

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SARAH WILLIAMS WELCH

Complainant,

v.

DOCKET NO. ES-156-77

SHERIFF OF BOONE COUNTY

Respondent.

FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

I  
PROCEEDINGS

This case came on for hearing on August 11, 1982, at the Boone County Board of Education Building in Madison, West Virginia, before Hearing Examiner Emily Spieler. The Complainant appeared in person and was represented by Assistant Attorney General Mary Lou Newberger, who also represented the West Virginia Human Rights Commission. The Respondent appeared by its counsel, Francis N. Curnttte. The parties agreed to waive the presence of a Hearing Commissioner in this matter.

On November 12, 1976, the Complainant filed a verified complaint under the name of Sarah Williams, alleging that the Respondent, Sheriff of Boone County, had discriminated against her on the basis of sex by failing to hire her. The Human Rights Commission issued a letter of determination finding probable cause to believe that the Human Rights Act had been violated in late 1977.

On June 30, 1982, the Human Rights Commission, by Howard D. Kenney, Executive Director, served written notice of public hearing upon the parties pursuant to W.Va. Code §5-11-10. The Respondent did not file an answer. Sometime during the pendency of the case, the Complainant changed her name to Sarah Williams Welch and the complaint was amended in 1982 to reflect this change. On July 27, 1982, pursuant to Section 7.10 of the Administrative Regulations of the Human Rights Commission, a pre-hearing order was entered by Hearing Examiner Emily A. Spieler. A pre-hearing conference was held on August 9, 1982, pursuant to Section 7.09 of the Administrative Regulations, in which the parties appeared by respective counsel. The matters determined at the pre-hearing conference were summarized by the Hearing Examiner in a pre-hearing order which was read into the record at the public hearing (Tr. 5-14).

After full consideration of the testimony, evidence, and arguments of counsel, the Hearing Examiner's recommended decision and exceptions thereto, the Commission makes the following Findings of Fact and Conclusions of Law.

## II ISSUES

The ultimate issues to be resolved in this matter are:

Did the Respondent's failure to hire the Complainant as a deputy sheriff constitute unlawful employment discrimination based on sex under the West Virginia Human Rights Act? Did the Respondent engage in a pattern and practice of discrimination against women in violation of the West Virginia Human Rights Act?

III  
FINDINGS OF FACT

1. John Protan was Sheriff of Boone County from January 1, 1975, through December 31, 1978. (Tr. 19).
2. The Complainant, Sarah Williams Welch is a female. During 1976 to 1977, Ms. Welch was married to Colin Williams. She now assumes the surname Sarah Williams Welch. (Tr. 5).
3. Ms. Welch took the deputy sheriff's civil service examination given by the Boone County Deputy Sheriff's Civil Service Commission on August 28th, 1976. Ms. Welch scored a 90 on the examination, which was the highest score among these applicants. (Tr. 5, St. Exh. 1).
4. Civil service deputy sheriffs during all times relevant to this complaint were selected in the following manner. Applicants for the position of deputy sheriff took a civil service test, as required by W.Va. Code §7-14-1. Candidates were then ranked by test score by the Civil Service Commission of Boone County. When a vacancy occurred, a list of the three highest scoring candidates was submitted by the County Clerk to the Sheriff. (Tr. 20, 52, 65). Only the names of the three candidates appeared on the list. (Tr. 52). Candidates did not fill out written employment applications indicating prior experience or qualifications. (Tr. 50). Sheriff Protan was responsible, pursuant to W.Va. Code §7-14-11, to select from among the three names submitted to him the most qualified candidate to be deputy sheriff. (Tr. 20).

5. Ms. Welch's name was properly certified and placed upon the eligibles list by the Boone County Deputy Sheriff's Civil Service Commission. (Tr. 5, 6).
6. Sections 17 and 18 of the Rules and Regulations of the aforesaid Civil Service Commission require that the sheriff select from the submitted list the applicant to be hired solely upon the relevant merit and fitness of the candidates. Merit and fitness are to be determined as far as practicable by examination. (Tr. 6, Compl. Ex. 2); W.Va. Code §7-14-1.
7. On September 10, 1976, December 1, 1976, and December 30, 1976, the Commission submitted Ms. Welch's name as one of three from which the Sheriff could select a deputy sheriff, in keeping with Civil Service requirements. On each occasion, Ms. Welch was the highest test-scoring applicant. (Tr. 6).
8. The Sheriff never interviewed Ms. Welch for available deputy sheriff positions. On each occasion, the Sheriff selected a male who had a lower test score than the Complainant. The men scored between 13 and 21 points lower than Ms. Welch. (Tr. 6).
9. Sheriff Protan, believed that from the list of three names submitted to him by the Deputy Sheriff Civil Service Commission, he could pick the person he believed to be best qualified. He believed that in every appointment he picked the candidate who was the most qualified to be a deputy sheriff. (Tr. 20).
10. The only information the Sheriff received from the Civil Service Commission was a list of three names. He received no documents regarding a candidate's prior experience or employment. (Tr. 50-52).

11. Sheriff Protan did not interview each of the three candidates. Rather, he relied upon the "recommendations of people who lived near the applicant." However, the Sheriff could not recall interviewing or investigating Gilbert Kuehle, whose name also appeared on the lists submitted to him on September 10, 1976, December 1, 1976 and December 30, 1976 and whom he did not know. The Sheriff neither interviewed nor investigated Sarah Williams Welch, because he believed he knew all he needed to know about her. (Tr. 53, 46, 47, 44, St. Exh. 1).
12. The Sheriff admitted that a candidate may have had experience of which he was not aware, and that he could have made a mistake about what he thought about applicants. (Tr. 50-52, 56).
13. One of Respondent's stated reasons for not hiring Ms. Welch was that Ms. Welch's husband, Colin Williams, had a felony conviction. (Tr. 25, St. Exh. 1).
14. Section 16 of the Commission's rules give reasons for the disqualification of candidates. Section 16(f) permits disqualification if the candidate has been convicted of a crime. No mention is made of convictions of family members. (Tr. 7, St. Exh. 2).
15. Sheriff Protan hired deputies to serve a particular district.
16. Boone County is divided into five districts, Washington, Sherman, Crook, Peytona and Scott. The towns making up each district are as follows: In the Washington District, Ottawa; in the Sherman District, Seth, Bloomingrose, Racine; in the Peytona District, Peytona; in the Crook District, Van and Uneeda; in Scott District, Danville, Madison and Lory. (Tr. 7).

17. Respondent also stated that Sarah Williams Welch was not hired because a deputy was not needed where she lived, and that appointments were made on the basis of the deputy being a resident of the district in which the vacancy occurs. (Tr. 7, 44, St. Exh. 3).
18. Two of the three male deputies hired instead of the Complainant were residents of Sherman District, the same district as the Complainant's residence. (Tr. 7, St. Exh. 3).
19. The Rules and Regulations of the Boone County Deputy Sheriff's Civil Service Commission do not require that deputy sheriffs be hired according to, or assigned to a particular district. (St. Exh. 2).
20. The Sheriff stated that he believed Sarah Williams Welch had attempted to smuggle ~~contraband~~ contraband (liquor) into the jail while her husband, Colin Williams, was incarcerated there, and he therefore refused to hire her on that additional ground. (Tr. 25).
21. The Sheriff's belief was unreasonable at the time since:
  - a. No bottle was ever produced as the one found on Ms. Welch; (Tr. 39-40, 89).
  - b. The Complainant was subject to random pat down searches of her person upon her visits to the jail. She could not anticipate when she would not be subject to a search; (Tr. 85)
  - c. At all times Colin Williams was in the Boone County jail he was not the only prisoner, other prisoners had visitors, and Sarah Welch was not Colin Williams' only visitor; (Tr. 39, 40)

- d. The trustees, who were prisoners who were permitted to leave the jail to go to the store, were known to have smuggled in liquor; (Tr. 87)
  - e. When questioned at the time, Sarah Williams Welch denied that she had brought the liquor in. (Tr. 89).
22. The Respondent offered no corroborative evidence that Ms. Welch attempted to smuggle liquor into the jail. (Tr. 48-49).
  23. Sheriff Protan accused Ms. Welch of attempting to smuggle liquor into the jail in November 1976. Sarah Williams Welch had already been denied the position at that time and had filed a complaint of sex discrimination against the Respondent. (Tr. 89-90, 92).
  24. Subsequent to Respondent's failure to hire her, Ms. Welch sought and obtained employment at the Eye and Ear Clinic in Charleston, West Virginia. She was continuously employed there from January 1977 until she left West Virginia in July 1979. Her earnings totaled \$20,282.43. (Tr. 8, St. Exh. 5).
  25. The parties stipulated the wage rates for deputy sheriffs during the relevant period of time. The wage rates for a deputy were: In 1976, \$800 per month; 1977, \$875 per month; 1978, \$910 per month; 1979, \$979 per month. The total earnings during the relevant time period would have been \$31,073.00. (Tr. 9-10).
  26. The parties stipulated that the measure of back-pay damages in this matter will be the difference between the Complainant's actual earnings in the period from the time she should have been hired to the time she left West Virginia in July of 1979. She was employed during that period of time by the Eye and Ear Clinic in Charleston, West Virginia. Complainant's interim earnings through this alternate employment was \$10,790.57.

27. Ms. Welch suffered humiliation and mental anguish by not receiving a position with the Respondent as a deputy sheriff, (Tr. 15-16).

IV  
LEGAL DISCUSSION

Under McDonnell-Douglas Corp. v. Green, 411 U.S. 792, (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Complainant has the burden of establishing; 1) that she is a member of a protected class; 2) that she was qualified for a position for which there was a vacancy; 3) that the Respondent failed to hire her for that position; and 4) that the Respondent hired males less qualified. The Respondent then must articulate a legitimate non-discriminatory reason for not hiring the Complainant. The Complainant then has an opportunity to rebut the proffered reasons of Respondent.

Clearly, Complainant, Sarah Welch, has established a prima facie case of sex discrimination against Respondent, the Boone County Sheriff's Department. She is a female. She was qualified for a position for which there was a vacancy as a deputy sheriff; she was not hired for that position on two separate occasions and Respondent hired less qualified males in her stead.

The Boone County Deputy Sheriff's Civil Service Commission (hereinafter the Commission) is charged with the duty of implementing and enforcing West Virginia Code §7-14-1 et seq., which extends civil service protection to deputy sheriffs. Pursuant to that mandate, the Commission adopted rules and regulations ". . . to provide an orderly and uniform system for the administration of civil service for deputy

sheriffs in Boone County on a basis of merit and fitness . . ." (Rules and Regulations for the Classified Civil Service of Deputy Sheriffs of Boone County, West Virginia [hereinafter Rules]), (emphasis added).

Two of the reasons articulated by the Respondent, namely the preference for veterans with prior military training and the residency requirement were not legitimate. These job requirements, unilaterally imposed by the Sheriff, were in direct contravention and/or circumvention of the Rules which had the force and effect of law.

Sheriff Protan stated at the hearing that he took into consideration and based his hiring decision upon 1) the prior military police experience of some candidates and 2) where in the county the deputy lived. If a candidate had such prior experience the Sheriff would preferably hire that person. Secondly, if a higher-scoring candidate lived in an area of the county where Mr. Protan did not feel he needed a deputy, he would hire a lower-scoring individual who lived in the appropriate area.

The State contends that these criteria, which are nowhere outlined or permitted by the Rules, were in direct contravention of the Rules. They were thus not legal and therefore not a legitimate non-discriminatory reason for not hiring the Complainant. Burdine v. Texas Dept. of Community Affairs, Supra.

~~There are numerous sections of the Rules which would preclude~~  
the Sheriff's actions. First, Section 7 Classification Plan requires the Commission, not the sheriff, to determine the duties and responsibilities of each position. The plan is to include the experience, qualifications

and training required for each position. Nowhere in the Rules are prior military (or civilian) police experience or a candidate's residency cited as requirements.

Section 7(b) permits the sheriff to request an amendment of the classification plan, which the Commission must review, investigate, approve and adopt. Sheriff Protan could have proposed that these two job requirements be adopted, but instead he circumvented the lawful process by utilizing his own de facto job requirements.

Had prior military police training been deemed necessary the Commission could have, pursuant to §16 of the Rules refused to certify Sarah Williams Welch. That section permits denial of certification to individuals whose reference check reveals them to be unsuitable for employment because of an unsatisfactory employment or personal record. This the Commission did not do in Ms. Welch's case.

(As aside, Sheriff Protan also stated that he believed Ms. Welch had attempted to smuggle liquor to her husband while he was incarcerated in the Boone County jail and therefore did not hire her. Mr. Protan could have presented this information to the Commission and asked the Commission, under this section, to disqualify Ms. Welch. However, he took no such action).

Further, the Sheriff's actions are prohibited by Sections 17, 13, and 18 of the Rules, which must be read in pari materia. Section 17 requires all appointments to be made on the basis of merit and fitness, which shall be determined ". . . insofar as practicable . . ." by examinations prepared under the direction of the Commission. Section 13, governing examinations, requires that they be practical. Further, they

are to inquire into the comparative merit and fitness of the examiners to discharge the duties of the position sought. Finally, §18 directs the sheriff to, ". . . with sole reference to the merit and fitness of the candidates, make an appointment . . ." On this practical test the Complainant, without prior police experience, scored substantially higher than candidates with prior experience. She therefore demonstrated her superior merit and fitness for the job and should have been hired.

Finally, the Sheriff's rationale that candidates with prior military police training would "probably" make better deputies lacks merit in light of West Virginia Code §7-14-16. That section, governing deputy sheriffs, requires that each deputy first appointed a deputy must complete a training program during the probationary period. In compliance with the section the Commission adopted §23 of the Rules, which mirrors the language of the state code. By resolution adopted February 23, 1973, and incorporated into the Rules, the Commission designated the Police Officers in-Service Training School conducted at the West Virginia Department of Public Safety at Institute, West Virginia as the mandatory training program.

The Commission, whose duty it was to establish the training program, determined that the in-Service program was sufficient for deputies with no prior experience as well as those who had experience. The Commission could have chosen to require that deputies with no prior police training receive additional training. But it did not, and Sheriff Protan could not exclude non-experienced candidates on this basis. In fact, Sheriff Protan's actions violated the spirit, if not the letter, of

Airhart v. Carpenter, 260 SE 2d 729 (WVA Sup. Ct. 1979). In that case a deputy sheriff who had not received the statutorily mandated training was discharged during the probationary period. The Supreme Court held that if the reasons for the termination were related to a lack of training, and the training had not been provided, the termination was improper. Here, Sheriff Protan began a step farther back. He refused to hire Ms. Welch because of her lack of training, although once hired there is a statutory duty to train her. Thus she would have been trained, just as were the men who were hired in her stead.

Sheriff Protan stated that each time he failed to chose the Complainant as a deputy he chose a male because that male had prior military police training. In effect Sheriff Protan gave these men a preference because of their status as veterans.

Veterans preferences have been upheld by both state and federal courts. However, in every case the preference was established by statute. (77 Am Jur 2d Civil Service §122). In the instant case the preference was not statutory, but merely the result of a baseless assumption held by the decision-maker.

West Virginia law does provide a veterans preference for deputy sheriffs. Section 6-13-1 of the West Virginia Code governs officers in the state. It permits an additional five (5) or ten (10) points to be added to the score of veterans under civil service or job classification systems. Therefore, the candidates chosen by the Sheriff had already received one veteran preference. To permit the Sheriff's actions is to allow double dipping. It is grossly unfair to each non-veteran to permit the veteran to first have his score increased and then to be

preferred for appointment among the candidates certified. Veterans preference statutes are to be strictly construed. (15 Am Jur 2d Veterans §37). The applicable West Virginia statute permits additional points and no more. That is all the veterans herein were entitled to and all they ought legally to have received.

The Sheriff's actions were tantamount to de facto sex discrimination. Mr. Protan used this policy in September 1976. As of December 1975 98% of all veterans were male; 40% of all males over 18 in the work force were veterans. In comparison, only 1% of women over 18 in the work force were veterans. (Blumberg, "De Facto and De Jure Sex Discrimination under the Equal Protection Clause: A Reconsideration of the Veteran's Preference in Public Employment", 26 Buffalo Law Review 1, 1976).

Finally, Sheriff Protan's preference for veterans is a test as defined by the EEOC Guidelines. A test is defined as "... specific qualifying or disqualifying personal history or background requirements, (and) specific educational or work history requirements." The Sheriff's testimony that military police experience "probably would help make them better deputies" is hardly the validation required when a test is used. Respondent failed completely to demonstrate any job-relatedness of this job requirement which the Complainant could not acquire.

Finally, the Respondent also offered as a legitimate non-discriminatory reason for not hiring Ms. Welch, the sheriff's belief that she had attempted to smuggle liquor into the jail. The State has sufficiently rebutted this reason in two ways.

First, the State has established in its Findings of Fact, that the Sheriff's belief was not reasonable given the circumstances surrounding the alleged event. Secondly, the record of this hearing reveals that the alleged smuggling, if it occurred at all, occurred not only after Sheriff Protan had already once rejected Ms. Welch's name, but after she had filed her charge of sex discrimination against the Respondent.

The State has sufficiently rebutted the only legitimate non-discriminatory reason for not hiring Ms. Welch which the Respondent offered. The Complainant is therefore entitled to prevail and to recover back-pay from the Respondent in this case.

V  
CONCLUSIONS OF LAW

1. At all times referred to herein, the Respondent, Sheriff of Boone County is and has been an employer within the meaning of Section 3(e), Article 11, Chapter 5 of the Code of West Virginia.
2. At all times referred to herein, the Complainant, Sarah Williams Welch, is and has been a citizen and resident of the State of West Virginia, and is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the Code of West Virginia.
3. On November 12, 1976, the Complainant filed a verified complaint properly alleging that Respondent had engaged in one or more unlawful discriminatory practices within the meaning of Section 9, Article 11, Chapter 5 of the Code of West Virginia.
4. Said complaint was timely filed within ninety days of an alleged act of discrimination. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9, and 10, Article 11, Chapter 5 of the West Virginia Code.

5. The West Virginia Human Rights Act is violated when the basis of discriminatory treatment insofar as employment opportunities is based on sex.
6. Complainant made a prima facie showing that the Respondent discriminated against her on the basis of her sex by establishing, (1) that she is a member of a protected class under the West Virginia Human Rights Act; (2) that she was qualified for a position as a deputy sheriff, a position for which there were vacancies, (3) that she was rejected for these vacant positions, and (4) that less qualified males were hired to fill these vacancies.
7. The Respondent's proffered reasons for rejecting Complainant, to wit, - residency requirements; military preference and her spouse's conviction are not legitimate non-discriminatory reasons under State law, and therefore Ms. Welch establishes on her prima facie showing, a violation of Section 9, Article 11, Chapter 5 of the West Virginia Code. The Respondent articulated a legitimate non-discriminatory reason for rejection of Ms. Welch on the grounds that it was his belief that Ms. Welch had attempted to smuggle contraband into the jail.
8. The Complainant showed by a preponderance of the evidence that the reason articulated by the Respondent for not hiring her, on the grounds of smuggling contraband was pretextual and that she was, in fact, not hired due to illegal discriminatory reasons in violation of Section 9, Article 11, Chapter 5 of the Code of West Virginia.

9. Although the Respondent's workforce contained 7% female in a county (Boone) where females comprise 26% of the workforce, probative as to underrepresentation and underutilization of females in the Boone County Sheriff's Department, this statistical data on Respondent's workforce is legally insufficient and inconclusive to establish a pattern and practice of discrimination without more. Accordingly, the pattern and practice allegation of Complainant's charge is dismissed.

VI

ORDER

THEREFORE, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby ordered as follows:

1. The Respondent is hereby permanently ORDERED to CEASE and DESIST from engaging in employment practices that discriminate against the Complainant and all other persons on account of their sex.
2. The Respondent is hereby ORDERED to pay to the Complainant, Sarah Williams Welch, the sum of \$10,790.57 plus interest of \$5,064.33 at the rate of eight percent (8%) compounded per annum from 1976-1979.
3. The Respondent is hereby ORDERED to pay to the Complainant, Sarah Williams Welch, the sum of \$1,000 which represents damages for mental anguish and humiliation.
4. Respondent shall comply with provisions 2 and 3 of Section V of this order within 35 days of its receipt of this order.

5. It is further ORDERED that there shall be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under the West Virginia Human Rights Act, as amended, or because of the filing of a complaint, giving of testimony or assistance, or participation in any investigation, proceeding or hearing under the West Virginia Human Rights Act, as amended.
6. It is further ORDERED that Respondent will develop and disseminate a clear and direct policy forbidding intimidation and harassment and providing for disciplinary action against violators.
7. It is further ORDERED that the Respondent shall forthwith adopt and implement the following affirmative action program to eliminate the effects of any discriminatory practices:
  - A. Within thirty (30) days of the effective date of the Order, Respondent shall prepare and distribute a written statement of non-discriminatory policies to all of its present employees. Such statement shall include, but is not necessarily limited to, a specific statement that neither Respondent, nor its members, shall discriminate against any individual with respect to terms, conditions or privileges of membership because of race, color, religion, national origin, ancestry, sex, age, blindness or handicap, as provided in Chapter 5, Article 11 of the Code of West Virginia, and that no direct or indirect means such as harassment or reprisal may be utilized to contravene such policy;

- B. The Respondent, pursuant to Chapter 5, Article 11, Section 17, of the Code of West Virginia, shall post and maintain in all its offices or places of business, in a prominent place where it is clearly visible, the poster of the West Virginia Human Rights Commission advising the public and its employees of their rights under the West Virginia Human Rights Act.
8. It is further ORDERED that within one hundred and eighty (180) days of the effective date of this ORDER, and thereafter within one hundred and eighty (180)-day intervals for a period of two (2) years, the Sheriff of Boone County or other responsible officer or representative of the Respondent shall file with the Commission a sworn statement affirming that Respondent has fully and completely complied with this ORDER.

It is so ORDERED:

May 10 1984  
DATE

Enter:

Russell Van Cleve

Russell Van Cleve  
Chairperson  
WV HUMAN RIGHTS COMMISSION