently changed since the exact elements of a prima facie case are not hard and fast rules, but rather a set of standards whose application to differing factual situations requires individualized variations, Spruill v. PA Dept. of Transportation, Docket No. E-18816 (PHRC, February 28, 1983); Fisher v. Montgomery County Sheriff's Dept., Docket No. [-21522 (PHRC August 9, 1984); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

Since the Complainant's initial burden should not be onerous, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 284 (1981), I have chosen to apply a minimally restrictive adaptation of the fourth element. Accordingly, the fourth element can be met in this case if the Complainant can show that the Respondent hired an individual who is not Black.

Using this standard, the facts of this case make it clear that the Complainant has met her initial burden of establishing a prima facie case. The evidence readily reveals that the Complainant belongs to a racial minority; she was qualified for the substitute teacher position; she was not selected; and the individual selected was White.

The real dispute in this case is rooted in the second stage of the allocation of the burden of proof. In Pennsylvania, the Supreme Court has provided clear guidance on what burden must be met by the Respondent once the Complainant establishes her prima facie case. See General Electric Corp. v. PHRC, 365 A.2d 649 (1976).

General Electric cleared up the issue regarding whether the Complainant has the burden of proving as part of a prima facie case that she is "the best able and most competent to perform the services required." Id. at 654. The PA Supreme Court declared that lithe legislature intended that it is the employer who should shoulder the burden of demonstrating that the Complainant was not "best able and most competent to perform the services required." Id. at 654. Thus, after the Complainant establishes her prima facie case, the burden shifts to the Respondent to justify its employee selection on the basis of job-related criteria which are necessary for the safety and efficiency of the enterprise. Id. at 656.

Pragmatic considerations were also cited as support for requiring the Respondent to prove the person selected was better qualified. *Id.* at 657. First, the Respondent has far easier access to the facts to prove the relative qualifications of the applicants in question. When objective criteria are used, the Respondent is better able to demonstrate which standards it used and whether they were applied in a nondiscriminatory manner. When a subjective assessment is made, only the employer can articulate the rationale for its decision.

In this case, the Respondent's selection process has both objective and subjective aspects. The Complainant here does not contest the objective requirements that applicants be certified and have college degrees. Instead, the Complainant argues that she had teaching experience which made her better qualified than Brenda Thornburg, the woman selected for the position, who had no experience as a teacher.

The Respondent's selection procedure included a range of assessment factors. First, there were uncontested objective requirements of a degree and certification. Next, application forms were used from which the Respondent subjectively chose those individuals who would go to the next stage of the selection process. Interestingly, when the position in question came open at Chartiers-Houston High School, the Respondent had to contact Stewart because she did not have an application on file.

Thomas Zellars, the Principal of Chartiers-Houston High School, called Stewart to inform her of the opening and encourage her to submit an application. Thornburg's application had been on file since the Spring of 1982. Thornburg displayed initiative and motivation because her application was sent approximately one month before she graduated. On the other hand, even though Stewart had taught as a substitute in the Chartiers-Houston School District for several years, she apparently never submitted an application for a full-time teaching position.

The next stage of the selection process, an interview, is inherently subjective. Zellars and Dr. Paul Lapcevic, the middle-school Principal, and Coordinator of the Respondent's special education program, conducted the interviews. Both Zellars and Lapcevic knew Stewart from prior encounters with her when she was in the School District as a substitute. Neither Zellars nor Lapcevic knew Thornburg prior to the interview.

The Complainant suggests that her interview had been perfunctory, lasting only approximately 10 minutes. Additionally, Stewart felt that comments by Lapcevic and Zellars about her recent hair cut made the interview unprofessional. In everyday common experience, most good interviewers will attempt to put an applicant at ease. It appears the comments regarding Stewart's hair cut were most likely an attempt to be personable and congenial. This alone certainly does not amount to an unprofessional interview.

Following the interviews Zellars and Lapcevic separately completed a rating sheet for each prospective applicant. A rating sheet contains eight factors which were to be assigned a numerical score between 1-5. On this scale, a score of 1 was unacceptable; 2 was fair; 3 average; 4 very good, and 5 excellent. The eight categories rated were educational background; expression; work experience; poise; use of language; ability to answer questions; appearance; and references.

Every item on the list is of the kind that is potentially a matter for subjective judgment. We note that the Respondent did not offer any standards whatsoever on how the interviews were to be conducted and there was no guidance available to Lapcevic and Zellars regarding how to score the eight categories. Despite the lack of standards available to the interviewers, and the fact that the interviewers' determinations on the eight categories were based on their subjective impressions, the Respondent has sufficiently shown that Lapcevic and Zellars applied the process in a nondiscriminatory manner.

Respondent cites several factors which collectively indicate that the Respondent simply chose the best applicant. First, a comparison of Stewart's and Thornburg's rating sheets reveals that both Lapcevic and Zellars believed Stewart and Thornburg's qualifications were very close. Lapcevic gave Stewart a total of 32 points out of 40 and Thornburg was given a 35. Zellars gave Stewart a 37 and Thornburg was given a perfect 40. Four applicants were interviewed and consistently, Thornburg received the highest total score and Stewart was always second.

The Complainant argues that the Respondent cannot meet its burden of demonstrating that Thornburg was the best able and most competent to perform as the full-time substitute. The Complainant's argument focuses almost exclusively on the fact that she had teaching experience and Thornburg did not. After Stewart graduated from college, she taught intermittently as a substitute for five years. During this period, Stewart's experience included exposure to a full range of special education categories at all grade levels between elementary and high school. Additionally, a portion of Stewart's experience was with the Chartiers-Houston School District. In fact, on two particular occasions, Stewart's assignments with the Respondent were long term: one three month period and another period of almost one month.

The Complainant's argument that Thornburg had no teaching experience was substantially countered by the simple fact that the Respondent evaluated "work experience", not "teaching experience". Thornburg's "work" history was impressive.

The position in question was for a substitute for a special education class. The class was composed of educable mentally retarded students and included children with a variety of learning disabilities. Thornburg's work history fit the position perfectly. First, she is the mother of three children. Zellars, Lapcevic, and the Superintendent of the School District, John Abraham, considered this a plus factor. Many of the self help needs of the students directly parallel the needs of very young children. A parent certainly has direct experience in this regard.

On a more professional level, Thornburg worked closely with severe and profoundly retarded and multiple handicapped students, educable mentally retarded, and children with learning disabilities. In 1976, Thornburg became a substitute teacher's aide in the Intermediate Unit at Western Center. In April of 1977, Thornburg was hired as a permanent aide at Western Center. Thornburg stayed at Western Center working with severe and profoundly retarded and multiple handicapped students for 21 years.

In the Summer of 1978, Thornburg enrolled in college. Thornburg was an evening student who held a full time job during the day. In the Fall of 1979, Thornburg was transferred from Western

Center to Washington Elementary School where she worked with profoundly retarded, trainable, and learning disabled children. Thornburg stayed at Washington Elementary until June of 1982.

In the Fall of 1982, Thornburg went to work with the Western Area Vocational Technical School. Once again she worked with educable mentally retarded and learning disabled children. The Western Area Vo-Tech is in the Chartiers-Houston School District.

Thornburg, Zellars, Lapcevic, and Abraham all agree, there is not a significant difference between the position of teacher and teacher's aide. Only Stewart held a different opinion.

The Complainant's argument almost totally discounts Thornburg's work experience, however, I do not. Clearly, Lapcevic, Zellars, and Abraham had a basis to give Thornburg high scores for her work experience. The fact that each interviewer considered Thornburg's work experience to be better than Stewart's will not be disturbed. Stewart had five years experience, Thornburg had seven years plus she is a parent who has raised three children.

Another area of contention dealt with the scores given for educational background. Thornburg received a score of 5 from all three interviewers. Stewart was given two 4's and a 3. Thornburg's transcript was available, however, Stewart's was not. Thornburg had straight "A's" and graduated either first or second in her class.

Once again the Complainant only partially refers to the evidence. The Complainant argues that the scores she was given for educational background were arbitrary since her transcript was unavailable. This view does not fully consider the issue of whether knowledge of computers was a factor.

On Zellars' rating sheet of Thornburg in the "comments" section he wrote, "She is an outstanding candidate. She has experience in different Sp. Ed. categories and has computer background." Emphasis added. Lapcevic wrote "Brenda's general background offers valuable resource to the H.S. principal. Her most recent pursuit of knowledge in the computer area may prove to be very valuable." Abraham commented on Thornburg by saying "...Mrs. Thornburg has taken Computer Science courses and is working toward a degree in Computer Science Technology."

Clearly, knowledge of computers was an important factor in the educational background category. Stewart agreed that when the interviewer asked her if she knew about computers, she answered "No, very little." The Complainant suggests that she was told that computer knowledge was not important, however, Stewart's credibility was placed in question.

During Stewart's testimony at the Public Hearing, she indicated that her substitute teaching special education experience was three to one over teaching traditional subjects. However, during a previous deposition, Stewart indicated the exact opposite. Clearly, each interviewer made notations regarding the value of computer training. It appears more likely that Stewart was simply asked about her computer experience and she replied she had very little.

Knowledge of computers was certainly a concern because the teacher for whom the substitute was being assigned had put in for a grant to buy computers. In fact, when Thornburg took over the position, she did introduce and utilize computers as an instructional aid in her Special Education class. Thornburg's introduction of computers into the special education arena worked out so well that she was subsequently called upon to lecture on the subject. Accordingly, Thornburg's extensive computer training combined with a straight A college transcript would easily merit the highest score possible.

Stewart's fine substitute work enabled her to achieve two 4's and a 3. This was true even though on Stewart's handwritten cover letter which accompanied her application there were fundamental spelling errors, and mistakes in grammar.

The final disputed area is the "references" category. The Complainant argued that no one contacted her references. In reality, two references were in the room with her. Both Zellars and Lapcevic already knew of Stewart's abilities from the times when she worked in their schools. Thornburg's references were called because neither interviewer knew her before her interview. This was reasonable and no discriminatory motive can be surmised from these facts.

One final issue deserves some comment. The Complainant argued that during the relevant time period, the Respondent's school district had only one Black teacher out of the 89 full time teachers in the district. The Complainant submitted 1980 census statistical labor market information which revealed that in the greater Pittsburgh area, 5.39% of teachers, other than post-secondary level, in the experienced civilian labor force are Black. The complainant concludes from this statistic that there is an under-representation of Black teachers in Respondent's work force.

The usefulness of this statistic is dependent upon the accuracy, completeness, and relevance of the data being compared. Considered in a vacuum, naked statistical comparisons are normally meaningless. The more finely tuned a statistical comparison is, the more probative the data becomes.

In this case, all the data shows is that 5.39% of the teachers in the greater Pittsburgh area are Black. A better statistic would have been a comparison of Black teachers available for hire, with the percentage of Black teachers in the Respondent's work force. Even more probative would be a comparison of available Black teachers with a special education certificate with the percentage of Black special education teachers in the Respondent's work force.

Another statistical showing which would have been even more probative would have been a showing of the percentage of Blacks which applied for teacher positions and either were or were not offered teacher positions. The one statistical representation given has little probative value.

Apparently, the Complainant recognized the fundamental flaws in the statistics presented because only four sentences in her brief were devoted to this issue. We agree with the Complainant's implied recognition that, given the facts of this case, little use can be made of the bare statistic submitted.

Clearly, the Respondent demonstrated by a preponderance of the evidence that the Complainant was not the "best able and most competent to perform the services required." Accordingly, the Respondent has met its burden of proof and the Complainant's complaint must therefore be dismissed.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

LEATRICE STEWART, COMPLAINANT

v.

CHARTIERS-HOUSTON SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-26636

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

Upon consideration of the entire record in this case, the Hearing Panel Chairperson concludes that the Respondent did not violate the PA Human Relations Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted by the full PA Human Relations Commission, and that a Final Order of dismissal be entered, pursuant to Section 9 of the Act.

March 30, 1987
Date

John P. Wisniewski
John P. Wisniewski, Panel Chairperson

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LEATRICE STEWART, COMPLAINANT

v.

CHARTIERS-HOUSTON SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-26636

FINAL ORDER


AND NOW, this 6th day of April, 1987, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the PA Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, pursuant to Section 9 of the PA Human Relations Act, and therefore

ORDERS

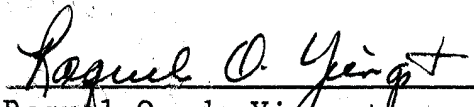
that the complaint in this case be, and the same hereby is dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:


Thomas L. McGill, JR.
Chairperson

ATTEST:


Raquel O. de Yiengst
Assistant Secretary

ALTERNATE OPINION

Clearly, the Complainant has set forth evidence which established a prima facie case. She is a member of a racial minority; she was certainly qualified for the permanent substitute teacher position; she was not selected; and the person selected was White.

Following this initial showing, the Respondent is obligated to demonstrate that the Complainant was not the best able and competent to perform the services required. General Electric Corp. v. PHRC, 365 A.2d 649 (1976). The Respondent attempted to assert the defense that the Complainant was less qualified than Thornburg for the open position. The Respondent asserts that Thornburg was rated superior to the Complainant by three separate interviewers.

It is of particular interest to note that eight rating factors were used by the three interviewers: educational background; expression; work experience; poise; use of language; ability to answer questions; and references. It is also significant that the evidence presented tends to show that interviewers had neither guidance on scoring nor standards to use when evaluating an applicant. Instead, it is obvious that each interviewer made his assessment based on individual subjective impressions.

Close scrutiny of the transcripts of this case reveals a fundamental inability by Lapcevic and Zellars to articulate particular rational for their subjective scoring of Stewart versus Thornburg. Additionally, common experience suggests that of the eight categories used by the Respondent, surely there should be greater importance placed on some of the factors listed over some others. What the Respondent did was to simply add all of the scores and compare the total scores. The applicant with the highest score was then given the position.

The totals were very close for both Stewart and Thornburg on the rating sheets of all three interviewers. On Zellars' sheet he gave Stewart a total of 37 and Thornburg received a perfect score of 40. Lapcevic gave Stewart a 32, and Thornburg a 35. Abraham awarded Stewart 35 points and Thornburg was given a 37.

Looking closer, the Respondent was unable to adequately substantiate the variable scoring given the testimony and evidence presented here. First, at the hearing, the Respondent suggests that minor errors in Stewart's application was a factor in the decision to hire Thornburg. This cannot be accurate. Instead, this defense appears to have been developed only after the complaint was filed. In the categories expression and use of language, Stewart actually was given one point more than Thornburg when all three interviewers' sheets are totaled in these categories. Accordingly, it appears more probable that at the time of the decision to hire Thornburg over Stewart, the errors on Stewart's application letter were unknown to the Respondent.

Similarly, in the category of educational background, the Complainant's transcripts were not available to the Respondent. To give Thornburg a 5 score for educational background since she was a 4.0 student is certainly appropriate however, there is no explanation offered regarding why Stewart was awarded two 4's and a 3 in this category.

The Respondent's suggestion that Thornburg's computer background made the difference is diminished by the Complainant's assertion that she was instructed that knowledge of computers

was not an important consideration. Telling the Complainant a computer background was not important is significant because it once again dims the Respondent's stated defense. Additionally, it bolsters the Complainant's claim in that it gives the appearance that the Respondent was not completely fair in the application process. Stewart's treatment was less favorable than that received by Thornburg.

This can also be seen when a comparison is made of the interview time given to the applicants. Stewart talks of being given a short period, approximately 10 minutes, while Thornburg's interview lasted considerably longer. Also, Stewart indicated that there was a great deal of small talk during her interview and on one occasion she described the procedure as unprofessional.

Perhaps the largest discrepancy to be found in the rating procedure is in the work experience factor. Stewart was given a 3 by Zellars while Thornburg was given a 5. Stewart's 5 year teaching experience clearly surpasses Thornburg's varied background. This was recognized by both Lapcevic and Abraham because they each gave Stewart a 4 and Thornburg a 3.

Finally, the reference factor adds to the discrepancies with the rating process. Fundamentally, Thornburg's listed references were contacted, but Stewart's were not. Instead, past personal knowledge of the interviewers was substituted for other outside opinions.

When each of these small considerations are weighed as a whole, the conclusion reached is that the Respondent was unable to substantiate that it hired the best able and most qualified applicant. The vestiges of subtle discrimination remain within the standardless subjective rating process used by the Respondent and accordingly, Stewart has successfully met her ultimate burden of showing discrimination by a preponderance of the evidence.

DAMAGES

Following a finding of illegal discrimination, the PHRC, under the PHRA, 43 P.S. §969(a), shall fashion a remedy, the purpose of which is not to punish the Respondent but to make the Complainant whole by restoring her to the position she would have been in but for the discriminatory act.

To be entitled to a backpay award a Complainant need only show an actual loss suffered from a Respondent's improper conduct. See United States v. U.S. Steel Corp., 371 F. supp. 1045, 1048 (N.D. Ala. 1973); PHRC v. Transit Casualty Insurance Co., 20 Pa. Commw. Ct. 43, 340 A.2d 624 (1975). Absent extraordinary circumstances, backpay should be awarded. Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

Once a Complainant has met the initial burden of showing economic loss, the burden shifts to the Respondent to show "clear and convincing" evidence regarding why backpay should not be awarded. Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364 (5th Cir. 1974). The Respondent made no effort to introduce evidence showing why backpay should not be awarded in this case. Accordingly, a backpay award is appropriate.

In calculating lost wages, it is generally accepted that the method of calculation need not be mathematically precise but should be "...a reasonable means to determine the amount [the

complainant] would probably have earned..." absent the discriminatory act. PHRC v. Transit Casualty Insurance Co., 20 Pa. Commw. Ct. 340 A.2d 624, 630 (1975). Stewart's lost wages are based upon the wages Thornburg earned minus the money earned by Ms. Stewart during the 1983 to 1984 academic year. the Commission has the power to award Stewart this sum plus interest at the rate of 6% compounded annually. In this case, the parties have agreed that the amount of damages to which Stewart is entitled will be stipulated to if the PHRC's finding is against the Respondent.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

LEATRICE STEWART, COMPLAINANT

v.

CHARTIERS-HOUSTON SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-26636

RECOMMENDATION OF HEARING PANEL COMMISSIONER

Upon consideration of the entire record in the above-captioned matter, this Commissioner concludes that the Respondent did unlawfully discriminate against the Complainant by refusing to hire her due to her race, in violation of Section 5(a) of the PA Human Relations Act. Accordingly, it is recommended that the attached Alternate Opinion and Alternate Final Order be adopted by the full Commission.

March 30, 1987
Date

Carl E. Denson
Carl E. Denson, Commissioner

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**LEATRICE STEWART, COMPLAINANT
v.
CHARTIERS-HOUSTON SCHOOL DISTRICT, RESPONDENT**

DOCKET NO. E-26636

FINAL ORDER

AND NOW, this ___ day of ___, 1987, the PA Human Relations Commission hereby adopts the foregoing Alternate Opinion in accordance with the Recommendation of Hearing Panel Commissioner, and therefore

ORDERS

1. That the Respondent, Charters-Houston School District cease and desist from discriminating against individuals on the basis of race.
2. That the Respondent shall pay to the Complainant, Leatrice Stewart, the amount she would have earned had she been employed by them as a permanent substitute teacher during the academic year 1983 to 1984, less any amounts she did earn during that same academic year, plus interest at the rate of 6% compounded annually. This amount shall be paid within 30 days of the date of the entry of this order.
3. That the Respondent shall pay the Complainant interest at the rate of 6% compounded annually on her damages from the date of this order until final payment is made.
4. That the Respondent shall provide written verification of its compliance with this order to the Pennsylvania Human Relations Commission within 30 days of the date of the entry of this order by mailing such verification to Marianne S. Malloy, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 11th Floor, State office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222-1210.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

Thomas L. McGill, Jr., Chairperson

ATTEST:

Raquel O. de Yiengst, Assistant Secretary