

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GERALDINE LESTER PERRY,

Complainant,

v.

Docket Number: ESA-334-93

WEST VIRGINIA DIVISION OF
NATURAL RESOURCES, PARKS
AND RECREATION SECTION,

Respondent.

ADMINISTRATIVE LAW JUDGES

FINAL DECISION

A public hearing in the above captioned-matter was convened on January 28, 1997 and continued on July 30 and 31, 1997, Kanawha County, West Virginia. Post hearing briefs were received through October 29, 1997.

The complainant, Geraldine Lester Perry, appeared in person and her case was presented by Barbara Evans Fleischauer, Esq. and Stephanie J. Milliron, Esq. The respondent, West Virginia Division of Natural Resources, Parks and Recreation Section, was represented by its counsel, Senior Assistant Attorney General Daynus Jividen.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent

that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

Findings of Fact

1. The respondent, West Virginia Division of Natural Resources, Parks and Recreation, hired complainant, Geraldine Lester Perry, as a secretary/bookkeeper at Beech Fork State Park in Cabell and Wayne Counties, in April of 1982. She began supervisory responsibilities in April 1984 and received regular promotions. Her current title is Office Assistant III.

2. Beech Fork State Park frequently operated without an assistant superintendent or a superintendent on the premises, other than complainant. In December of 1988, Superintendent Bill Moon was retiring and Superintendent Robert Gilligan was transferring to another park. Beech Fork State Park was without a superintendent approximately the next

four months. During this time period, Mr. Summers, then the superintendent at Babcock State Park, served as acting superintendent and came to Beech Fork only periodically.

3. Mr. Summers was placed as Superintendent at Beech Fork in May of 1989; however, he did not have an assistant for the next several months. When Superintendent Summers was gone from the park, complainant again operated the park.

4. In January of 1990, Dee Taylor was placed at Beech Fork State Park as Superintendent Summers' assistant. Ms. Taylor is the daughter of Clyde Crawley, who for many years trained men to become superintendents in the park systems. According to complainant, Assistant Superintendent Taylor confided to fellow employees, Geraldine Lester Perry and Daniel Wiley, that she was unhappy working for Superintendent Summers. Ms. Taylor denied making such a statement.

5. On August 18, 1992, Ms. Taylor received promotion to Superintendent of the Lost River State Park in Hardy County.

6. On September 23, 1992, due to the vacancy created by Ms. Taylor's promotion, the respondent posted the Beech Fork State Park assistant superintendent's job vacancy announcement at all state parks, wildlife management areas, forests and other locations. The job announcement was an "internal posting," meaning respondent did not request a Civil Service register due to the fact that a sufficient number of qualified applicants were received from within the agency.

7. Complainant reviewed the posting to make sure that she fulfilled all of the necessary training and special requirements. Graduation from a four-year college or university was listed as a training requirement for the position; however, there was a substitution provision. Experience in facility operation could be substituted for the training requirement on a year-for-year basis. This substitution option, coupled with complainant's conviction that she had experience, at Beech Fork State Park, actually performing all of the duties outlined in the job posting for Superintendent II at Beech Fork State Park led her to apply for the position.

8. Complainant has always been rated "Exceptional" in her performance evaluations. Superintendent Summers noted the following about complainant in the "Employee's Strong Point" section of her 1990 Annual Service Rating: that her job knowledge and willingness to help others is truly exceptional." Summers also noted that he had delegated additional responsibilities to complainant in her 1990 and 1991 Annual Service Ratings. His observation that she "[h]andles problems/emergencies during superintendent absence" was included in the "Brief Description of Employee's Duties" section. These Annual Service Ratings were reviewed and signed by Acting Director Cordie Hudkins.

9. Complainant applied for the position in September 1992. According to the complainant while she was typing her application, Superintendent Summers asked "are you really going to send that in?" and advised her that if she were "butch" she might have a

chance of getting the job. Superintendent Summers went on to say, “[t]hey want a man who can get his hands dirty or be able to use a snow plow to remove snow. Can you do that?” He asked if she “could crawl under a floor to repair plumbing.” The complainant believed Mr. Summers was attempting to discourage her.

10. During this conversation, according to the complainant, Superintendent Summers informed her that although she was qualified, he was voting against her appointment because she was a woman. Superintendent Summers told complainant that he wanted his next assistant to be a man. He explained that he had had his turn with a woman, Dee Taylor. He made it clear that it was someone else’s turn to work with a woman assistant, it was not going to be him again.

11. According to the complainant, she overheard Superintendent Summers’ telephone conversations with two males, Stan Mathis and Mike Tolley, in which he strongly encouraged them to bid on the position at Beech Fork State Park. Superintendent Summers also told complainant many times that the superintendents choose who they want to work with.

12. The West Virginia Division of Personnel “certified” five candidates as qualified for the vacant job at Beech Fork State Park. The complainant was one of those five candidates.

13. On October 8, 1992, the five qualified job applicants were interviewed by an interview committee comprised of Dr. Ronald Fortney, Chair and Chief of Operations of the

Parks System; Robert Beanblossom, District Administrator, Parks; and David Summers, Superintendent of Beech Fork State Park.

14. The five finalists for the job were: (1) Stanley Mathis, male, Superintendent of the Plum Orchard Lake Wildlife Management Area in Raleigh County; (2) Stephanie Brewer, female, Assistant Superintendent of Tomlinson Run State Park in Hancock County; (3) Tracey Newberry, male, Superintendent of the Point Pleasant Battlefield State Park in Mason County; (4) Ron Whitehar, male, Clerk/Assistant manager in the lodge at Blackwater Falls State Park; and (5) the complainant, Clerk in the administrative office at Beech Fork State Park.

15. At the conclusion of the interviewing process, the committee unanimously chose Stanley Mathis as the best qualified of the five candidates. According to Mr. Summers, its decision based on Mr. Mathis's post-graduate educational background in biology, his supervisory experience as an officer in the United States Army, his two years experience as superintendent of the Plum Orchard Lake Wildlife Management Areas and because Mr. Mathis had received specialized training in law enforcement and forestry.

16. The interview committee recommended to Cordie O. Hudkins, Jr., Chief of the Parks and Recreation Section, that the assistant superintendency of Beech Fork State Park be offered to Stanley Mathis.

17. According to Mr. Hudkins, after the recommendation of Stanley Mathis was made to him, he was informed by the Commissioner of Tourism, that "political pressure"

was being asserted to have the complainant named as assistant superintendent at Beech Fork State Park.

18. On October 20, 1992, Parks Chief Hudkins phoned the complainant to explain to the complainant the job selection process, to explain that political interference was not an acceptable part of the job selection process and to "get her [the complainant's] side of the story as to why this was happening."

19. During the course of the phone conversation between Parks Chief Hudkins and the complainant, the complainant stated that she felt she had not been treated fairly in the job selection process. She stated that Beech Fork Park Superintendent Dave Summers had made improper, sexist remarks to her, that he did not think the complainant was "butch" enough for the job and that "he [Summers] had had his term with a woman and did not want another woman as an assistant."

20. According to Chief Hudkins in response to hearing the complainant's allegations of improper remarks by Superintendent Summers, he decided to scrap the results of the October 8, 1992, job interview and schedule a new set of interviews for each of the five job candidates.

21. Chief Hudkins testified that in order to ensure that the second interviewing panel was fair and impartial he appointed himself and Assistant Chief of Parks and Recreation Kenneth Caplinger to sit as a two person panel to re-interview the five job candidates.

22. Chief Hudkins and Deputy Chief Caplinger began an inquiry to determine whether complainant's "allegations were credible or not." Their investigation relied on phone inquiries rather than face-to-face interviews. Hudkins and Caplinger called Dave Summers to ask if he really said those things. Superintendent Summers stated that he had never made any comments of that nature to complainant. They also called Dee Taylor to ask if Superintendent Summers had ever made "any bad remarks directed from him relative to her being a woman." Ms. Taylor responded that he had not and that they had never had any problems.

23. This conversation with Ms. Taylor led Chief Hudkins to conclude "that there was no need to go forward because the motive was not as stated. There was no proof at all that these things had occurred." Neither Hudkins nor Caplinger interviewed the complainant again or any of Superintendent Summers' other employees as part of their investigation. Hudkins and Caplinger concluded that there was "no basis to believe that there had been discriminatory conduct." They did not reduce the investigatory findings to paper. At the conclusion of their investigation, neither Caplinger nor Hudkins met with complainant to advise her as to their conclusions or that they had not found merit in her complaint.

24. Hudkins and Caplinger reinterviewed the same five applicants as the first committee on October 27, 1992. Prior to the interviews, Deputy Chief Caplinger knew the first panel's recommendation for the position was Stanley Mathis. Prior to the interviews, Chief Hudkins knew that Stanley Mathis was the choice of the first committee as well. Both

men selected Mathis as Superintendent II for Beech Fork State Park, "feeling that Stanley Mathis was the best person for the position."

25. October 27, 1997, Parks Chief Hudkins and his assistant Parks Chief Caplinger interviewed the five finalists for the position of Beech Fork State Park Assistant Superintendent.

26. According to Chief Hudkins, in conducting the job reinterviews, he and Caplinger sought to determine which applicant was most qualified for the job by assessing the applicant's written application forms, educational attainments; work experience; prior training, overall background and motivation for seeking the position.

27. This second interviewing panel--comprised of Parks Chief Hudkins and Assistant Parks Chief Caplinger--selected Stanley Mathis as the best qualified of the five candidates for the Beech Fork assistant superintendent position.

28. Deputy Chief Caplinger was asked by Assistant Commissioner Hartman to prepare a document comparing the education and experience of the candidates for the Assistant Superintendent position at Beech Fork State Park. Caplinger was then directed by Assistant Commissioner Hartman to attend a meeting with complainant at Beech Fork State Park on December 9, 1992. Hartman and Summers were also present at the meeting. The purpose of the meeting was to explain to the complainant why she was not chosen for the position.

29. At this meeting, complainant was told that all of the other applicants interviewed were more qualified than she was for the position of Superintendent II at Beech Fork State Park. Complainant was asked to review the chart prepared by Deputy Chief Caplinger. The document listed the candidates by number instead of name and detailed each candidate's education and experience.

30. According to complainant, her job experience as an employee in the State Park System was described as "10 years as secretary; clerk; supervisory experience" on this chart. Nor was there mention that complainant began work toward an associate degree in business management nor that complainant had supervised the park in the absence of Superintendent Summers.

31. During the meeting, according to the complainant, Deputy Chief Caplinger kept repeating that they had to consider "this guy that's been military." Because all of the importance the men were putting on this, she asked Caplinger where it said on the job posting that military or airborne was necessary. The complainant testified that she believed that Dave Summers wanted Stan Mathis because he was military.

32. Complainant was notified by letter dated December 23, 1992, that she had not been selected to fill the position. Stanley Mathis began his employment as Superintendent II at Beech Fork State Park in January, 1993. Superintendent Summers told complainant that because he was out of town, it was her job to make the new assistant and his family feel

welcome and comfortable at the park. She further testified that she was directed to acquaint Mr. Mathis in the day-to-day operation of the facility.

33. According to the complainant, Superintendent David Summers was the de facto decision-maker in regard to the job at issue, because respondent wanted their superintendents to be satisfied with those with whom they had to work.

34. Kanawha State Forest Superintendent Edward Boyd testified that a park superintendent normally has a "strong voice" in the hiring decisions affecting the superintendent's own park.

35. Chief Hudkins, as head of the agency, has the final approval over all the agency's employment and promotion decisions.

36. Mr. Harry Ison, a regular camper at Beech Fork State Park, testified that when he returned for the 1993 summer season, over a half year after complainant, whom he considered a friend, was informed that she had not been selected, he went into the office to congratulate complainant on being promoted to assistant superintendent. When Mr. Ison asked complainant in the presence of Superintendent Summers if she got the job, she replied, "no, Dave did not vote for me."

37. Mr. Ison also testified that, upon learning that the complainant had not received the promotion to Beech Fork Assistant Superintendent, he had had a "confrontation" with Superintendent Summers, that his (Ison's) temper had "flared," upon

learning--allegedly from Superintendent Summers--that the complainant had not received the job because Summers wanted a man for the job.

38. According to Mr. Ison, Superintendent Summers "proceeded to try to explain to Mr. Ison...why (he) had to look at Mr. Mathis." Superintendent Summers explained, he "didn't want a woman for the job, that he voted for the man and they brought in the most educated and the best qualified man that they could find."

39. David Frye, a seasonal maintenance worker at Beech Fork State Park, testified that he overheard a conversation between Park Superintendent Summers and a group of "CWEP" seasonal workers in which conversation Summers stated " he didn't want another woman working underneath his supervision." David Summers denies having made such a statement.

40. The complainant suffered monetary loss as a result of not being selected as Superintendent II at Beech Fork State Park.

41. Complainant's attorney reasonably expended 313.10 hours in prosecuting this matter.

42. Complainant's hourly rates of \$150.00 for 124.20 hours and \$100.00 for 188.90 hours is supported by complainant's fee affidavit.

43. The complainant's attorney also reasonably expended \$4,167.39 as costs associated with prosecuting this claim.

B.

Discussion

The West Virginia Supreme Court of Appeals held in Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1986), that to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, WV Code §5-11-1 et seq. A complainant must demonstrate that: (1) he or she is a member of a protected class; (2) the employer made an adverse decision concerning the complainant; and (3) but for the complainant's protected status, the adverse decision would not have been made.

Complainant has established that she was de minimus qualified for the job of assistant superintendent at Beech Fork State Park.

The complainant met the first two prongs of the Conaway test: She is a member of two protected classes; she is female and she was over 40 years old at the time she was denied the contested job and the employer made an adverse decision regarding the complainant when the respondent selected another candidate for the job the complainant was seeking.

The Supreme Court made clear in Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 (1995) that the third prong in Conaway is merely a threshold inquiry, requiring only that the complainant demonstrate an inference of discrimination. This complainant has done.

The job description for assistant parks superintendent lists, as one of the job requirements, a four-year college degree in recreation or one of the natural sciences. But the job description allows applicants to substitute work experience in a supervisory capacity, in

the State Parks System, on a year-to-year basis, for the college degree. It is this work experience substitution provision that qualified the complainant for consideration for the job.

Furthermore, respondent acknowledged that complainant was qualified based on her inclusion on the roster of the five final candidates for the position in issue. Moreover, complainant has further demonstrated an inference of discrimination offering credible evidence regarding various discriminatory sexist comments made by Superintendent Summers, which she believes impacted on respondent's decision to hire a male, Stanley Mathis, for that position rather than her.

Because complainant has established a prima facie case of sex discrimination, the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its decision not to name complainant as assistant superintendent for its Beech Fork facility.

The respondent defends its decision by asserting that Stanley Mathis possessed superior qualifications to those of the complainant.

According to the respondent, it took under consideration the following: Mr. Mathis has a bachelor's degree in biological sciences with 19 credit hours toward a masters degree, and notwithstanding the experience substitution which qualified the complainant, college graduates have proven to be more successful park superintendents and assistant park superintendents than have non-graduates, therefore the college degree is given considerable

weight in the hiring process; whereas Mathis had nearly two years experience as superintendent of the Plum Orchard Lake Wildlife Management Area, a facility similar to Beech Fork State Park, the complainant's work experience was limited to ten years as a secretary/clerk in the administrative office at Beech Fork State Park; Mathis had seven years experience as a United States Army officer with experience in managing and supervising personnel and material, whereas the complainant's supervisory experience was limited to managing a small number of seasonal clerical employees at the Beech Fork State Park administrative office; and the respondent considers it bad management practice to promote a clerk to a superintendent's position at the same state park where the individual served as a clerk.

Moreover, respondent claims that any gender bias in the selection process created by superintendent's discriminatory remarks were erased by the second round of interviews and that the second team chose the same candidate, Stanley Mathis, because he was the most qualified applicant.

All of these reasons are legitimate, nondiscriminatory, business reasons for the respondent making the hiring decision it made. Therefore, the respondent has succeeded in rebutting the presumption of employment discrimination raised in the complainant's prima facie case.

The respondent having succeeded in rebutting the presumption of discrimination that arises from complainant's prima facie showing, the complainant has the opportunity to prove

by a preponderance of the evidence that the reasons offered by the respondent are merely pretext for unlawful sex discrimination. Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983); O.J. White Transfer & Storage Co. v. WV Human Rights Commission, 383 S.E.2d 323 (1989).

With regard to the pretext stage of the proof framework the complainant has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of proving that she has been the victim of intentional discrimination. She may succeed in this either directly or indirectly by persuading the tribunal that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence, citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 256, 101.

In this case, the complainant has attacked the respondent's articulated reasons for making its employment decision first by asserting that Park Superintendent David Summers' sexist remarks rendered it more likely than not that the respondent's ultimate decision was motivated by illegal discrimination, and indirectly, by asserting that the respondent's articulated reasons are unworthy of credence.

Alternatively, the complainant maintains that it is necessary to look beyond the evidence offered by the respondent to determine whether they were actually motivated by valid, nondiscriminatory business purposes or by discrimination.

In Skaggs v. Elk Run Coal Co., 479 S.E.2d 561 (1996), the West Virginia Supreme Court of Appeals included an extensive discussion of how intent can be proven in mixed motive cases:

[A] plaintiff states a claim under the Act if he or she proves by a preponderance of the evidence that a forbidden intent was a motivating factor in an employment action. Liability will then be imposed on a defendant unless it proves by a preponderance that the same result would have occurred even in the absence of the unlawful motive.

If the evidence shows that discriminatory motive entered into the decision making to any degree, then the employer engaged in wrongdoing and should bear the burden on causation.

The complainant states a claim if she proves that a forbidden intent was a motivating factor in an employment action. Skaggs, supra at 585. She is not required to show that the respondent's claim that Mathis is the superior applicant is false or played no role in the employment decision, but only that they were not the only factors in the decision and that the prohibited factor of gender was at least one of the motivating factors. See, e.g. Price Waterhouse v. Hopkins, 109 S.Ct. 1775. The Court opined:

“In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.”

The credible weight of the evidence clearly establishes that the first decision to select Mathis was clearly tainted by Superintendent Summers' gender bias. Moreover, it can be

assumed that the initial interview panel was influenced to support Superintendent Summers' sexism by the well-known, unwritten, internal rule that a superintendent at the Parks Department usually gets to select his assistant.

Corroborative of this was the testimony of Ed Boyd, a superintendent with 25 years experience in the Parks System, who testified that in the normal process the superintendent has the strongest voice in choosing their assistant. Moreover, Superintendent Summers told complainant "many times that they let the superintendents choose who they want to work with."

Chief Hudkins' knowledge of this unwritten rule coupled with complainant's revelation of sexism on the part of Superintendent Summers clearly motivated his decision to conduct a second interview.

As a consequence, under the Skaggs proof scheme, the burden of proof shifts to the respondent to demonstrate that the same promotion decision would have been made even in the absence of discriminatory motivation.

Liability will be imposed upon the Parks Department unless it proves by a preponderance of the evidence that it would have selected Mathis even in the absence of the discriminatory motive. Skaggs, supra at 585. Although the respondent claims that the second round of interviews "cured" any discrimination that may have occurred as a result of Superintendent Summers' discriminatory remarks, this defense fails because the Parks Department did not ensure that gender bias did not influence the selection process for the

Superintendent II position at Beech Fork State Park. Sex discrimination so permeated the decision-making process that this factor can no longer be disentangled from possible objective factors. The entanglement of illegal gender motivation is demonstrated by the following analysis.

First, the Parks Department's contention that the second interview procedure "cured" any possible sex discrimination does not withstand scrutiny because the investigative procedures and the procedures for the second round of interviews were fatally flawed. The most serious procedural flaw stemmed from the fact that the same two individuals who conducted the investigation into complainant's charges of discrimination and concluded they had no basis, also conducted the second round of interviews.

The investigation that preceded the second round of interviews was flawed in several ways. Caplinger and Hudkins' strong reliance on Summers' denial that he had made discriminatory remarks as proof that the remarks did not occur is not in conformity with accepted investigative procedures for discrimination complaints. Because discrimination is subtle, and those accused normally deny culpability, accepted investigative procedures require that a more in-depth investigation be conducted.

Although Mr. Hudkins and Mr. Caplinger did speak with Ms. Taylor, her failure to confirm that she had problems with Mr. Summers is not conclusive with respect to the main issue in contention this case: whether Mr. Summers expressed a prejudice about working with female subordinates after Ms. Taylor's departure. Furthermore, none of the interviews

were face-to-face and none of the findings of Hudkins and Caplinger were reduced to writing.

Had Mr. Caplinger and Mr. Hudkins conducted an in-depth investigation, they would have discovered that three other persons were available to corroborate that Mr. Summers made statements that he did not wish to have a woman hired as Assistant Superintendent, namely, Mr. Wiley, Mr. Frye and Mr. Ison. Significantly, none of these three witnesses, and especially Mr. Ison, had any motive to fabricate their testimony. Mr. Ison had been camping at the park for 11 years. Ison was so offended by the conversation in which Mr. Summers told him that he did not want to hire a woman as Assistant Superintendent, that he sold his camper and stopped coming to the park. Because Caplinger and Hudkins did not dig deep enough, their investigation was fatally flawed.

The flaws in the investigative procedure were then compounded by having the same persons who had personally conducted the investigation of complainant's charges participate in the second round of interviews. It is simply impossible to believe that the two investigators, having concluded that complainant's charges were unsubstantiated, and concomitantly that they were fabricated, thereafter completely disregarded these conclusions when they conducted the second set of interviews. The strong implication from their investigation is that complainant was lying about Dave Summers' remarks. How could you disregard such a negative conclusion about a person when weighing their credentials against another individual? By using the same persons for both of these procedures, the respondent

did not “cure” any possible discrimination that occurred during the initial round of interviews, but instead continued the entanglement of illegal motivation into the second decision-making level.

A related reason why the procedures surrounding the second round of interviews were flawed, has to do with the knowledge that Hudkins and Caplinger had about the charges and the conclusions of the first panel. Both Caplinger and Hudkins were aware of the charges of sex discrimination made by complainant, including her allegation that Summers had stated he preferred a male. Complainant’s charges, if proven, necessarily would have reflected negatively on the Department. There is a natural tendency for the Department not to want such charges to be proven to be true because of this negative reflection and possible bad publicity.

As Superintendent Boyd confirmed, there is also a very strong unwritten rule that the superintendent’s choice will be confirmed. Boyd testified, that in his experience, he had the final say about his subordinate, despite the expressed preference of his boss on the interview panel. In addition, he testified about a situation where a superintendent was able to influence the selection of his next assistant superintendent by manipulating the job description to favor a particular candidate.

The knowledge of Caplinger and Hudkins of this unwritten internal rule, of complainant’s charges and of Mr. Summers’ alleged preference that a male be hired as his assistant, increased the potential that the second round of interviews would be tainted. A

simple solution for avoiding this problem during the second round of interviews was available. By appointing persons with no involvement in the investigation of the charges and no knowledge of the charges that the superintendent preferred a male replacement, the Parks Department could have insulated the second panel from the gender bias that occurred in the initial promotion decision. Instead, the entanglement continued. For this reason alone, the Parks Department cannot meet its burden of proving that gender bias did not influence its ultimate decision to promote someone other than complainant.

A second ground for concluding that the Parks Department failed to meet its burden of proving it would have reached the same promotion decision absent the sexually discriminatory comments of Mr. Summers, is the failure to give weight to relevant qualifications possessed by complainant. According to the respondent, both the first and the second interview panels preferred Mr. Mathis over complainant because he was allegedly better qualified. After the second interviews had been conducted, Mr. Caplinger used a simple chart to try to convince complainant that Mr. Mathis had superior qualifications. Instead of demonstrating Mr. Mathis' superior qualifications, the chart provides demonstrative proof of how the Parks Department undervalued complainant's qualifications.

First, it failed to mention that complainant had actually performed the duties of superintendent for days and weeks at a time without the presence of any supervisor. As was agreed by both Mr. Summers and Mr. Hudkins, complainant was repeatedly rated an excellent employee, in part, because she "handled problems and emergencies in the absence

of the superintendent.” She handled floods, she supervised employees, she managed reservations, and she ordered supplies; and as others who worked at the park testified, they turned to her as the person in charge on the many occasions when a named superintendent was not present. As Mr. Hudkins admitted, he was aware the complainant had performed every single duty listed in the job description. Yet, nowhere is this actual, hands on experience mentioned in the chart.

Second, the chart fails to mention that complainant’s many years of experience were with the Parks Department and that Park in question. This experience, which has obvious relevance, was not even mentioned; in contrast, Mr. Mathis’ job as commander for a nuclear support unit is highlighted, even though work with nuclear weapons has no obvious relevance to Park work and is repetitive of two facts already mentioned in the description of his qualification: (1) that he was in the military, and (2) that he had supervisory experience.

The chart also fails to reflect that complainant had determinedly worked her way up the career ladder at Beech Fork State Park, that she had trained several past superintendents in their on-the-job duties and that she had, in fact, functioned as far more than just a secretary/clerk at Beech Fork State Park. The institutional knowledge she possessed far exceeded that possessed by Mr. Mathis, but was disregarded because she had not been given a title reflective of her actual duties. That the second interview panel, in effect, endorsed the

first panel's disregard of her actual qualifications lends further support to the conclusion that the second panel's decision was influenced by gender bias.

A final reason why the Parks Department failed to prove that Mathis would have been hired, even if gender had not been a motivating factor, relates to the timing of the incident involving Mr. Summers and Harry Ison. Mr. Summers significantly confirms the outlines of Mr. Ison's statement. Summers admits that in June of 1993, he was conversing with Mr. Ison in complainant's presence. Although he denied telling Mr. Ison that he did not want a woman, he admits that he recommended Mathis.

Both Mr. Ison and complainant credibly testified that Summers stated that he wanted a man and that he voted for the man. The weight of the evidence supports the conclusion that this conversation actually took place, and the timing is significant. The Parks Department claims that Mr. Summers was totally removed from the ultimate decision not to promote complainant. The second round of interviews were conducted on October 27, 1992. But in May or June of 1993, over six months after decision had been made, Summers defended the decision to hire Mathis instead of complainant by stating that he voted for the man and that he wanted a man because he thought a man would do a better job. At this point in time, he clearly thought that his opinion about the relative merits of the male and female candidates had been adopted and affirmed by the Parks Department for the reasons stated.

Here, the fact that Summers' statement was made in Mr. Ison's presence over six months after the decision had been made without his input lends further credence to complainant's contention that the normal, unwritten internal rule was followed--that the agency permitted the superintendent to choose his subordinate, even though in this case, it was based on an illegal motivation.

For all the reasons discussed above, the respondent failed to prove the Mr. Mathis would have been hired absent sex discriminatory motivation. Here, the gender biased motivation became so intertwined with the final decision that it cannot be separated out. Because the Parks Department failed to meet its burden of proof, liability must be imposed in accordance with Skaggs.

Finally, the complainant has clearly demonstrated that discriminatory intent, based on her gender, was a motivating factor in respondent's adverse employment decision.

C.

Conclusions of Law

1. Complainant, Geraldine Lester Perry, is an individual claiming to be aggrieved by an unlawful discriminatory practice and is a proper complainant for the purposes of the West Virginia Human Rights Act, WV Code § 5-11-10.

2. Respondent, West Virginia Division of Natural Resources, Parks and Recreation, is an employer as defined by the WV Code § 5-11-1 et seq. and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with WV Code § 5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. The complainant has established a prima facie case of sex discrimination as follows: (1) she is a female and a member of a protected class; (2) the respondent failed to select her as Superintendent II at Beech Fork State Park, an adverse decision concerning the complainant; and (3) but for the complainant's protected status, the adverse decision would not have been made.

6. The respondent has articulated a legitimate, nondiscriminatory reason for its action against the complainant by claiming that they did not select the complainant because they selected the more qualified applicant.

7. The complainant has established that discriminatory intent was a motivating factor in the decision not to select her by a preponderance of the evidence.

8. The respondent has failed to prove by a preponderance of the evidence that the same decision regarding selection would have been made even in the absence of the unlawful motive.

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to reinstatement to the first available comparable Assistant Superintendent position in the park system and back pay as well as to an award of incidental damages in the amount of \$3,2777.45 for the humiliation, embarrassment, emotional and mental distress, and loss of personal dignity.

10. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of reasonably attorneys' fees and costs in the aggregate amount as more fully set forth in the attached complainant's fee petition and affidavit.

D.

Relief and Order

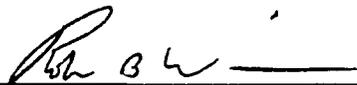
Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

Within 15 days of receipt of this decision, complainant shall provide complete calculations related to back pay, prejudgment interest and front pay, taking into consideration the difference in pay for the position of Assistant Superintendent and her yearly salary as a Secretary/Clerk. Said calculations shall be submitted to respondent, who shall have 15 days from receipt thereof to respond thereto. Thereafter, the Commission will issue a general Relief Order.

It is so **Ordered**.

Entered this 28th day of January, 1999.

WV HUMAN RIGHTS COMMISSION

BY 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 108A

Charleston, WV 25301-1400

TELEPHONE (304) 558-2616

FAX (304) 558-0085

TDD - (304) 558-2976

TOLL FREE: 1-888-676-5546

Cecil H. Underwood
Governor

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 1, 1999

Geraldine Lester Perry
51927 Long Branch Rd.
Huntington, WV 25701

Barbara E. Fleischauer, Esq.
Stephanie Milliron, Esq.
3628 Monongahela Blvd.
Morgantown, WV 26505

Daynus Jividen
Sr. Asst. Attorney General
WV Div. Of Natural Resources
Parks & Recreation
Bldg. 3, RM 669
1900 Kanawha Blvd. E.
Charleston, WV 25305-0660

Re: Lester Perry v. WV DNR, Parks & Recreation
ESA-334-93

Dear Parties:

Enclosed, please find the Final Relief Order Supplementing the Final Decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole

Final Relief Order
Supplementing Final Decision
September 1, 1999
Page 3

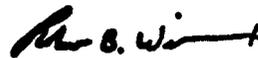
record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RBW/mst

Enclosure

cc: Norman Lindell, Deputy Director
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GERALDINE LESTER-PERRY,

Complainant,

v.

DOCKET NUMBER(S):ESA-334-93

WEST VIRGINIA DIVISION OF NATURAL RESOURCES,
PARKS AND RECREATION SECTION,

Respondent.

FINAL RELIEF ORDER
SUPPLEMENTING THE FINAL DECISION

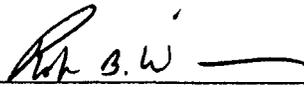
By Order entered February 5, 1999, counsel for respondent was directed to provide complainant's counsel with any information necessary to calculate the back pay and front pay. That cooperation was lacking to some extent and by Motion For Updated Award of Back Pay, Front Pay, Interest and Attorney's Fees, complainant, by counsel submitted documentation for back pay losses to May 27, 1999 totaling, \$123,936.00, \$38,221.00 in prejudgment interest, updated attorney's fees at the most recently approved hourly rate totaling \$41,354.00 and costs of \$4,722.81. Counsel for respondent having had ample opportunity to object to these figures and not having provided accurate information upon which any other award can be premised, the undersigned does hereby **ORDER** that the respondent pay back pay, prejudgment interest, attorney's fees and costs in the foregoing amounts, as more fully set forth in Geraldine Lester Perry's Motion For Award Of Back Pay, Front Pay, Interest and Attorney's Fees attached hereto; and that the respondent pay front pay reflecting the difference in pay and benefits between her current employment and that position to which she should have been promoted in the absence of the unlawful sex based discrimination for which the respondent was previously found to be

liable in the Administrative Law Judge's Final Decision entered January 28, 1999.

It is so **ORDERED**.

Entered this 31st day of August, 1999.

WV HUMAN RIGHTS COMMISSION

BY 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE