

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

FINDINGS OF FACT

CONCLUSIONS OF LAW

STIPULATIONS

ADMISSIONS

OPINION

RECOMMENDED ORDER

PROPOSED COMMISSION ORDER

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

FINDINGS OF FACT

EXPLANATION OF ABBREVIATIONS

S.F. Stipulation of Fact
H.T. Hearing Transcript
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
J.E. Joint Exhibit

1. The Complainant herein is Marion Ward, a Black female. (J.E. #1, S.F. #1).
2. The Respondent herein is the School District of Philadelphia. (J.E. #1, S.F. #2).
3. The Complainant, at all times relevant to the case at hand, has been an employee of the Respondent. (J.E. #1, S.F. #3).
4. The Respondent, at all times relevant to the case at hand, has employed four or more individuals within the Commonwealth. (J.E. #1, S.F. #4).
5. The Complainant, on or about April 28, 1981, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at docket number E-20335. (J.E. #1, S.F. #5).
6. In correspondence, dated September 13, 1983, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the above-captioned complaint. (J.E. #1, S.F. #6).
7. Subsequent to the determination of probable cause, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion, but were unable to do so. (J.E. #1, S.F. #7).
8. In correspondence, dated November 18, 1983, the Commission notified the Respondent that a Public Hearing would be held in the above-captioned case. (J.E. #1, S.F. #8).
9. The Complainant, at all times relevant to the case at hand, has been employed by the Respondent as a teacher of physical health education. (H.T. 14-15; C.E. #5).

10. On February 1, 1979 the Complainant, who had been on layoff as a result of budget limitations, was re-hired and assigned to teach in the physical education department at George Washington High School ("George Washington"). (N.T. 16; C.E. #5)
11. Both at the time of Complainant's initial assignment, of duties, and during all other times relevant to this action, Carol Wacker ("Wacker") has served as the principal at George Washington. (H.T. 16, 117).
12. George Washington, both at the time of Complainant's initial assignment of duties, and throughout all periods relevant to this action, has existed as a predominately white school vis-a-vis student and staff racial composition (C.E. #33; H.T. 123).
13. The Complainant's assignment of duties to George Washington occurred as a part of the Respondent's ongoing effort to, racially balance its teaching staff (H .T. 16, 122).
14. The aforementioned racial balancing policy resulted in an increase in Black instructional staff at George Washington from 9.2% in school year 1977-78 to 15.2% in 1978-79, and to 16.6% in 1979-80, and to 18.8% in 1980-81. In 1981-82 the percentage slipped to 18.2%. (C.E. #33).
15. At the time of Complainant's initial assignment of duties to George Washington there were some 31 members in the physical education department of whom 5 were Black. (C.E. #34).
16. In the years between 1969 and 1977-78, there had never been more than two Black teachers in the physical education department at one time. (H.T. 179; C.E. #34).
17. The Complainant, shortly after being assigned to George Washington submitted a written application for the position of intramural girls' track and field coach for the Spring 1979 season. The Complainant was the only applicant for the position. (H.T. 18-19, 322).
18. Wacker selected the Complainant to fill the position in question. (H.T. 19; C.E. #6).
19. During that same year, prior to June 21, 1979, the Complainant applied for the same position for the Spring 1980 season. (H.T. 20, 21).
20. The Complainant's application for this position included a copy of her resume, as requested. The Complainant had previously advised Respondent of her background and experience in track and field. (H.T. 19, 21; C.E. #7).
21. Wacker again selected the Complainant. The Complainant, as before, was the only applicant. (H.T. 22, 322; C.D. #8).
22. In March 1980, a group of Black teachers at George Washington, including the Complainant, filed a grievance with their union in which they alleged both Black faculty and Black students at George Washington were being discriminated against because of their race. (H. T. 31, 118).
23. While the grievance did not name the specific teachers who asserted the existence of Black teachers who appeared at an arbitration hearing, in late October or early November 1980, to present testimony regarding the unfair treatment. (H.T. 31-33, 118).
24. Approximately three months after the arbitration hearing, in February 1981, the Complainant again applied for the position of intramural girls' track and field coach. She applied in the same manner in which she had in prior years. (H.T. 23-31; C.E. #10).
25. The only other applicant for the position was Kenneth Glathorn ("Glathorn"), a White male. (C.E. #2 at 6 and C.E. #3 at 6).
26. Wacker selected Glathorn to fill the position and advised Complainant, in a memo dated February 23, 1981, that she had not been selected because someone else's resume better met the stated criteria. (H.T. 11.7; C.E. #11).

27. At hearing, Wacker testified that Glathorn, on the basis of his application, was better qualified for the position than the Complainant. (H.T. 339-340).
28. Wacker did not interview Glathorn nor did she investigate his qualifications and/or experience that he listed on his application. (H.T. 306-307, 333).
29. The position posting for the position in question indicated that the selection of the coach was to be based on fulfillment of the six criteria found on the posting and eligibility as defined by the appropriate coaching list as developed by the School District of Philadelphia, The Bridge. (C.E. #7).
30. The document identified above as The Bridge contains the Respondent's clarification or guidelines related to the appointment of coaches for both interscholastic and intramural positions. (R.E. #2).
31. The Bridge indicates that teachers seeking to be certified as eligible to coach and placed on the appropriate coaching list must meet four stated qualifications and must have successfully completed an examination which included both practical and oral tests related to the particular sport. (R.E. #2).
32. Both The Bridge and the qualification/examination process (used to rank successful applicants as either highly qualified, qualified or acceptable and used as the basis for development of coaching eligibility lists) have been utilized by the Respondent from the 1971-72 school year to the year of the alleged acts of discrimination. (R.E. #2; C.E. #2 at I and C.E. #3 at I).
33. The Respondent had certified the Complainant as "highly qualified", its highest ranking, and had placed her on its track and field coaching eligibility list with this ranking on December 3, 1980. (C.E. #9).
34. The Complainant, prior to attaining the highly qualified ranking and prior to her arrival at George Washington, had taken and passed the same examination and had been ranked as acceptable. (H.T. 24).
35. At the time of Wacker's selection of Glathorn for the position in question she was aware of the existence of coaching eligibility list and the qualifications set forth in The Bridge. Wacker had included fulfillment of The Bridge's eligibility criteria as a requisite for selection to the position in question (H.T. 335-337; C.E. #7).
36. At the time of Wacker's selection of Glathorn for the position in question, he had not taken and/or passed the examination for track and field. His name did not appear on the appropriate coaching eligibility list. (C.E. #2 at 8 and C.E. #3 at 8).
37. Glathorn's application indicates that it does not contain information sufficient to permit one to determine, that he met the posted criteria for the position. (R.E. #3 H.T. 332, 333).
38. Wacker knew, as the selecting individual, that the Complainant had worked in the same posted position for the two previous years. (H.T. 335, 337).
39. Complainant was more qualified than Glathorn to coach the position in question. (C.E. 9, 10, R.E. #3; H.T. 18-30, 305-307, 332-340).
40. At hearing, Wacker testified that she selected Glathorn, in part, because the Complainant had received an unsatisfactory assessment on January 19, 1981 and that, as a result, the Complainant failed to meet criteria #5 on the position posting. (H.T. 324).
41. Wacker's testimony regarding this assessment as a basis for non-selection is inconsistent with her notice of non-selection to the Complainant. The notice contains no mention of the unsatisfactory assessment as the factor which resulted in non-selection. (C.E. #11).

42. Under existing school district policy the aforementioned unsatisfactory assessment, if not forwarded to the administration personnel office, was to be destroyed and no longer utilized in any fashion after the rating period during which it was given ended. This policy existed as a result of a 1975 arbitration award. (H.T. 242-246).
43. The Respondent did not forward the aforementioned unsatisfactory assessment to the Complainant's administrative personnel file and on January 31, 1981. The Complainant's performance was rated by the Respondent as satisfactory. As such, under Respondent's existing policy, required by the 1975 arbitration award, Wacker should not have considered the unsatisfactory assessment in reviewing the Complainant's February 1981 application. (H.T. 242-246; C.E. #29).
44. Wacker's testimony at hearing on the purported reason for denying Complainant the coaching position is not credible and is inconsistent with the objective evidence available regarding the qualifications of Glathorn and the Complainant.
45. Prior to the arbitration hearing the Complainant had had no contact with Wacker; had never had her classroom performance observed by Wacker; had never received an unsatisfactory assessment from Wacker; had never received any written criticism of her performance by Wacker; and had been rated in June 1979, January 1980, and June 1980 as a satisfactory employee under the Respondent's performance evaluation system. (H.T. 33-37; C.E. #12, 13, H.T. 68-69).
46. Between January 1981 and June 1981, in addition to denying the Complainant the coaching position, Wacker criticized some aspect of the Complainant's performance no fewer than nine times. (C.E. #14-28).
47. Both the nature of the conduct which resulted in the written criticism and the drastic alteration in the pre- and post-arbitration pattern of observation and criticism gives credence to Complainant's allegation that Wacker attempted to single out the Complainant for differing treatment. (C.E. #14-28; H.T. 33-69).
48. Respondent produced no written documentation at hearing to support its contention that the Complainant had been a "problematic employee" prior to the arbitration hearing. (H.T. 255-256, 310, 323).
49. Wacker's testimony at hearing regarding both the extent of problems caused by the Complainant and the nature of those problems prior to October 1980 is inconsistent with Respondent's failure to maintain records related to the alleged performance problems. (H.T. 342-348).
50. Wacker's testimony that the Complainant, on occasion, assigned specific subject areas to students for testing only to test on another area and then to count the test scores after insuring students that she would not is inconsistent with her failure to report such activity as part of an unsatisfactory assessment and is inconsistent with the continued satisfactory performance ratings received by the Complainant. (R.T. 342-348; C.E. #12-13).
51. Wacker's testimony that the Complainant had required a student, who had just returned to school after open heart surgery, to run laps in the gym notwithstanding a doctor's excuse is not credible given Wacker's admission that at the time she did not provide Complainant with an unsatisfactory assessment and subsequently had rated the Complainant as a satisfactory employee. (R.T. 346-348; C.E. #12).
52. Wacker's testimony at hearing, related to the Complainant's performance before the October/November 1980 arbitration hearing, unsupported as it is by any documentation, is not credible. (R.T. 342-348).

53. The Complainant, both before assignment of duties to George Washington, and after reassignment to Cook Junior High School in 1983, received satisfactory classroom observation assessments. She has never been given an unsatisfactory assessment by anyone other than Wacker during her tenure at the School District. (C.E. #'s 30, 31 and 32; H.T. 70-74, 85-86; C.E. ¶3 at 14 and #3 at 14.)
54. As a teacher in the physical and health education department at George Washington, the Complainant was responsible for teaching a variety of health and/or physical education classes at grade levels 9, 10, 11 and 12. (H.T. 74-76).
55. During the time that the Complainant taught at George Washington, she (as was the case with all teachers in the department) received roster assignments, i.e., assignments to fill particular classes, from the department head. (H.T. 78, 130).
56. Beginning at least as early as the time of the Complainant's initial assignment of duties, and continuing to the present, Black teachers in the department received a disproportionate share of non preferred assignments and fewer of the preferred assignments. (H.T. 78-85, 174-188, 198-204, 207-213; C.D. #35 and 42).
57. Non preferred assignments included 9th and 10th grade classes, health rather than gym classes, locker room duties, and first period preparation periods. Preferred assignments included physical education rather than health, 11th and 12th grade classes and 7th period preparation periods. (H.T. 80-82, 136-137).
58. At all times relevant to the case at hand, Respondent's stated policy as to equalize the assignments to the extent possible and to rotate non preferred/preferred assignments whenever possible. (H.T. 136-137).
59. At all times relevant to the case at hand, Respondent failed to adhere to its stated policy with respect to assignment of duties of Black teachers. (H.T. 82, 178, 201-202, 211).
60. Respondent failed to produce roster sheets at hearing to demonstrate equity in assignments. (H.T. 138).
61. Respondent contended at hearing that roster sheets for the years in question have not been maintained even though the Respondent knew as early as May 1981 that the complaint involved an allegation of inequity in rostering and even through as early as July 1981 the Commission was requesting records related to rostering. (H.T. 139-140).
62. Respondent's failure to maintain roster records is inconsistent with its stated position that such records would support its position, especially in light of its knowledge of their relation to the case.
63. As a whole, Black physical and health education teachers were less senior than their White counterparts. (H.T. 135-136; C.E. #34).
64. At hearing, Harold Zeitz, Department Head for the physical and health education department testified that seniority was a factor utilized where roster -preference sheets were in conflict. (H.T. 130-135).
65. To the extent that seniority was a factor utilized by the Respondent, its use would impact disproportionately on the less senior Black teachers. (H.T. 130-137).
66. Respondent offered no evidence of any legitimate business necessity or collective bargaining agreement with respect to its reliance on seniority as a criteria in the roster assignment process.
67. While Black instructional staff at George Washington at no time relevant to the action at hand exceeded 18.8% of the total instructional staff, Black teachers received

approximately 30% of the unsatisfactory ratings issued by Wacker during her tenure (7 of 23). (C.E. #56).

68. Had the Complainant been selected to fill the girls' intramural track and field coaching position in 1981 she would have been paid \$700.00. (C.E. #4).
69. Glathorn served as coach for the team again in 1982 and 1983. He received \$700.00 and \$525.00, respectively, for those two seasons. (C.E. #2 and 3 at 7; C.E. #4).
70. The Respondent had a girls' intramural team again in 1983 and 1984 but the salary figure for the 1984 season is not a part of the record. (C.E. #4; H.T. 87).
71. The Complainant did not reapply for the position in 1982, 1983 or 1984 because Wacker continued to be in charge of selecting the coach and Complainant, based upon her treatment by Wacker, reasonably believed that applying for such positions would be futile. (H.T. 86).

**COMMONWEALTH OF PENNSYLVANIA
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MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant and the Respondent and the subject matter of the complaint pursuant to Section 9 of the Pennsylvania Human Relations Act ("Act"), 43 P.S. §951-964
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter, pursuant to Section 9 of the Act. 43 P.S. §959.
3. Respondent is an "employer" within the meaning of Sections 4(b) and 5(a) of the Act. 43 P.S. §959.
4. Complainant is an "individual" within the meaning of Section 5(a) of the Act. 43 P.S. §959(a).
5. The Complainant has established, by a preponderance of the evidence, that the Respondent unlawfully discriminated against her with respect to the terms and conditions of her employment (by denying her the girls' intramural track and field coaching position in February 1981 and by singling out the Complainant for close scrutiny regarding her performance) because of her race, Black, and because of her opposition to practices engaged in by the Respondent which the Complainant believed to be in violation of the Act.
6. The Respondent has failed to introduce credible evidence in support of its contention that the White male selected to fill the above described coaching position was more qualified than the Complainant to fill the position.
7. The available evidence demonstrates that the Complainant would not have been selected to fill the position even if she had applied for the Spring 1982, Spring 1983 or Spring 1984 seasons.
8. The Complainant has demonstrated, by a preponderance of the evidence that she was singled out by Carol Wacker for close scrutiny and available evidence demonstrates that Respondent's articulated reasons for this treatment are pretextual
9. The Complainant has established, by a preponderance of the evidence that Black members of the physical education department routinely and repeatedly receive a disproportionate share of non-preferred assignments and fewer preferred assignments than their White counterparts because of their race.

10. Whenever the Commission concludes that the Respondent has engaged in an unlawful practice, the Commission may order such affirmative action, including payment of back wages with interest, as in its judgment will effectuate the purposes of the Act. 43 P.S. §959(f).

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARION L. WARD, Complainant

v.

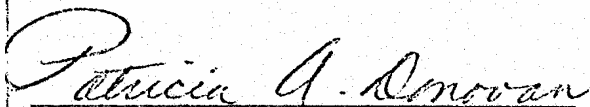
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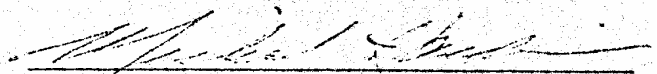
STIPULATIONS OF FACT

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

1. The Complainant herein is Marion Ward, a Black female.
2. The Respondent herein is the School District of Philadelphia.
3. The Complainant, at all times relevant to the case at hand, has been an employee of the Respondent.
4. The Respondent, at all times relevant to the case at hand, has employed four or more individuals within the Commonwealth.
5. The Complainant, on or about April 28, 1981, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission"), at docket number E-20335. A copy of the formal complaint is attached hereto at Appendix "A".
6. In correspondence, dated September 13, 1983, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the above captioned complaint.
7. Subsequent to the determination of probable cause, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion, but were unable to do so.
8. In correspondence, dated November 18, 1983, the commission notified the Respondent that it had voted to hold a Public Hearing in the above-captioned case.



Patricia A. Donovan
Assistant General Counsel
(Representing Respondent)



Michael Hardiman
Assistant General Counsel
(Representing the Commission
on behalf of the Complainant)

11-30-84
Date:

Date:

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

ADMISSIONS

The Pennsylvania Human Relations Commission, pursuant to 16 Pa. Code §42.94, requests that the School District admit the following facts:

1. Beginning not later than the 1971/1972 school year, and continuing to the present, the School District has utilized an examination process as a means of developing coaching eligibility lists for the various inter-scholastic and intramural athletic activities offered by the School District.
2. As a general rule, subsequent to the development of the eligibility lists, coaches were to be selected from among those teachers who have passed the examination and were placed on the applicable list.
3. Teachers who pass the examination are classified, with respect to the particular athletic area in which they are tested, in one of three categories: highly qualified, qualified or acceptable.
4. The "highly qualified" rating is the highest classification and teachers with this rating are qualified to coach, in any area so rated, at all grade levels in either interscholastic or intramural activities.
5. In February, 1981, Carol Wacker, then, as now, principal at George Washington High School, selected Kenneth Glathorn, a White, male social studies teacher at George Washington, to coach the girls' intramural track program for the Spring 1981.
6. Mr. Glathorn and Marion Ward, Complainant in the above captioned matter, were the only applicants for the above described coaching position.
7. Mr. Glathorn continued in the above described coaching position during the Spring 1982, Spring 1983 and Spring 1984 track seasons.
8. At the time of Mr. Glathorn's initial selection, in February 1981, his name did not appear on the list of teachers eligible to fill track coaching positions because he had not, prior to that time, taken and/or passed the applicable examination utilized by the School District.
9. Marion Ward applied for and was selected by Carol Wacker as the coach for the girls' intramural track program for the Spring 1979 and Spring 1980 track seasons.
10. Marion Ward was rated by the School District as "highly qualified" to coach track and field and placed on the coaching eligibility list that became effective December 3, 1980.

11. On January 14, 1981, Carol Wacker observed a first period Health Education class taught by Marion Ward.
12. The above described observation led to the preparation by Wacker of a written anecdotal record which assessed Ward's lesson as "unsatisfactory".
13. Prior to the above described unsatisfactory assessment, Wacker had not issued any unsatisfactory assessments regarding Ward's performance as a teacher at George Washington High School.
14. From the date of Ward's initial appointment as a teacher by the School District, on February 7, 1977, to the present, Ward has never received an unsatisfactory rating or an unsatisfactory anecdotal record of any kind from anyone other than Carol Wacker.

Respectfully submitted,

January 25, 1985
Date:

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**COMMONWEALTH OF PENNSYLVANIA
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SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

OPINION

Complainant, Marion Ward, is a black female who was a health and physical education teacher at a public school, George Washington High School, in Respondent Philadelphia School District in 1981. Ms. Ward applied for a position as coach of the Girls' Intramural Track and Field Team in the Spring of 1981. She and Kenneth Glathorn, a white male, were the only candidates. The principal, Carol Wacker, a white female, chose Glathorn for the opening. Complainant, Ms. Ward, believing that she was more qualified than Glathorn, filed a Pennsylvania Human Relations Commission (hereinafter called "PHRC") complaint which alleged that Respondent discriminated against her because of her race in Wacker's choice for coach of the girls' track and field and in the scheduling of her and other black teachers for teaching assignments within the Health and Physical Education Department. Complainant also alleged that the acts of discrimination by Respondent against her were in retaliation for her participation in grievance proceeding filed against Respondent principal Carol Wacker by certain black teachers. Respondent argued that there was no cause to credit the allegations of Complainant insofar as they allege racial animus, impermissible discriminatory intent, or retaliation by Respondent agents/employees, i.e., Carol Wacker and Howard Zeist, in administrative decisions to promote, hire or assign black teachers, and Complainant in particular. Respondent argued that it has the right to make discretionary administrative decisions strictly regarding public education within its school district, and it does so without unlawful intent.

The ultimate issue is whether the Respondent district discriminated against black individuals on the basis of race in each of the instances alleged in the complaint. Respondent was correct when it asserted that there must be sufficient evidence to demonstrate that Complainant was at least as qualified as the successful candidate to fill the position of coach of George Washington High School Girls' Track and Field. Respondent was also correct when it asserted that employers are entitled to evaluate each candidate's qualifications (including subjective evaluations); Respondent was also entitled to select the most qualified candidate without being subject to this Commission's substituting its own opinion as to the qualifications of the two candidates. Therefore, where possible, criteria of the Respondent were considered to determine which of the two candidates was most qualified. This was not possible where those qualifications were not articulated, whether these criteria were subjective or objective, and where those qualifications

were not made part of the record. Moreover, Respondent may not avoid scrutiny altogether by asserting broad administrative discretion, where such discretion was exercised in any arguably racially discriminatory manner. Where subjective criteria were used by the employer, at the very least, it is necessary to identify the goals. Albermarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975).

We find that Complainant established a prima facie case of race discrimination in each of the two complaint allegations and Respondent failed to present a credible defense. Therefore, for reasons which shall be enumerated this Commission finds that Respondent by the preponderance of the evidence:

I. Discriminated against Complainant Marion Ward because of her race in giving the coaching position for Girls' Intramural Track and Field to Kenneth Glathorn in 1981 in violation of the Pennsylvania Human Relations Act (hereinafter "PHRA") 43 P.S. §§951 et seq.

II Maintained a policy regarding the assignment of duties of teachers within the George Washington High School Physical Education Department which discriminates against black teachers, including Respondent assigning them a disproportionate share of non-preferred teaching duties, and assigning those same black teachers fewer preferred teaching duties in violation of PHRA.

I. The Allegation of Race Discrimination in Refusing to Re-hire Complainant as Girls' Intramural Track and Field Coach

Respondent maintains that it should be allowed to decide who was most qualified to be Girls' Intramural Track and Field Coach at George Washington High School if the criteria used are job related, defined and are applied fairly. This is not disputed. For example, Respondent Principal Wacker may use her professional (subjective) opinion, so long as Respondent can demonstrate at hearing that her opinion is based on reason rather than based on racial bigotry or retaliatory motive. However, this Commission is not required to ignore either the nature of criteria for the manner in which such criteria were applied. The Commission must reserve this limited review to itself in order to discover race discrimination proscribed under the Pennsylvania Human Relations Act, and may decide whether the adverse action against Complainant was unlawfully discriminatory. U.S. Postal Service v. Aikens, 462 U.S. 711, 102 S. Ct. 1478 (1983).

The Respondent District posted criteria requiring each applicant to fulfill certain preliminary criteria expressly enumerated in the document developed by Respondent called "The Bridge." (R.E. #2, C.E. #7). Those requirements include satisfactory completion of the examination for intramural track and field coaches and placement on the eligibility lists. (C.E. #7). Respondent admits that Complainant fulfilled all these criteria. (R.E. #2, C.E. #9, H.T. 337, Respondent's Brief p. 1). Kenneth Glathorn, the successful candidate did not. (C.E. #2, C.E. #3). Complainant received a "highly qualified" rating on the coaches' eligibility list from Respondent. (C.E. #9). The successful candidate had not taken the exam and his name did not appear on the eligibility list at the time of his application. Further, Complainant held the position for which she applied, in the Spring of 1979 and Spring of 1980. (C.E. #8, C.E. #6). Evidence produced at hearing does disclose comparable experience of the successful candidate Glathorn. Reasonable and objective

analysis of the relative qualifications of both with regard to these criteria compels the conclusion that the Complainant was more qualified. This Commission is not required to ignore this obvious fact in its ruling.

To establish a prima facie case Complainant is only required to establish that she applied for the position, that she was qualified for that position, that she was a member of a class protected by the PHRA (black), and that she was denied the promotion in favor of a white individual. We find that Complainant has met her burden of showing a prima facie case exists in the above-mentioned promotion. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (198B). Once the prima facie case of discrimination is established the burden of persuasion then falls to Respondent to show by convincing evidence that the employment decision was made for non-discriminatory reasons. Absent such a showing Complainant is entitled to a finding in its favor. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248,101 S. Ct. 1084 (1980); General Electric Corp. v. Commonwealth, Human Relations Commission, 460 Pa. 212, 365 A.2d 649 (1976).

In order to defend, Respondent represented in its hearing and post-hearing presentations that Carol Wacker's subjective evaluation of Complainant was that she was a less qualified candidate than the successful candidate. Yet, the evidence presented at hearing does not support that conclusion.

Respondent's strongest defense was partly that Complainant was not qualified because she had received "negative" evaluation by her principal, Carol Wacker. (C.E. #10, C.E. #14, H.T. 309, 310, 324, 326, 334-336). Carol Wacker testified that there were several occasions in the two years prior to the application in which she gave Complainant negative evaluations.

This contention that Complainant's negative assessment(s) were the reason for Wacker's choice was not credible because:

- 1) Principal Carol Wacker did not indicate in her letter to Complainant explaining Glathorn's hiring that the negative assessments of Complainant were the reason why Complainant was not chosen over Kenneth Glathorn. The stated reason was, "...someone else's resume better met the stated criteria." (G.E. #11);
- 2) Use of the negative assessments would have been a violation of the Respondent's own policy pursuant to a 1975 arbitration decision, which proscribed use of negative assessments beyond the current rating period. (H.T. 242-46);
- 3) Wacker rated Complainant as a satisfactory performer in the two rating periods immediately prior to Complainant's relevant application. (For the period ending January 31, 1980, C.E. #12; for the period ending January 31, 1981, C.E. #29).
- 4) The negative ratings did not absolutely preclude a successful application for the position in question. (H.T. 387-390).
- 5) There is some question as to the validity of the ratings themselves; where Complainant received greater scrutiny and her first negative assessment from Wacker only after she participated in a grievance proceeding by black teachers against Wacker. (H.T. 118-119; 124-125).

A second facet of Respondent's defense on relative qualifications is that the successful candidate was more qualified. Pennsylvania case law clearly places the burden of showing better qualifications on the party seeking to assert superior qualifications. General Electric Corp. v. Commonwealth, Human Relations Commission, 460 Pa. 202, 365 A.2d 649 (1976).

Respondents contention that Glathorn was more highly qualified is not credible because:

- 1) The Hearing Transcript does not disclose any evidence that Principal Wacker ever investigated the qualifications of Kenneth Glathorn in order to form a reasonable opinion as to his relative qualifications. (H.T. 332-333 Testimony of Wacker). The Federal Courts have held that an employer in evaluating an employee should act on the basis of firsthand knowledge; employer's action uninformed by such knowledge may be found to be improper. Wade v. Mississippi Cooperative Extension Service, 372, F.Supp. 126 (N.D. Miss. 1974) aff'd in relevant part, 528 F.2d 508 (5th Cir. 1978).
- 2) Unlike Complainant, Glathorn did not meet the posted criteria for application for the job. (H.T. 332-338, C.E. #2, C.E. #3).
- 3) Complainant at the time of her application had held the coaching position in question for two consecutive terms immediately prior to her application. (H.T. 21-22, C.E. #8, C.E. #6).
- 4) Respondent presented no evidence that Wacker knew that Glathorn had ever held such a position. (H.T. 332-338).

Since Respondent has failed to establish a credible defense, we are persuaded that Respondent had no non-discriminatory reasons for its hiring of Kenneth Glathorn for girls' intramural track coach at George Washington High School, instead of Complainant, Marion Ward.

Further, Wacker had no prior opportunity to discriminate against Complainant in the same manner, since although Wacker hired Complainant for the coaching position on two prior occasions, the application in question was the first time a white individual competed with her for the position.

Therefore, we find by inference that Carol Wacker discriminated against Complainant because of her race. Having found thus, the issue of retaliation need not be reached.

II. The Allegation of Race Discrimination in Roster Assignments

During Complainant's employment with Respondent at George Washington High School's Physical and Health Education Department (hereinafter called the "Department"), she, and all other Department teachers, were given certain teaching and student supervision assignments within the Department. Those assignments were periodically posted on a master roster. It was and is the avowed policy of the Department that teachers should rotate equitably, if not equally, the various assignment of duties. (H.T. 136, 137). It is the equitable rotation of assignment of duties which is put at issue by the Complainant. Complainant contends that black teachers receive a disproportionate share of the non-preferred assignments and few of the preferred assignments. At hearing Respondent asserted that there was no intent to discriminate against Complainant or other black teachers. Respondent stated that if blacks received non-preferred

assignments there was no intent to discriminate against Complainant or other black teachers. Respondent stated that if blacks received non-preferred assignments it was pursuant to a neutral policy adopted because of the practical necessities of running the Department, without regard to race.

The standard for review of facially neutral employment policy which has a disparate impact on racial minorities is quite clear. If the Complainant can establish to the satisfaction of the fact-finder, that the employment policy has a disparate impact on a person or persons protected by the applicable statute, Respondent must then show that business necessity exists for the implementation of that policy. Griggs v. Duke Power Co., 401 U.S. 424, 9 S. Ct. 819 (1971).

The most troublesome problem for the fact-finder surrounding the issue of disparate impact was the failure of Respondent to produce relevant original roster records which were apparently within its exclusive control at the time of service of this complaint. (H.T. 138-140). Without such documents, the fact-finder can only assume that Respondent has presented its best case. Without these documents, the preponderance of the evidence produced at hearing supports a finding that black teachers received a disproportionate share of the non-preferred assignments and fewer of the preferred assignments.

Complainant and three of the five black teachers testified that they received a disproportionate share of the non-preferred positions and few of the preferred positions. (H.T. 101-103, 146-208). Complainant produced an exhibit which seemed to indicate, at least for the time period in 1979, that blacks received a disproportionate share of non-preferred assignments. (C.E. #42, women's locker room assignments for 1979). Thirty-three teachers were employed by the Department, of which five were black. According to the Exhibit, thirteen teachers were assigned to locker room duties, all five blacks and eight whites. Four teachers were given assignment of duties for all seven of the assignment periods; all were black. No white teacher had more than 6 assignments; no black teacher had fewer than six assignments. White teachers' assignment of duties ranged from one to six. Respondent did not contest the authenticity of this document and there was no controversy over the facts that locker room assignments were not preferred and that teachers preferred fewer assignment periods. (H.T. 137).

Blacks were again disproportionately represented as having more non-preferred assignments in the exhibit for locker room assignments, 9th grade classes and health education classes for the school year 1980-1981. (See C.E. #34). Respondent did not contest the admissibility of this document. In addition Respondent department chairperson, Howard Zeist, testified that few, if any, black teachers were assigned Dance, P.E. theory or Adaptive Gym despite the fact that they were all certified to teach those subjects from 1979-1981. (H.T. 288-293).

Respondent attempted to rebut the evidence of disparate impact by asserting that white teachers also complained of their roster duty assignments. (H.T. 280-299). We find this assertion not to be persuasive on the issue of whether the roster duty assignments had a disparate impact on the black teachers. In the absence of a convincing rebuttal, we find that the roster duty assignments had a disparate impact on black teachers, in that (they received a disproportionate share of the non-preferred assignments and few of the preferred assignments).

Since "legitimate business necessity" is the one and only justification for employer standards and procedures or benefits, it is important to consider factors which Respondent (employer) deemed essential. Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). The U.S. Supreme Court in ruling on the Federal analogue to PHRA stated, "...Congress directed the thrust of the (Civil Rights Act of 1946), 42 U.S.C. §§2000(e) et seq., to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., Supra., 401 U.S. at 426 91 S.Ct. at 851 (1971). We believe the Pennsylvania Legislature had that same intent in enacting PHRA, 42. P.S. §§951 et seq.

We, therefore, have examined the consequences of Respondent's roster duty assignments and not simply what may have motivated Respondent. Absent business necessity, motivation, no matter how innocuous, cannot justify a policy which has a disparate impact on black teachers.

The Respondent's chief witness with regard to Department roster duty assignments was the chair, Howard Zeist. Zeist testified that there were four factors which determined which teachers should be assigned certain duties: student need, expertise (and/or experience), availability, and seniority. (H.T. 134, 135). Apart from the impact of these factors, Respondent contends that it made every effort to satisfy each teacher's preference and rotate non-preferred assignments. (H.T. 136-140). Zeist testified that certain classes required more expertise:

- (1) Fertility Control and Contraception
- (2) Major gym class (P.E. Theory)
- (3) Dance Classes
- (4) Adaptive Classes (H.T. 275, 276, 288-292).

He mentioned no other classes which required deviation from the equal rotation of assignment of duties. Despite the fact that Zeist acknowledged that at least one black may have been certified as being able to teach Fertility Control and Contraception, and all blacks were certified to teach P.E. Theory, Dance and Adaptive Gym classes, Respondent presented no evidence that blacks had been proportionately assigned to those classes. Instead, Respondent contends that white teachers may have been assigned to those classes on the basis of school seniority and experience. Both these criteria placed blacks at a disadvantage. George Washington High School only hired significant numbers of black teachers about 1978-1979. Whites, therefore, had disproportionately more of both relevant seniority and experience. (C.E. #33; G.E. #34; H.T. 121-133; H.T. 135-137). Neither of these criteria for preference was mandated by collective bargaining (H.T. 130-140). More importantly, for the purposes of this adjudication no evidence adduced at hearing supports the proposition that the criteria were used because of business necessity.

Respondent also contends that its use of certain whites in the assignments of duties limited its flexibility to equally rotate other teachers, including blacks, out of non-preferred assignments and into preferred assignments. (H.T. 130 138). Respondent asserts that the disproportionate placement of blacks into first and seventh period roster assignments, locker room assignments, and ninth grade assignments (all non-preferred), as well as failure to place blacks in desirable assignments, can be explained by this lack of flexibility. This argument is singularly unconvincing. For example, Respondent introduced no evidence which would satisfactorily explain why it was necessary to give all but one dance class to a white female. (H.T. 172-197).

Respondent did not rebut the testimony of Theresa Copeland, a black teacher, that she had an inordinate number of ninth grade classes and locker room assignments from 1979 to 1981. No evidence was presented to explain or rebut the testimony by black teachers that few of the preferred junior and senior classes were given to blacks. (H.T. 89-11, 190-197, 213-215).

A substantial quantity of unrebutted testimony of black teachers, albeit anecdotal, was presented by Complainant to support the proposition that the roster duty assignment process had an adverse effect on black teachers. We find that Respondent has not adequately defended on the basis of presenting business necessity for the process. "The burden (is on the defendant) of showing that any given requirement (preference)...has a manifest relation to the employment in question..." Albermarle Paper Company v. Moody, 422 U.S. 405, 10 F.E.P. 1181, 1190 (1975). See also Griggs v. Duke Power Company, 401 U.S. 424 (1971); Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971) cert. denied, 404 U.S. 1006 (1971). Further, it is difficult to believe that these black teachers need bear a disproportionate share of the non-preferred assignments when they constitute, at most five of twenty-eight or 18% of the teachers within the Department when fully half or 50% of the white teachers had no non-preferred roster duty assignments at any one time. (C.E. #33, C.E. #34, C.E. #42). Therefore, Complainant is entitled to a finding that the Respondent's roster duty assignment policy discriminated against black teachers because of their race.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

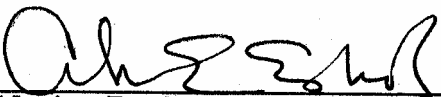
HEARING PANEL'S RECOMMENDED ORDER

AND NOW, to wit, this 10th day of November, 1985 upon consideration of the Findings of Fact, Conclusions of Law and Commission's Decision, and pursuant to the provisions of Section 9 of the Pennsylvania Human Relations Act, as amended, the Pennsylvania Human Relations Commission hereby

ORDERS

1. That the Respondent cease and desist from discrimination against the Complainant because of her race, Black, and her opposition to practices forbidden by the Act.
2. That the Respondent pay the Complainant the sum of two thousand, four hundred and fifty dollars and no cents (\$2,450.00) which represents salary she would have earned had she coached girls' intramural track in 1981, 1982, 1983 and 1984, plus 6% interest per annum, and make any necessary corrections/annotations to the Complainant's payroll and personnel records which are impacted on by virtue of such payment.
3. That the Respondent remove from the Complainant's personnel file any and all records related to discipline imposed during the 1980-1981 school year.
4. That the Respondent cease and desist from utilizing race as a criteria regarding assignment of duties in the physical education department and/or that it cease utilizing seniority as a factor in such assignments where the utilization of seniority has a disparate impact on black teachers.
5. That the Respondent develop and implement an assignment of duties formula which, to the extent possible, equally divides both the preferred and non-preferred assignments within the physical education department at George Washington.
6. The Respondent shall insure that the percentage of black teachers receiving non-preferred roster assignments shall not exceed percentage of white teachers receiving non-preferred assignments.
7. That Respondent shall provide satisfactory written proof of compliance with the terms of this Order to the Commission within thirty days of the date of the Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 
Alvin E. Echols, Esquire
on behalf of Hearing Panel

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

FINAL ORDER

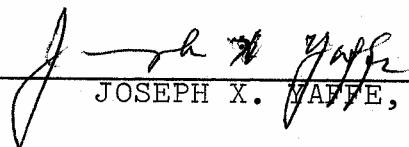
AND NOW, to wit, this 26th day of November, 1985, upon due consideration of Alvin E. Echols' Recommendation on Behalf of the Hearing Panel, and pursuant to the provisions of Section 9 of the Pennsylvania Human Relations Act, as amended, the Pennsylvania Human Relations Commission hereby

ORDERS


1. That the Respondent cease and desist from discrimination against the Complainant because of her race, Black, and her opposition to practices forbidden by the Act.
2. That the Respondent pay the Complainant the sum of two thousand, four hundred and fifty dollars and no cents (\$2,450.) which represents salary she would have earned had she coached girls' intramural track in 1981, 1982, 1983 and 1984, plus 6% interest per annum accrued for each of the foregoing years until paid, and make any necessary corrections/annotations to the Complainant's payroll and personnel records which are impacted on by virtue of such payment.
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4. That the Respondent cease and desist from utilizing race as a criteria regarding assignment of duties in the physical education department and/or that it cease utilizing seniority as a factor in such assignments where the utilization of seniority has a disparate impact on black teachers.
5. That the Respondent develop and implement an assignment formula which, to the extent possible, equally divides both the preferred and non-preferred assignments within the physical education department at George Washington.
6. The Respondent shall insure that the percentage of black teachers receiving non-preferred roster assignments shall not exceed percentage of white teachers receiving non-preferred assignments.
7. That Respondent shall provide satisfactory written proof of compliance with the terms of this Order to the Commission within thirty days of the date of the Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:


JOSEPH X. JAFFE, Chairperson

ATTEST:


ELIZABETH M. SCOTT, Secretary

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

JOINT PETITION FOR AMENDMENT TO FINAL ORDER

AND NOW, comes Michael Hardiman, Assistant General Counsel, Pennsylvania Human Relations Commission, as counsel for the Commission on behalf of the complainant, and Patricia A. Donovan, Assistant General Counsel, School District of Philadelphia, on behalf of the School District, to petition for amendment to a final order and in connection therewith state the following:

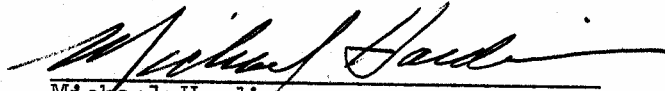
1. On November 26, 1985, the Commission issued a final order and decision in the above captioned matter. A copy of this order is attached hereto as Appendix "A".
2. On December 26, 1985, the School District filed a petition for review of the above referenced order and decision in Commonwealth Court.
3. The petition for review filed by the School District is premised on its belief that the Commission's order can be interpreted in a manner which would impose obligations that exceed the scope of the evidentiary record created at the public hearing and which would require the School District to violate its existing collective bargaining agreement.
4. Subsequent to filing of the petition for review, counsel for the Commission on behalf of the complainant contacted counsel for the School District in an effort to resolve the matter, if possible, without the need for further litigation.
5. As a consequence of discussions between counsel, counsel for the Commission on behalf of the complainant has proposed amending the final order issued in this matter in order to eliminate the concerns expressed by the School District and to more precisely state the nature of the obligations imposed on the School District by virtue of the order. A copy of the proposed Amended Order is attached hereto as Appendix "B" (the amendatory language found in paragraphs 4, 5 and 6, appears in capitol letters).
6. Amendment of the final order to conform to that found in Appendix "B" herein will result in the School District's withdrawal of its pending petition for review and its compliance with the terms of the Amended Final Order within thirty days of the date of said order.
7. The Complainant in the above captioned matter has no objection to the proposed amendment.
8. The Commissioner who presided over this matter at hearing has reviewed the proposed Amended Order and has no objection to its entry as such.

WHEREFORE, counsel jointly petition the Commission to issue an Amended Final Order in the above captioned matter which sets forth the terms found in Appendix "B" attached hereto.

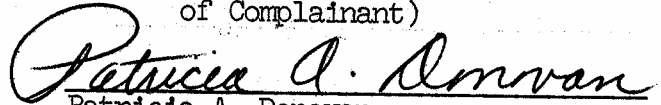
April 22, 1986
Date:

April 28, 1986
Date:

Respectfully submitted,



Michael Hardiman
Assistant General Counsel
PA Human Relations Commission
711 State Office Building
Broad and Spring Garden Street
Philadelphia, PA 19130-4088
(Counsel for Commission on behalf
of Complainant)



Patricia A. Donovan
Assistant General Counsel
(Counsel for School District)

**I COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

MARION L. WARD, Complainant

v.

SCHOOL DISTRICT OF PHILADELPHIA, Respondent

Docket No. E-20335

AMENDED FINAL ORDER

AND NOW, to wit, this 2nd day of June, 1986, upon due consideration of the Joint Petition For Amendment To Final Order, and pursuant to the provisions of Section 9 of the Pennsylvania Human Relations Act, as amended, the Pennsylvania Human Relations Commission hereby amends its Final Order issued November 26, 1985 and now

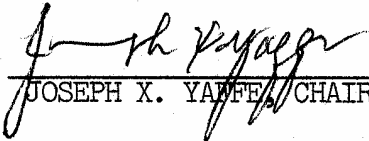
ORDERS

1. That the Respondent cease and desist from discrimination against the Complainant because of her race, Black, and her opposition to practices forbidden by the Act.
2. That the Respondent pay the Complainant the sum of two thousand, four hundred and fifty dollars and no cents (\$2,450.00) which represents salary she would have earned had she coached girls' intramural track in 1981, 1982, 1983 and 1984, plus 6% interest per annum accrued for each of the foregoing years until paid, and make any necessary corrections/annotations to the Complainant's payroll and personnel records which are impacted on by virtue of such payment.
3. That the Respondent remove from the Complainant's personnel file any and all records related to discipline imposed during the 1980-1981 school year.
4. That the Respondent cease and desist from utilizing race as a criteria regarding assignment of ROSTER duties in the physical education department AT GEORGE WASHINGTON HIGH SCHOOL and/or that it cease utilizing seniority as a factor in such ROSTER assignments in THE PHYSICAL EDUCATION DEPARTMENT AT GEORGE WASHINGTON HIGH SCHOOL where the utilization of seniority has a disparate impact on black teachers.
5. That the Respondent develop and implement a ROSTER assignment formula FOR THE PHYSICAL EDUCATION DEPARTMENT AT GEORGE WASHINGTON HIGH SCHOOL which, to the extent possible, equally divides both the preferred and non-preferred ROSTER assignments within the physical education department at George Washington.
6. The Respondent shall insure that the percentage of black teachers receiving non-preferred roster assignments in THE PHYSICAL EDUCATION DEPARTMENT AT GEORGE

WASHINGTON HIGH SCHOOL shall not exceed percentage of white teachers receiving non-preferred assignments.

7. That Respondent shall provide satisfactory written proof of compliance with the terms of this Order to the Commission within thirty days of the date of the Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 

JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:



ELIZABETH M. SCOTT, SECRETARY