

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GREGORY L. BOJASKI,

Complainant,

v.

DOCKET NO. EH-54-86

CAMC - GENERAL DIVISION,

Respondent.

FINAL ORDER

On the 19th day of November, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Theodore R. Dues, Jr. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the amendments set forth below.

The Commissioner hereby amends the Findings of Fact and Conclusions of Law of the Hearing Examiner by deleting entirely the Discussion, page 5, without substitution.

It is hereby ORDERED that the complainant prevail in this matter. It is further ORDERED that the complainant is entitled to recover from the respondent incidental damages for embarrassment and humiliation in the amount of \$500.00.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order, as amended by this Order.

It is further ORDERED that the respondent cease and desist from further acts of discrimination in conditions of employment on the basis of a handicap against the complainant and any other employee or applicants for employment.

The respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this Order and that they have the right to judicial review.

Entered this 22nd day of January, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamilton
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

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GREGORY L. BOJASKI,
Complainant,

v.

Docket No. EH-54-86

CAMC - GENERAL DIVISION,
Respondent.

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on March 6, 1986. The hearing was held in the Conference Room, Daniel Boone Building, 405 Capitol Street, Charleston, West Virginia. The hearing panel on each day consisted of Theodore R. Dues, Jr., Hearing Examiner. The parties waived the presence of a Hearing Commissioner.

The Complainant appeared in person and by his counsel, Sharon Mullens. The Respondent appeared by its representative, Christine Antoinette Lyon and by its counsel, Fred F. Holroyd.

ISSUES

1. Is the Complainant a handicapped individual within the meaning of a West Virginia Human Rights Act.
2. If so, did the Respondent make reasonable efforts to accomodate the Complainant's handicapped?

PROPOSED FINDINGS OF FACT

1. The Complainant applied for an attendant position

with the Respondent on or about May 25, 1985.

2. The Complainant was offered such a position with the Respondent and pursuant to that offer was given a pre-employment physical. On or about June 28, 1985, by Respondent's doctor, Kenneth G. MacDonald.

3. Complainant reflected in his medical history background that he had a disk removed from his back in 1977.

4. Dr. MacDonald failed the Complainant on his physical examination. His opinion was based upon his interpretation of a conversation with the Complainant that the Complainant had a recurrent back pain in early 1985 which result in the Complainant having to miss approximately one (1) month of his employment as an elementary Special Education Teacher.

5. In fact, the Complainant had advised Dr. MacDonald that he had missed approximately one (1) month from his usual exercise routine due to sustaining colds and being absent for several weeks and then upon returning to his exercise routine having hurt his back.

6. The Complainant was not provided an opportunity to review his written medical history for accuracy. Accordingly, the Complainant apparently was unaware of the misinterpretation of his comments regarding the subsequent back injury.

7. The Complainant indicated on his 1985 application that he has previously worked for the Respondent for the years 1977 to 1983 in the position of attendant; the same position for which he was currently applying.

8. Dr. MacDonald was of the opinion that the Complainant

was handicapped as a result of having had the operation to remove a disk.

9. The evidence reflects that Dr. MacDonald found no indication of current pain or any other negative clinical findings with Complainant's back. The evidence further reflects that Dr. MacDonald did not take a current X-ray of the Complainant's back at the time this pre-employment examination and decision by him was made.

10. The job of Nursing Attendant requires considerable manipulation and/or lifting of patients.

11. The evidence reflects that the Respondent's normal procedure for lifting patients was to have assistance provided to the Nursing Attendants while performing the lifting.

12. The Personnel Director for Respondent testified that no accomodation was possible for the Complainant and further that she made no inquiries of the appropriate supervisory personnel to determine the possibility of accomodating the Complainant's perceived handicapped.

13. During his previous employment as earlier reflected herein, the Complainant performed his duties as a Nursing Attendant in a satisfactory and competent manner.

14. The specific job duties of a Nursing Attendant included catheterizing, lifting, weighing, adjusting tractions, and giving enemas, bathing and transporting patients, taking temperatures and pulse rates and running errands for patients and nurses.

15. The Complainant was examined by the orthopedic

surgeon who had operated on him in 1977 and was found to be in excellent physical condition and able to perform all of the duties required in the attendant position.

16. The Complainant sustained emotional distress and humiliation as a result of what he believed to be discriminatory conduct on the part of the Respondent.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter herein. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

2. As in all cases, the Complainant has the burden of proof and establishing that he is a qualified **handicapped** individual and that the failure to hire was motivated, in part, by his handicap without reasonable efforts to accomodate the same.

3. The Complainant established a prima facie case by introducing evidence which indicated that he is handicapped within the meaning of Section 4.02 of the Interpretative Rules, that he was able and competent to perform the Nursing Attendant job with reasonable accomodation and that to his knowledge no reasonable accomodation was made.

4. The Respondent failed to show it made reasonable efforts to accomodate the Complainant's handicap, or, to accomodate the Complainant's handicap would have caused it undue hardship.

5. Respondent's failure to reasonably accomodate the

Complainant's handicap constitutes an unlawful discriminatory practice in violation of the West Virginia Code § 5-11-9(a).

6. The Complainant is entitled to damages for embarrassment and humiliation in the amount of \$500.00.

DISCUSSION

This case is one in which the Respondent made an error in judgment which resulted in a discriminatory act against a handicapped individual. However, notwithstanding the testimony of the Personnel Director that no efforts to accomodate were made, that attitude was not a malicious one and was motivated by what the Director felt to be a legitimate perspective on the practicality of rehiring the Complainant in the Nursing Attendant position.

In addition, the damages were set at the recommended amount due to the absence of the Complainant's testimony of any legitimate deep seated problems as a result of the actions taken by the Respondent. Accordingly, it is the Examiner's position that the Complainant should recover nominal damages as a result of the unlawful act of the Respondent, but more significant damages for Respondent's actions would be inequitable and unjustified.

PROPOSED ORDER

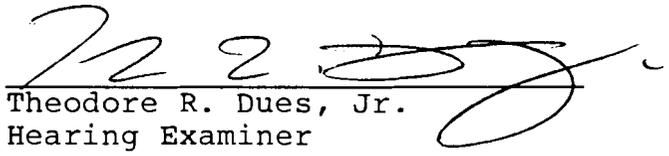
The Examiner recommends that the Commission issue a final Order as follows:

1. Judgment for the Complainant; and

2. Damages for embarrassment and humiliation in the amount of \$500.00.

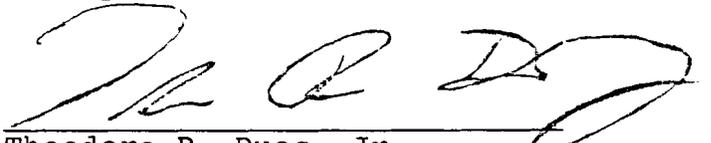
DATED: October 7, 1986

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., Hearing Examiner, do hereby certify that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon Sharon M. Mullens, Esq., Assistant Attorney General, 1204 Kanawha Boulevard, E., Charleston, West Virginia, 25301, and Fred F. Holroyd, Esq., 209 Washington Street, W., Charleston, West Virginia, 25302, by mailing a copy of the same in a properly addressed envelope on this the 7th day of October, 1986.



Theodore R. Dues, Jr.
Hearing Examiner