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WV HUMAN RIGHTS COMM.

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

TELEPHONE 304-348-2616

May 29, 1990

GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

Mr. Alphonso Ferguson
160 1/2 Marcum Terrace
Huntington, WV 25701

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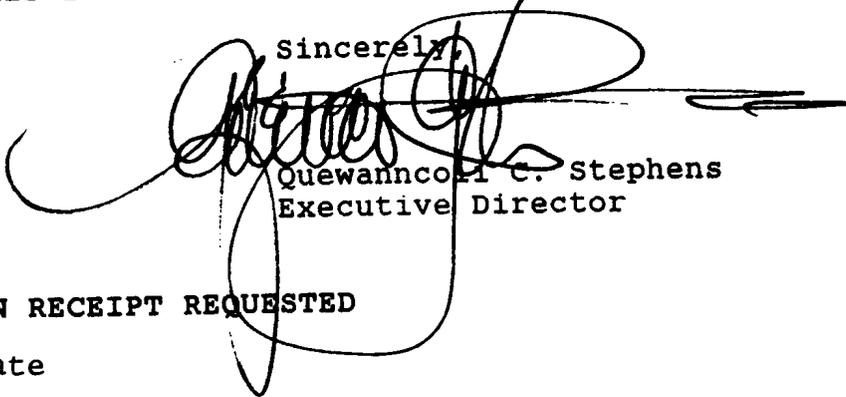
Paul E. Jordan, Assistant Attorney General
Christopher G. Moffatt, Assistant Attorney General
1018 Kanawha Blvd., E.,
Suite 700
Charleston, WV 25301

Re: Ferguson v. West Virginia Board of Regents, ER-166-87

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,



Quewanncoii C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

cc: Secretary of State

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code §5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ALPHONSO M. FERGUSON,

Complainant,

v.

DOCKET NO. ER-166-87

WEST VIRGINIA BOARD OF REGENTS,

Respondent.

FINAL ORDER

On 14 March 1990 the West Virginia Human Rights Commission reviewed the recommended decision filed in the above-styled matter by hearing examiner Theodore R. Dues, Jr. After consideration of the aforementioned, as well as the transcript of record, arguments and briefs of counsel and all exceptions filed in response to the recommended decision, the Commission decided to, and does hereby, adopt said proposed recommended findings of fact and conclusions of law as its own, including supplemental order entered by the hearing examiner on 24 July 1989, with such modifications and amendments as are set forth below:

In the subsection entitled "Proposed Order" of the examiner's recommended findings of fact and conclusions of law, paragraph B is modified to read: "Respondent shall pay to complainant the sum of \$2,500.00 in incidental damages as compensation for the humiliation, embarrassment, mental anguish and loss of personal dignity suffered by complainant as a result of respondent's unlawful discriminatory acts."

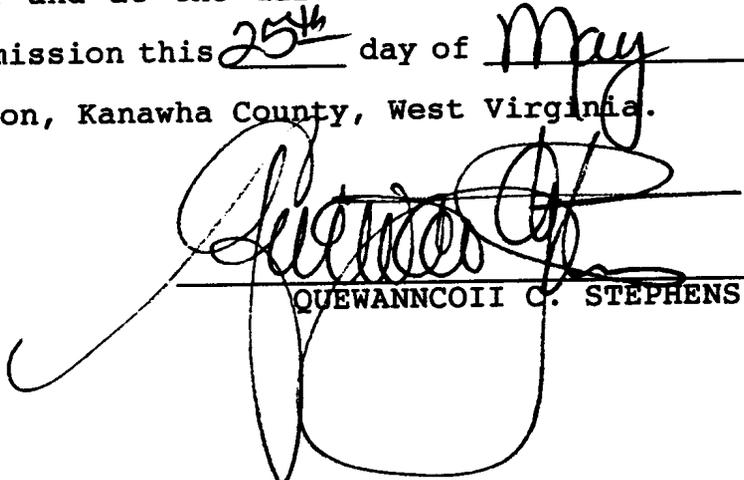
It is, therefore, the order of the Commission that the hearing examiner's recommended findings of fact and conclusions of law, and his supplemental order, be attached hereto and made a part of this final order, except as amended by this final order.

By this final order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they have ten (10) days to request that the Human Rights Commission reconsider this final order or they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 25th day of May, 1990 in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED
MAR -9 1989
CIVIL RIGHTS DIV.

ALPHONSO M. FERGUSON,

Complainant,

v.

DOCKET NO: ER-166-87

WEST VIRGINIA BOARD OF REGENTS,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter matured for public hearing on May 3, 1988. The hearing was held in the Cabell County Commission Court Room, Cabell County, Huntington, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner. The presence of a Hearing Commissioner was previously waived by the parties. The Complainant appeared in person and by his counsel, Sharon Mullens. The Respondent appeared by its representative, Edward Dzierzac and its counsel, Bruce Walker and Ann Ewart.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matter for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by

the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

ISSUES

1. Did the Respondent discriminate against the Complainant, on the basis of his race, in its decision to discharge him on or about July 17, 1986?

2. If so, to what relief is the Complainant entitled?

FINDINGS OF FACT

1. The Complainant is a black male.

2. The Complainant was employed by the Respondent on September 1981 in the capacity of Library clerk II. The Complainant's initial supervisor was Ann Howard.

3. The Complainant successfully completed the probationary period.

4. During his tenure, the Complainant was the only Black employed in the Health Science Library.

5. The position of library clerk II entailed: shelving books; shelf reading (going from book to book through the stacks to make sure they were in order); performing relief help at the circulation desk (checking in and checking out books and other reference material); photocopying materials requested for interlibrary loans, for institutions, doctors and other patrons; assisting patrons;

and maintaining the stacks (keeping books and materials in order and in a neat fashion).

6. During Howard's supervision, the Complainant worked from the hours 8:00 a.m. to 4:30 p.m., five days per week and once a month for a week at 3:00 p.m. to 11:00 p.m.

7. The Health Science Library is open 7 days a week and is open as late as 11:00 p.m., with only two medical student workers after 4:30 p.m. After Dzierzak became director of the Health Science Library, the Complainant was removed from the evening shift except for a period of time when he occasionally worked until 6:00 p.m. During Dzierzak's supervision, the Complainant's duties were the same.

8. Prior to Dzierzak's tenure, the Complainant had performed his duties in a satisfactory manner and had received no admonishment or counseling for any deficiencies in his responsibilities.

9. In 1986 Dzierzak performed a performance evaluation on the Complainant. This evaluation reflected a below average performance in certain areas. The Complainant felt this was unfair but indicated that he tried to improve in the areas cited, notwithstanding the way he felt.

10. At a later point and time, Phoebe Randal was made the Complainant's supervisor.

11. Randal made it a practice to follow the Complainant around the library and check behind him on a daily basis. The Complainant complained of this conduct to

Dzierzak. But Randal's behavior continued.

12. The Complainant reasonably perceived Randal's conduct as harassment.

13. Although Randal was the Complainant's supervisor, Dzierzak prepared the Complainant's performance evaluation.

14. During his tenure, the Complainant was the only library employee who Dzierzak assigned a supervisor.

15. During the Complainant's tenure, and under Dzierzak's administration, the Complainant performed his duties in a satisfactory manner.

16. During the Complainant's tenure, Dzierzak did nothing to monitor the accuracy of the information he was receiving from Randal, regarding the Complainant's performance.

17. During his tenure, the Complainant was not the sole employee responsible for the functions of his job. There were other employees, on shifts, and times, at which the Complainant, was not scheduled, that performed similar functions and were accountable for similar responsibilities.

18. Randal and Dzierzak conducted a time study on the duties of a Library Clerk II for the Health Science Library. The Complainant was not a participant in this time study. Also, the participants who did participate, knew they were being timed during the completion of their respective functions.

19. For the relevant period herein, no such time

studies were conducted on any other library position. While employed with the Respondent, the Complainant was ill with pancreatitis. One of the side effects of the medication that he was prescribed was to cause him to move slower than normal.

20. During the Complainant's tenure, Randal made racial statements to and in front of the Complainant.

21. On one occasion, Dzierzak instructed the Complainant to perform two different job tasks at once. As a practical matter, these tasks were impossible to be accomplished by concurrent effort.

22. The Complainant exercised due diligence in seeking employment after his termination.

23. As a result of his termination, the Complainant lost his health and hospitalization insurance, as well as, incurred a loss in pay.

24. The Complainant was embarrassed by his termination.

DISCUSSION

The Complainant established a prima facie case of race discrimination by introducing evidence to establish that: he is a member of the protected group; that he was qualified in, and did satisfactorily perform, the duties of Library Clerk II; that the terms and conditions of his employment were different than those for white employees; that his race was the motivation for the adverse treatment

in the terms and conditions of his employment; and that his discharge was motivated by his race as opposed to legitimate job related criteria. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Human Rights Commission v. Logan-Mingo Area Mental Health Agency Inc., 329 S.E.2d 77, 85 (1985); Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342 (1983).

The Respondent's position is that the Complainant failed to adequately perform his job responsibilities. However, this is inconsistent to the credible evidence of record. Due to the contrasting nature of the Complainant's account of his work performance and the Respondent's position, the Examiner placed considerable emphasis on the fact that prior to Dzierzak's tenure, the Complainant received no admonishments, nor, was his work in other way criticized or sited for deficiency. That, coupled with the fact that the Complainant's job responsibilities and duties did not change, in any significant manner, after Dzierzak became director, corroborates the Complainant's position that he in fact performed his job in a satisfactory manner. Accordingly, the weight of the evidence indicates that the Respondent's articulated reasons for its actions are in fact pretext for its unlawful discrimination against the Complainant. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter herein.

2. The Complainant established a prima facie case of race discrimination pertaining to the terms and conditions of his employment, as well as, in his discharge.

3. The Respondent articulated legitimate nondiscriminatory reasons for his actions.

4. The totality of the evidence indicated that the legitimate nondiscriminatory reasons articulated by the Respondent were in fact pretext for its unlawful discrimination against the Complainant.

5. Accordingly, the Complainant proved by a preponderance of the evidence that he was discriminated against in the terms and conditions of his employment, as well as, in his discharge on the basis of his race.

6. The Complainant incurred a loss of income and benefits as a result of the Respondent's conduct.

7. The Complainant suffered embarrassment and humiliation as a result of the conduct of the Respondent.

PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Commission award judgment for the Complainant and provide the following relief:

A. Back pay and benefits in an amount to be

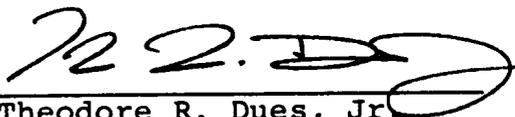
supplemented herein by subsequent Order of the Examiner. The parties are directed to submit updated calculations for the aggregate amount of lost pay and benefits incurred by the Complainant. The same is to be submitted within 10 days from the date of this Order.

B. Provided the Bishop case is not applied retroactively, then it is recommended that the Complainant be awarded \$10,000 for incidental damages for mental pain and anguish.

C. A cease and desist Order prohibiting the Respondent from committing further violations of the West Virginia Human Rights Act.

DATED: March 8, 1984

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

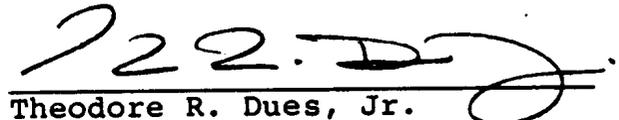
CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., Hearing Examiner, do hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Sharon Mullens, Esquire
Senior Assistant Attorney General
L & S Building, 4th Floor
812 Quarrier Street
Charleston, WV 25301

Bruce Walker, Esquire
Ann Ewart, Esquire
Bldg. 6 Crestmont Dr., Apt. 63
Charleston, WV 25311

by depositing the same in the United States mail postage prepaid on this 8th day of March, 1989.


Theodore R. Dues, Jr.
Hearing Examiner

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ALPHONSO M. FERGUSON

v.

DOCKET NO. ER-166-87

WEST VIRGINIA BOARD OF REGENTS

ORDER

The issue of backpay having matured for consideration, the Examiner does hereby recommend the following relief be awarded by the Commission.

Backpay. The Examiner adopts the calculations submitted by the Complainant and does hereby award backpay in the amount of \$7,062.00; being his loss of pay less his interim earnings.

DATED: JULY 24, 1989

ENTER:



THEODORE R. DUES, JR.
HEARING EXAMINER

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AUG - 4 1989

W.V. HUMAN RIGHTS COMM.