



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

November 3, 1986

ARCHA MOORE JR.
Governor

Donna (Spade) Banton
P.O. Box 913
Hinton, WV 25951

Hinton Police Civil Service
Commission
322 Summers St.
Hinton, WV 25951

Mary C. Buchmelter
Assistant Attorney General
1204 Kanawha Blvd. E.
Charleston, WV 25301

J. W. Fuchtenberger, Esq.
P.O. Box 1459
Bluefield, WV 24701

RE: (Spade) Banton v. City of Hinton Police Dept.,
City of Hinton Police Civil Service Commission
REP-184-82

Ladies and Gentlemen:

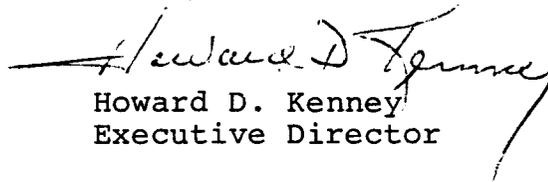
Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the county wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within thirty (30) days, the Order is deemed final.

Donna (Spade) Banton
November 3, 1986
Page Two

The Respondent is required to provide to the Commission proof of compliance with the attached Order by affidavit, cancelled check or other means calculated to provide such proof within thirty-five (35) days of service of the enclosed Order.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/mst

Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

RECEIVED

OCT 14 1986

W.V. HUMAN RIGHTS COMM.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DONNA SPADE,

Complainant,

vs.

Docket No. REP-184-82

CITY OF HINTON POLICE DEPARTMENT,
CITY OF HINTON POLICE CIVIL
SERVICE COMMISSION,

Respondent.

O R D E R

On the 9th day of October, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner James Gerl. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below and except as the same conflicts with the reasoning set forth below.

The Commission finds that the complainant would not have been unemployed for six months in 1983 but for the respondent's discrimination. Since she did not earn any income during that period she should be awarded back pay for the period in the amount she would have earned had the discrimination not taken place, a total of \$4,820.00. Therefore the following amendments:

The Commission amends the Findings of Fact and Conclusions of Law by adding Finding of Fact No. 24 as follows:

"24. In early 1983 the complainant was unemployed for a period of approximately six months. During this period she would

have earned \$4,820.00 had she been employed by respondent."

The Commission further amends the Findings of Fact and Conclusions of Law by adding Conclusion of Law No. 6 as follows:

"6. The complainant is entitled to an award of back pay in the amount of \$4,820.00 plus prejudgment interest at the rate of 10% per annum from August 1, 1983, until May 2, 1986, the date of the hearing in this matter."

The Commission further amends the Proposed Order by deleting from paragraph 2 the figure "\$2,000.00" and substituting therefor the figure "\$5,000.00" and by adding paragraph 5 as follows:

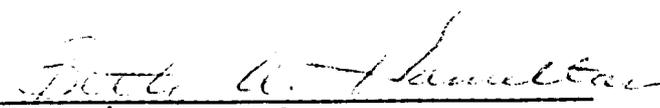
"5. That respondent shall pay to complainant the sum of \$4,820.00 plus prejudgment interest from August 1, 1983, until May 2, 1986, at the rate of 10% per annum.

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, except as amended by this Order.

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 Oct, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

SEP - 1986

W.V. HUMAN RIGHTS COMM.

DONNA SPADE

Complainant,

v.

DOCKET NUMBER: REP-184-82

CITY OF HINTON POLICE DEPARTMENT
CITY OF HINTON POLICE CIVIL
SERVICE COMMISSION

Respondents.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on June 18, 1986 in Hinton, West Virginia. Commissioner Nate Jackson served as Hearing Commissioner. The complaint was filed on October 19, 1981. The notice of hearing was issued on March 3, 1986. A telephone Status Conference was convened on May 2, 1986. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been

omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent failed to hire her as a police officer in reprisal for her having filed a prior charge of discrimination. Respondent maintains that a prior settlement agreement is not binding and that complainant was not qualified for the position.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant is a woman.
2. Complainant applied for a position with the Hinton Police Department as a police officer.
3. Complainant filed a complaint with the West Virginia Human Rights Commission on February 9, 1980, alleging discrimination based on sex and naming respondents, the City of Hinton and the Hinton Police Civil Service Commission, Docket No. ES-287-80.
4. Complainant and respondents entered into a Pre-determination Conciliation Agreement in April, 1981, prior to any hearing on the merits.

5. Said Conciliation Agreement is signed by complainant; Wicker, Mayor, City of Hinton; Miller, Police Chief, City of Hinton; and Wheeler, Chairman, Hinton Police Civil Service Commission.

6. Said Conciliation Agreement states among other things that upon certification of the complainant by the Civil Service Commission, that the complainant would be hired into the position of police officer at the first available opening.

7. Subsequent to the execution of the Conciliation Agreement, complainant was certified and placed upon the Civil Service list.

8. Keaton, a police officer on the Hinton Police Department, left his position in December 1980, and was subsequently terminated. He did not appeal the termination. Keaton returned and was "reinstated," in that position in August, 1981. That position had been vacant from December, 1980 until August, 1981.

9. Keaton is now the Police Chief of Hinton, West Virginia.

10. On November 1, 1983, Cook was hired as a police officer with the Hinton Police Department.

11. On November 15, 1983, Cobb was hired as a police officer with the Hinton Police Department.

12. On May 30, 1985, Lilly was hired as an officer with the Hinton Police Department.

13. In September, 1985, Sears was hired as a police officer with the Hinton Police Department.

14. Complainant was never offered a job as a police officer with the Hinton Police Department.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

15. The Hinton City Council ratified the aforementioned Conciliation Agreement at a meeting on January 19, 1982.

16. There have never been any female police officers employed by the City of Hinton.

17. Hunt, former Chief of Police for the City of Hinton, made statements on WOAY-TV and directly to complainant that she was too weak to be a police officer and that he would not hire her.

18. Complainant has done police work as a corrections officer, has taken martial arts training, has lifted weights, and has taken numerous courses at the West Virginia State Police Academy.

19. The City of Hinton has never requested a declaratory judgment from the Circuit Court of Summers County with regard to the validity of the afore-mentioned Conciliation Agreement.

20. In 1981, police officers of the Hinton Police Department earned \$765.00 per month, or \$9,180.00 per year. In 1984 they earned \$5.19 per hour, or \$10,795.20 per year.

21. Complainant was employed by the West Virginia Department of Corrections in July, 1980 at a salary of approximately \$9,000.00 per year. When complainant left the employ of the Department of Corrections in December, 1982, she was earning approximately \$11,000.00 per year.

22. Complainant became employed by the Federal Bureau of Prisons in August 1983 at a salary of approximately \$16,000.00 per year. As of the date of the hearing herein complainant was still employed by the Bureau of Prisons and was earning approximately \$18,000.00 per year.

23. As a result of respondents' actions, complainant felt depressed and worthless.

CONCLUSIONS OF LAW

1. Donna Spade is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, Section 5-11-10.

2. City of Hinton Police Department and City of Hinton Police Civil Service Commission are employers as defined in West Virginia Code, Section 5-11-3 (d) and are subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case that respondent failed to hire her in reprisal for her having filed a prior complaint.

4. Complainant has shown that the reasons articulated by respondent for failing to hire complainant are pretextual.

5. Respondent engaged in a reprisal against complainant in violation of West Virginia Code, Section 5-11-9(i) by failing to hire her.

DISCUSSION OF CONCLUSIONS

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown volunteer fire department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell-Douglas corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with

respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has established a prima facie case of reprisal by showing that she filed a prior complaint of sex discrimination, that the parties resolved the prior complaint through a Conciliation Agreement which provided that upon certification of complainant, she would receive the first available position opening for a police officer, that complainant was subsequently certified, and that respondent hired several males as police officers subsequent to complainant's certification without ever offering a police officer position to complainant.

Respondent has articulated legitimate non-discriminatory reasons for failing to hire complainant. Respondent provided testimony that complainant was never properly qualified and that the Conciliation Agreement is legally invalid.

Complainant has proven by a preponderance of the evidence that the reasons articulated by respondent for failing to hire her as a police officer are pretextual. The testimony of complainant and her witnesses was marked by a credible demeanor. The testimony of respondent's witness, on the other hand, was not credible.

It was the undisputed and uncontroverted testimony of complainant that Hunt, former Chief of Police for respondent, made statements to complainant and to the television cameras that complainant was too weak to be a police officer and that she would never be hired. The record evidence also reveals that respondent has never employed any female police officers. Thus, retaliation for filing a sex discrimination complaint appears to be likely.

Respondent's argument that the Conciliation Agreement itself violates West Virginia law is vitiated by the fact that respondent made no attempt to obtain a declaratory judgment from the Circuit Court with respect to the validity of the Conciliation Agreement. If respondent were truly afraid of potential liability for complying with the Conciliation Agreement, it would be difficult to believe that respondent would not obtain a declaratory ruling from the court. In any event, respondent's City Council ratified the Conciliation Agreement and said ratification clearly makes said Conciliation Agreement retroactive to the date of the signatures on the Conciliation Agreement. Thus, respondent's argument that the Conciliation Agreement does not apply to the August, 1981 vacancy because the City Council had not yet ratified the agreement makes no sense and should be rejected.

Respondent contends that complainant's certification based upon her score on the August 15, 1980 Civil Service examination was valid only until August 14, 1982. Respondent's assertion with regard to this claimed fact is not supported by

any evidence in the record. Accordingly, respondent's proposed fact to that effect is rejected. In any event, the Conciliation Agreement, by its terms, provides only that upon certification of complainant, respondents will hire complainant into the position of police officer at the first available opening. There is no requirement in said agreement that complainant periodically be recertified once she obtains the initial certification for the position. Respondent's obligations under the Human Rights Act, including those obligations imposed in the settlement agreement reached voluntarily subsequent to the filing of a complaint, are very serious obligations. Failure to observe those obligations is tantamount to an act of treason. Allen v. Human Rights Commission 324 S.E.2d 99 (W.Va. 1984). Respondent's defense in the instant case seems to forget the gravity of the obligations imposed by the Human Rights Act.

RELIEF

Complainant is satisfied with her current job at the Bureau of Prisons, and does not seek reinstatement to the position of police officer at respondent.

Complainant's brief includes a Voodoo backpay calculation. Complainant's calculation begins backpay at the date that a position "became available" rather than the date subsequent to the Conciliation Agreement that the first police officer

was hired. Said calculation also assumes that complainant would have become the Chief of Police. There is absolutely no support in the record evidence that complainant would have become respondent's Chief of Police. It is true that Keaton, who was the first person hired subsequent to the Conciliation Agreement, eventually became Chief of Police. There is no evidence, however, that complainant would have become Chief of Police. The record evidence does reveal, however, that complainant earned much more in her positions with the West Virginia Department of Corrections and the Federal Bureau of Prisons than she would have earned had she been hired by respondent in August, 1981, when Keaton was first hired. Even though complainant was unemployed for a period of time in early 1983, her salary in the positions she has held were substantially higher than the salaries she would have received as a police officer for respondent. Accordingly, complainant should be awarded no backpay.

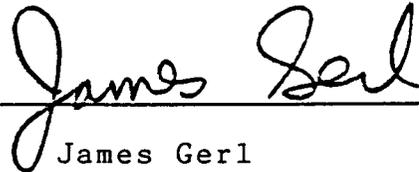
Complainant testified that she was depressed and that she felt worthless as a result of respondent's actions in failing to hire her as required by the Conciliation Agreement. Although there was no showing of any great harm to complainant and although the Hearing Examiner recommends that the Commission exercise caution in awarding incidental damages, it is recommended that complainant be awarded the sum of \$2,000.00 as compensation for damages

resulting from humiliation, embarrassment, emotional distress and loss of dignity.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner hereby recommends the following:

1. That the complaint of Donna Spade, Docket No. REP-184-82, be sustained.
2. That respondent pay complainant the sum of \$2,000.00 as incidental damages for humiliation, embarrassment, distress, and loss of dignity resulting from respondents failing to hire complainant in reprisal for her having filed a complaint of discrimination.
3. That respondent be ordered to cease and desist from engaging in reprisals against individuals who file complaints of discrimination.
4. That respondent report to the commission within forty-five days of the entry of the Commission's Order, the steps it has taken to comply with the Order.



James Gerl
Hearing Examiner

ENTERED: September 3, 1984

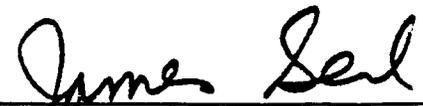
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served
the foregoing PROPOSED ORDER AND DECISION
by placing true and correct copies thereof in the United States
Mail, postage prepaid, addressed to the following:

J. W. Feuchtenberger, Esq.
P. O. Box 1459
Bluefield, WV 24701

Mary Kay Buchmelter, Esq.
Assistant Attorney General
1204 Kanawha Boulevard
Charleston, WV 25301

on this 3d day of September, 1986.



James Gerl