

*closed 8/16/78*

Sandra Bernier )  
New Hampshire Commission for )  
Human Rights )  
and )  
M. M. Mades Co., Inc. )  
\_\_\_\_\_ )

ORDER OF THE COMMISSION

Sitting Commissioners: Walter E. Gibbs, Chairman;  
Sylvia Figueredo,  
Romeo J. Rejimbál

The Commission denies respondent's motion for a Finding at Default.

Complainant (Sandra Bernier) filed a charge of discrimination with the New Hampshire Commission for Human Rights (the Commission) and dually with the United States Equal Employment Opportunity Commission on February 9, 1977, alleging discrimination in employment against Respondent (M. M. Mades Co., Inc.) in that she was denied hire because of her sex (female).

Following her investigation, Commissioner Gail Paine Found Probable Cause and offered to conciliate the complaint with a Proposed Agreement, cover letter requesting Mades accept, amend, or reject in whole or in part. On 16 September 1977 Robert J. Mades answered Commissioner Paine, stating her judgment was totally unacceptable and requesting a review (hearing). Hearing was held 7 April 1978 and 12 April 1978.

Testimony given at the Hearing included the facts that in late 1976, M. M. Mades Co., Inc., bought out the facilities of Foster Meat Packing Company and was preparing to move its operation from its Massachusetts site to Bedford, New Hampshire. As part of Mades effort to fill its labor needs, Foster personnel records were made available to Mades who established a system of grading applicants 1, 2, and 3, with 1 being the highest rating. The Commission's photostatic copy of the Bernier job application form, Exhibit 1-E, was placed in evidence, showing a circle around #1 and an additional mark encompassing #2 and #3. Mades' attorney submitted the original job application form which apparently had no circle around #1. On close examination, it is the Commission's opinion that a circle around #1 had been erased from the original form. The form was not placed in evidence. However, the record shows that it was submitted for examination.

Mades testified further that Bernier was not to be considered for employment because of her record of absenteeism and disruptive talkativeness while employed at Foster Beef. This information was supplied to Mades by Bernier's former supervisors at Foster Beef.

Mades further testified that Bernier was not recommended for hire by Mr. Steve Foster, former owner of Foster Beef. Steve Foster testified that he had no recollection of recommending or not recommending any former employee to Mades.

Phil Simons, currently employed by Mades and Bernier's former supervisor at Foster Beef, testified that Bernier had had a record of absenteeism and talkativeness while employed at Foster Beef. Under examination Simons admitted never having given Bernier written reprimands or warnings, had never threatened termination, and that at no time was the productivity of his department jeopardized as a result of Bernier's actions. Simons also testified that on several occasions Bernier had successfully performed complete ham boning procedures at Foster Beef Company.

Mades testified that in his entire history as an employer in Massachusetts and now in Bedford, New Hampshire, he had never employed a female ham boner, and that the only boning operation conducted for M. M. Mades Co., Inc., by females are in the "fowl" department where, by Mades' admission, the work is of a "lighter" nature. The Commission notes that ham boning operators at M. M. Mades Co., Inc., represent the Company's highest paid hourly workers.

Bernier testified that she was never made aware by Mades of any reason for her not being hired by Mades nor was she ever made aware during the four years she was employed by Foster Beef Company of any job deficiencies.

Testimony was offered by a Mades supervisor that because ham boning involved lifting of 30-40 pound weights, there was "no way a woman of her (Bernier) stature could do it."

The Commission notes that another qualified female boner, formerly employed by Foster Beef Company, was not hired by Mades, yet a male boner with no professional experience was hired as a boner, and subsequently had to be relieved of his responsibilities although enjoying continued employment at M. M. Mades Co., Inc.

As a result of the many inconsistencies in testimony and Mades' admitted history of never having hired a female into its ham boning operation, it is the unanimous opinion of the Commission that Mades was predisposed not to hire females in its ham boning operation and that Bernier was refused hire solely because of her sex, in violation of RS354-A:8, I.

The Commission notes Mades' attorney's reference to a prima facie formula, citing Scarborough v. Arnold ---NH--- October 24, 1977 (sic: The Commission assumes this reference is to Green v. McDonnell Douglas Co., U.S. Supreme Court, 411 U.S. 792 5 FEP Cases 965, at which the formula for prima facie case was developed.

However, the Commission also relies on King v. New Hampshire Department of Resources and Economic Development, 1st U.S.D.C. #76-184, where the Court ruled --- "Where a prima facie case of animus has been shown, it may be fairly presumed that the employer has failed to adequately consider the plaintiff's application."

It is the opinion of the Commission that such failure to adequately consider Bernier's application constitutes a refusal to hire because of sex in violation of RS354-A as amended.

Sandra Bernier )  
New Hampshire Commission for )  
Human Rights )  
 )  
and )  
 )  
M. M. Mades Co., Inc. )  
 )

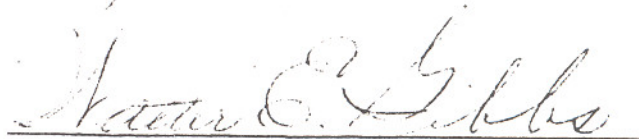
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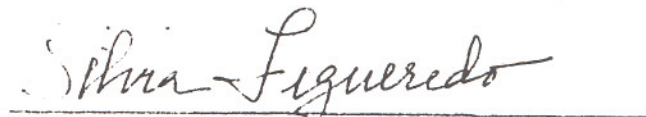
REMEDIES

1. M. M. Mades Co., Inc., will immediately Cease and Desist all employment practices prohibited under RS354-A as amended and Title VII of the United States Civil Rights Act of 1964 as amended.
2. Mades will submit to the Commission for its approval, its revised application for employment form that has deleted from it all material prohibited under RS354-A:8, III.
3. Whenever a vacancy exists in the ham/beef boning operations at M. M. Mades Co., Inc., that vacancy shall be posted in a conspicuous place on all employee bulletin boards, and all other advertisements for help shall contain the phrase "equal opportunity employer, male/female."
4. For the next two (2) years, at regular six (6) month intervals, M. M. Mades Co., Inc., shall submit to the Commission a report containing the following information:
  - A. Number of ham/beef boners currently employed;
  - B. The number of ham/beef boner positions vacant during the period;
  - C. The number of applications for the vacancies, broken down by sex;
  - D. The number of vacancies filled, broken down by sex.

5. M. M. Mades Co., Inc., shall compensate Bernier with back pay in the amount of \$119.51 arrived at in the following manner: Gross amount Bernier would have earned had she been employed by M. M. Mades Co., Inc., for the period beginning February 14, 1977, through April 12, 1978, less Bernier's gross income for the like period, plus 6% interest. (Attachment A)
6. M. M. Mades Co., Inc., shall pay attorney's fees for Bernier in the amount of \$1717.60. (Attachment B)
7. All awards contained in paragraph 5 shall be made payable to Sandra Bernier and mailed, return receipt requested, to the Commission, and the awards contained in paragraph 6 shall be made payable to Sheehan, Phinney, Bass & Green, and mailed to the Commission, return receipt requested.
8. M. M. Mades, Co., Inc., shall post paragraphs 1, 2, 3, and 4 of this Order on all employee bulletin boards.

So Ordered.

  
\_\_\_\_\_  
Walter E. Gibbs, Chairman  
N.H. Commission for Human Rights

  
\_\_\_\_\_  
Sylvia Figueredo, Commissioner  
N.H. Commission for Human Rights

  
\_\_\_\_\_  
Romeo J. Rejmbal, Commissioner  
N.H. Commission for Human Rights

Bernier v. M.M.Mades Company  
(#ES-1495)

Attachment A - Subject to Final Confirmation

Back pay for period February 14, 1977, through  
April 12, 1978:

60 weeks + 3 days at \$3.30 per hour	\$7,999.20
less Bernier's gross income for like period	<u>3,094.00</u>
	\$4,945.20
plus 6% interest	<u>294.31</u>
Total Award	\$5,119.51

STATE OF NEW HAMPSHIRE

Hillsborough, SS.

Superior Court

April Term 1979

M. M. Mades Co., Inc.

vs.

Sandra Bernier and N. H. Commission for Human Rights

MOTION FOR LEAVE TO WITHDRAW APPEARANCES OF ATTORNEYS

Now comes the attorneys, Philip S. Hollman and Arthur E. Porter (hereafter the "Attorneys") representing M. M. Mades Co., Inc. (hereafter the "Company")) in the hearing before the N. H. Commission for Human Rights (hereafter the "Commission") and say:

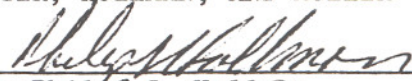
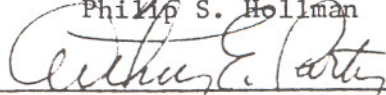
1. The Commission found adversely after hearing against the Company.
2. The Company well after the Commission's order of August 1978 filed a Chapter 11 bankruptcy (the Bernier claim, and the orders of the Commission were not significant in the filing of the Chapter 11).
3. The Company cannot engage counsel without the order of the Federal Bankruptcy Court.
4. A notice of an order of Judge Goode was sent to the Attorneys on March 8, 1979, indicating a hearing to be held on May 8, 1979, on the merits.
5. The Company was advised of the hearing, and the Company was not able to continue the Attorneys' services in view of the bankruptcy.
6. The Attorneys filed their withdrawals with this Court in view of their lack of authority on March 30, 1979, and all counsel were sent withdrawal cards.

WHEREFORE, the Petitioners pray:

In view of the above facts, and other good causes, the Attorneys now request the leave of the Court to withdraw their appearances under ROC 15.

Respectfully submitted,  
PORTER, HOLLMAN, AND MULLER

Dated: April 6, 1979

  
\_\_\_\_\_  
Philip S. Hollman  
  
\_\_\_\_\_  
Arthur E. Porter

Hillsborough, ss

Superior Court

September Term, 1978

M.M. MADES CO., INC.

vs.

SANDRA BERNIER and  
N.H. COMMISSION FOR HUMAN RIGHTSPETITION FOR JUDICIAL REVIEW OF ORDER OF THE NEW HAMPSHIRE  
COMMISSION FOR HUMAN RIGHTS UNDER RSA 354-A:10

NOW COMES M. M. Mades Co., Inc., a corporation duly established by law, with a principal place of business located at Fosters Road, Bedford, County of Hillsborough, State of New Hampshire, and complains against Sandra Bernier, of 1107 Hayward Street, Manchester, County of Hillsborough, State of New Hampshire, and the New Hampshire Commission for Human Rights, a State Commission established under RSA 354-A:4, with executive and administrative offices located at 66 South State Street, Concord, County of Merrimack, State of New Hampshire, and says:

1. Sandra Bernier (hereinafter Bernier) filed a complaint against M. M. Mades Co., Inc. (hereinafter Mades) with the New Hampshire Commission for Human Rights (hereinafter Commission) alleging that Mades discriminated against her by denying her employment because of her sex.
2. A hearing on this complaint was held before the Commission on April 7, 1978 and April 12, 1978.
3. By letter dated August 16, 1978 the Commission notified Mades through counsel of its order. By the terms of its order, the Commission found, inter alia, that Mades was predisposed not to hire females in its ham boning operation and that Bernier was refused employment solely because of her sex, in violation of RSA 354-A:8, I. In its statement of Remedies, the Commission, inter alia, decreed that Mades



was to compensate Bernier with back pay in the amount of \$5,119.51, plus 6% interest, plus attorney's fees in the amount of \$1,717.60.

4. Mades is aggrieved by the order of the Commission not only with respect to damages and attorney's fees awarded Bernier but also with respect to other provisions of the Commission's statement of Remedies.

5. Mades is further aggrieved by the Order of the Commission in that:

(a) At the inception of the hearing and throughout the proceedings before it, the Commission was prejudiced against Mades and was invidiously predisposed to rule against it regardless of the evidence.

(b) Throughout the hearing, the Commission arbitrarily and capriciously refused to consider relevant and material evidence in support of legitimate theories of defense raised by Mades and arbitrarily and capriciously refused to permit Mades to advance legally recognized defenses to the sex discrimination complaint of Bernier.

(c) During the course of hearing and after the close of the evidence, the Commission improperly denied motions made by Mades to protect its right to administrative due process.

(d) During and throughout the course of hearing and after the close of the evidence, the Commission patently denied Mades administrative due process.

(e) Such findings of fact as the Commission did make in its order were not supported by sufficient evidence on the record considered as a whole.

(f) The Order and Remedies of the Commission are predicated upon an erroneous application of law to the facts of the case as appear upon the record.

(g) The Commission arbitrarily and capriciously refused to rule upon the requests of Mades for findings of fact and rulings of law.

(h) The Commission palpably denied Mades a full and fair hearing in accordance with basic standards of justice and fairness, as required by the law.

(i) The Commission's Order and Remedies are on their face contrary to law and legally insufficient.

6. This Petition is filed pursuant to RSA 354-A:10 so that Mades may obtain judicial review of the Commission's Order and statement of Remedies.

WHEREFORE, Mades moves that the Order and Remedies of the Commission in this case be set aside, that the Commission and Bernier be ordered to pay the reasonable costs and attorney's fees of Mades, and for such other and further relief as to the Court may seem just.

Respectfully submitted,  
M. M. Mades Co., Inc., by its attorneys,  
Porter, Hollman & Muller  
155 Myrtle Street  
Manchester, N.H. 03104  
669-4777

By: \_\_\_\_\_  
Philip S. Hollman

I certify that on the thirtieth day of January 1979  
mailed Philip S. Hollman, Esquire and  
a copy of the within motion was ~~delivered~~ to Steven J. McAuliffe, Esquire opposing couns

Claudia C. Dawson  
Atty. for Sandra Bernier

A hearing on within motion is ..... desired by opposing counsel

.....  
Atty. for

NOV E-3862

MOTION for  
Early hearing on the merits

M.M. Mades Company, Inc. ....

vs.

Sandra Bernier N.H. Commission  
of Human Rights .....

*Motion granted  
date to be assigned  
during week of May  
17/79*

*Judith S. Cook  
3/8/79*

JAN 30 1979  
SUPERIOR COURT  
CLERK

The State of New Hampshire

SUPERIOR COURT

Hillsborough, SS.

January

Term, 1979

M.M.Mades Co., Inc.

v Sandra Bernier and New Hampshire  
Commission for Human Rights

No. E-3862

MOTION

The counsel for Sandra Bernier moves as follows:

That the above-entitled matter be scheduled, at the Court's convenience,  
for an early final hearing on the merits.

The clerk is requested to put this motion upon the next list

SHEEHAN, PHINNEY, BASS & GREEN PROF. ASS'N

by: *Claudia C. Dawson*

Atty. for Sandra Bernier

Date January 30 1979

(over)

THE STATE OF NEW HAMPSHIRE

Superior Court

Hillsborough, ss.

January..... Term, 19 79

M. M. Mades Co., Inc.

vs

Sandra Bernier and N.H. Commission  
for Human Rights

WITHDRAWAL

To the Clerk of the Superior Court.

In the above action please note my/our withdrawal as counsel for

M. M. Mades Co., Inc.

I/we have notified my/our client of withdrawal by letter dated March 29, 1979, and mailed to the following address:

P.O. Box 4997

Manchester, N.H.

Duplicate withdrawal card ~~xxxxxx~~ mailed to Steven J. McAuliffe, Esq., Claudia Damon, Esq., and to Berel Firestone, Exec. Dir. N.H. Comm. for Human Rights

Opposing Counsel ..... March 29, 19 79

Signed *Arthur E. Porter*  
Arthur E. Porter

Date ..... March 29, 19 79

Sandra Bernier	)	Docket Numbers
New Hampshire Commission for	)	ES-1495-468-270
Human Rights	)	E.E.O.C. #011770842
	)	
and	)	EXCEPTION OF RESPONDENT
	)	
M. M. Mades Co., Inc.	)	
_____	)	

Now comes the respondent in the above matter and through counsel excepts to the Order of the Commission and its Remedies, which Order and Remedies were received by respondent's counsel on August 17, 1978, as follows:

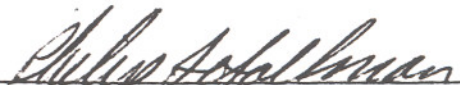
1. The Order of the Commission is predicated upon factual findings not supported by the record in this case.
2. The Order of the Commission is predicated upon erroneous rulings of law.
3. The Remedies of the Commission are likewise predicated upon erroneous findings of fact and erroneous rulings of law.
4. The procedures employed by the Commission during the course of hearing in this case were arbitrary, prejudicial to the respondent, and contrary to administrative due process and basic standards of justice and fairness.
5. The procedures employed by the Commission after the close of evidence in this case were arbitrary, prejudicial to the respondent, and contrary to administrative due process and basic standards of justice and fairness. In particular, the Commission violated administrative due process by communicating with complainant's counsel after the hearing

without notifying respondent's counsel as to that fact and eliciting evidence from complainant's counsel without giving respondent's counsel the benefit of knowing what evidence was being elicited, the fact that additional evidence was being requested from complainant's counsel, or the fact that in effect the hearing process was being re-opened only for the purpose of hearing the complainant's evidence. Among other things, the Commission thereby deprived the respondent of the right of cross-examination.

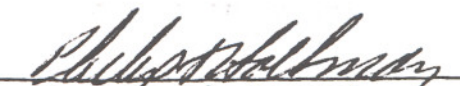
6. The Commission failed to rule upon any of the Requests for Findings of Fact or Rulings of Law of the respondent and thereby totally evaded its responsibility to set forth the precise basis upon which its Order and Remedies were being made.

7. All of the Motions made by respondent during the hearing and after the hearing were improperly denied.

Respectfully submitted,

  
Respondent's Counsel

I certify that on this 17th day of August, 1978 a copy of the within Exception was mailed to Claudia Damon, Esquire, Counsel for the Complainant.

  
Respondent's Counsel

STATE OF NEW HAMPSHIRE  
COMMISSION FOR HUMAN RIGHTS

\* \* \* \* \*  
Sandra Bernier,  
Complainant  
vs.  
M. M. Mades, Co., Inc.,  
Respondent  
\* \* \* \* \*

\*  
\*  
\* Case Assigned for  
\* #ES1495468-270  
\*  
\* #EEOC - 011770842  
\*  
\*  
\*

ANSWER TO RESPONDENT'S MOTION

NOW COMES the complainant and says in answer and opposi-  
tion to respondent's motion as follows:

1. Her attorney had a jury trial in Keene, New Hampshire during the week of April 17, which had been anticipated to last one day but which in fact consumed four days.
2. Her attorney's secretary called the New Hampshire Commission for Human Rights on Friday, April 21, 1978, when it became apparent that the complainant's requests for findings of fact and rulings of law could not be completed in the ten days suggested by the New Hampshire Commission for Human Rights even though due diligence and best efforts were being used, and was told that an extension of time would be granted as long as the requests were submitted during the week of April 24, 1978.
3. The ten days suggested by Commissioner Gibbs and agreed to by complainant and respondent at the conclusion of the April 12, 1978 hearing expired at the end of the day on Saturday, April 22, 1978.
4. The common practice in the courts is that when a deadline falls on a weekend or holiday the due date becomes the next working day, which in this case would have been April 25, 1978.



5. Complainant filed her requests on April 27, 1978 by hand carrying them to the New Hampshire Commission for Human Rights.
6. Respondent was not required to file its requests until April 25, 1978, however it did file its requests by letter dated April 13, 1978.
7. Complainant's attorney received a copy of respondent's requests on April 14, 1978, eleven days before they had to be filed.
8. The requests filed by respondent and the complainant reflected their respective legal positions, which were known to all participants in and observers to the hearing before the New Hampshire Commission for Human Rights, and in no way did complainant benefit from having received respondent's requests prior to filing her own.
9. There has been no prejudice to respondent which arises out of or in connection with the filing of any requests.

WHEREFORE, complainant requests that the New Hampshire Commission for Human Rights deny respondent's motion to disregard complainant's requests for findings of fact and rulings of law.

Respectfully submitted,

SANDRA BERNIER

By Her Attorneys:

SHEEHAN, PHINNEY, BASS & GREEN  
PROF. ASS'N

By:

  
\_\_\_\_\_  
Claudia C. Damon

I certify that on the first day of May, 1978, I mailed a copy of the foregoing Answer to Respondent's Motion to Philip Hollman, Esquire.

Claudia C. Damon  
Claudia C. Damon

STATE OF NEW HAMPSHIRE  
COMMISSION FOR HUMAN RIGHTS

\* \* \* \* \*

Sandra Bernier,	*	
Complainant	*	Case Assigned for
	*	#ES1495468-270
vs.	*	
	*	#EEOC - 011770842
M. M. Mades, Co., Inc.,	*	
Respondent	*	

\* \* \* \* \*

COMPLAINANT'S REQUESTS FOR FINDINGS  
OF FACT AND RULINGS OF LAW

NOW COMES complainant and respectfully requests that the Commission for Human Rights make the following Findings of Fact and Rulings of Law in the above-captioned matter.

Findings of Fact

1. Complainant filed a charge of discrimination with the New Hampshire Commission for Human Rights on or about February 9, 1977, shortly after receiving notification from the respondent that she would not be hired.
2. Robert Mades had not read R.S.A. 354-A at any time prior to April 7, 1978.
3. The application form of Mades Co. asks for birthplace, sex, dependents, marital status, physical handicaps, height, weight, age.
4. Complainant clearly fell within the group entitled to initial consideration by the individuals charged by Mades Co. with personnel responsibilities, in that she submitted her application.
5. Complainant was not hired by Mades Co.
6. Complainant's application for employment was dated December 15, 1976; nothing on the application indicated for what position complainant was applying.

THE STATE OF NEW HAMPSHIRE  
NEW HAMPSHIRE COMMISSION FOR HUMAN RIGHTS

Case #ES 1495468-270  
EEOC 011770842

Sandra Bernier vs. M. M. Mades Co., Inc.

RESPONDENT'S MOTION TO CLARIFY  
RECORD AND TO NOTE OBJECTION TO  
PREJUDICIAL PROCEDURAL ACTIONS

The Respondent in the above matter hereby moves to clarify the record of proceedings in this case and to have its objection noted to prejudicial procedural actions on the part of the Commission, as hereinafter more particularly described:

1. The Respondent requests that the record show the seating and table arrangements which prevailed in the hearing room on Friday, April 7, and which Respondent assumes will continue to exist upon the hearing resumption date, April 12, 1978. They are as follows: The hearing is being held in Room 307 of the Legislative Office Building in Concord. There are three large tables in this room, each probably twelve feet long. They are arranged in an inverted U-shaped configuration. The three commissioners hearing the case are sitting at the table at the top of the inverted U. The executive director of the commission is sitting at the same table as the commissioners, just to the left of Commissioner Rejimbál and two seats away from Commissioner Gibbs. Commissioner Figueredo is sitting to the right of Commissioner Gibbs, who is presiding as chairman. Respondent and its counsel occupy one leg of the inverted U, and the complainant and her counsel occupy the other leg of the inverted U. Attorneys Porter and Hollman, respondent's counsel, and Robert Madés are sitting at respondent's table. Attorney Hollman is the closest of those three to the table used by the commissioners and the executive director. Attorney Hollman's seat is close enough to the commissioners so that he, when seated, is in a position to hear at least a portion of off-the-record conversations at the commissioner's table.

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THE STATE OF NEW HAMPSHIRE

Case #ES 1495468-270  
E.E.O.C. 011770842

Sandra Bernier

vs.

M. M. Mades Co., Inc.

A N S W E R

NOW COMES M. M. Mades Co., Inc., Defendant, and in answer says:

1. The defendant, Mades, denies that it discriminates against hiring women.
2. The defendant, Mades, claims that plaintiff Bernier was not qualified for the job of being a boner in a meat packing plant.
3. The defendant, Mades, was informed by employers at Foster Beef Company, plaintiff's former employer, that the plaintiff would not meet Mades' standards in that at Foster Beef Company the plaintiff had a record of frequent absence and tardiness. In addition, Foster Beef Company supervisors told the defendant that Ms. Bernier was continually chatting with her co-employees, thereby interfering with both her work and the work of her co-employees.
4. Sandra Bernier did not have the capability and had not been suitably trained to perform the type of ham boning done by the defendant.
5. Foster Beef Company only required boning employees to perform two simple boning operations, whereas the defendant, Mades, requires boning employees to perform much more complex and difficult boning tasks, for which the plaintiff was neither trained nor qualified.

WHEREFORE, the defendant prays that a finding of no improper discrimination against hiring the plaintiff be made in its favor and that the plaintiff's complaint be dismissed.

Respectfully submitted,  
M. M. MADES CO., INC.  
By its attorneys, Porter & Hollman

Dated: April 6, 1978

By: Arthur E. Porter  
Arthur E. Porter

I, Robert Mades, President of M. M. Mades Co., Inc., state that the facts set forth in the foregoing Answer are true to the best of my knowledge and belief.

Robert Mades  
Robert Mades

The State of New Hampshire  
Hillsborough, ss.

On this 6th day of April, 1978, personally appeared the above-named Robert Mades, known to me, and made oath that the facts stated in the foregoing Answer are true to the best of his knowledge and belief.

Arthur E. Porter  
Justice of the Peace/Notary Public

My commission expires:

Aug 5, 1981