



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

**GASTON CAPERTON**  
GOVERNOR

**PHYLLIS H. CARTER**  
EXECUTIVE DIRECTOR

March 27, 1989

Jack M. Day  
Madison, WV 25130

Hobet Mining, Inc.  
P.O. Box 305  
Madison, WV 25130

Marcelle St. Germain, Esq.  
Crandall & Pyles  
P.O. Box 596  
Logan, WV 25601

Roger Wolfe, Esq.  
Jackson & Kelly  
P.O. Box 533  
Charleston, 25322

Sharon Mullens  
Deputy Attorney General  
812 Quarrier St.  
L & S Bldg. - 4th Floor  
Charleston, WV 25301

Re: Day v. Hobet Mining, Inc.  
ER-531-87

Dear Parties:

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

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

Phyllis H. Carter  
Executive Director

PHC/mst  
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE  
OF STATUTORY RIGHT TO JUDICIAL REVIEW  
AMENDED AND EFFECTIVE  
AS OF APRIL 1, 1987

Err. H. B. 2638]

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116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an  
2 application for review may be prosecuted by either  
3 party to the supreme court of appeals within thirty days  
4 from the receipt thereof by the filing of a petition  
5 therefor to such court against the commission and the  
6 adverse party as respondents, and the clerk of such  
7 court shall notify each of the respondents and the  
8 commission of the filing of such petition. The commis-  
9 sion shall, within ten days after receipt of such notice,  
10 file with the clerk of the court the record of the  
11 proceedings had before it, including all the evidence.  
12 The court or any judge thereof in vacation may  
13 thereupon determine whether or not a review shall be  
14 granted. And if granted to a nonresident of this state,  
15 he shall be required to execute and file with the clerk  
16 before such order or review shall become effective, a  
17 bond, with security to be approved by the clerk,  
18 conditioned to perform any judgment which may be  
19 awarded against him thereon. The commission may  
20 certify to the court and request its decision of any  
21 question of law arising upon the record, and withhold  
22 its further proceeding in the case, pending the decision  
23 of court on the certified question, or until notice that the  
24 court has declined to docket the same. If a review be  
25 granted or the certified question be docketed for  
26 hearing, the clerk shall notify the board and the parties  
27 litigant or their attorneys and the commission of the fact  
28 by mail. If a review be granted or the certified question  
29 docketed, the case shall be heard by the court in the  
30 manner provided for other cases.

31 The appeal procedure contained in this subsection  
32 shall be the exclusive means of review, notwithstanding  
33 the provisions of chapter twenty-nine-a of this code:  
34 *Provided*, That such exclusive means of review shall not  
35 apply to any case wherein an appeal or a petition for  
36 enforcement of a cease and desist order has been filed  
37 with a circuit court of this state prior to the first day  
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a  
40 final order of the commission within thirty days after  
41 receipt of the same. or, if applicable, within thirty days  
42 after a final order of the supreme court of appeals, a  
43 party or the commission may seek an order from the  
44 circuit court for its enforcement. Such proceeding shall  
45 be initiated by the filing of a petition in said court, and  
46 served upon the respondent in the manner provided by  
47 law for the service of summons in civil actions; a hearing  
48 shall be held on such petition within sixty days of the  
49 date of service. The court may grant appropriate  
50 temporary relief, and shall make and enter upon the  
51 pleadings, testimony and proceedings such order as is  
52 necessary to enforce the order of the commission or  
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JACK M. DAY,

Complainant,

vs.

DOCKET NO.: ER-531-87

HOBET MINING, INC.,

Respondent.

O R D E R

On the 12th day of January, 1989, the West Virginia Human Rights Commission reviewed the Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision of Hearing Examiner James Gerl and Complainant Jack M. Day's Exceptions to the Hearing Examiner's Findings of Fact and Conclusions of Law in the instant case.

After consideration of the Hearing Examiner's recommendations and Complainant's exceptions, the Commission does hereby adopt in toto the Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision.

It is hereby ORDERED that the Hearing Examiner's Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision be attached hereto and made a part of this final order.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten (10) days within which to request reconsideration of the West Virginia Human Rights Commission's

Order, and that they may seek judicial review.

ENTERED this 3rd day of March, 1989.

  
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CHAIR/VICE-CHAIR  
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

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W.V. HUMAN RIGHTS COMM.

JACK M. DAY

Complainant,

v.

DOCKET NUMBER: ER-531-87

HOBET MINING, INC.

Respondents.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on July 21-22, 1988 in Madison, West Virginia. Commissioner Russell Van Cleve served as Hearing Commissioner. The complaint was filed on April 23, 1987. The notice of hearing was issued on August 6, 1987. A telephone Status Conference was convened on September 2, 1987. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. The briefing process in this case continued until August 22, 1988. Complainant's brief was late by three days, prompting respondent to file a nine page letter, replete with legal citations requesting a reply brief. Complainant then filed a protest, replete with excuses. Respondent's motion is granted and the nine page letter is accepted as respondent's reply brief.

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 him because of his race. Respondent maintains that complainant was not qualified for the job and that complainant received a bad reference from a former employer.

#### 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 black.
2. Respondent did not hire complainant.

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

3. Complainant applied for a job at respondent on March 19, 1984, March 26, 1985, February 5, 1987 and March 20, 1987.

Applications filed by black and female applicants, until recently, were kept active by respondent for one year for affirmative action reasons.

4. In order to work on surface mines such as that of respondent at which complainant applied, it is required by law that the employee have a valid surface miners certificate from the State Department of Energy. In order to obtain such a certificate, the employee must complete 40 hours of classroom training and pass a written test to obtain an apprentice card. After the employee works at a surface mine for six months, he is eligible to make the card permanent by passing a written test.

5. Complainant has never possessed a West Virginia surface miners certificate, either permanent or apprentice.

6. Toler, respondent's Manager of Employee Relations, checked complainant's references after complainant applied.

7. Toler telephoned Easter, one of complainant's former employers. Easter stated that complainant had not driven an 85 ton truck. Easter said that he would not recommend complainant because complainant was lazy and he would hide from Easter. Easter also informed Toler that complainant's foremen complained about his work.

8. Toler also contacted Bigley, listed by complainant on his application. Bigley told Toler that he did not know complainant.

9. Based upon his check of complainant's references, Toler decided not to hire complainant.



### CONCLUSIONS OF LAW

1. Jack M. Day 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 §5-11-10.

2. Hobet Mining, Inc. is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has not established a prima facie case of race discrimination.

4. Respondent has articulated a legitimate non-discriminatory reason for its failure to hire complainant.

5. Complainant has not demonstrated that the reason articulated by respondent for failing to hire him is pretextual.

6. Respondent has not discriminated against complainant on the basis of his race by failing to hire him. West Virginia Code, Section 5-11-9(a).

### 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 a reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has failed to establish a prima facie case of discrimination. The parties have stipulated that complainant was black and that he was not hired by respondent. Complainant proved that he applied for employment with respondent on four occasions and that each application was considered active by respondent for one year.


The record evidence is clear, however, that complainant was not qualified for the surface mine truck driver job for which he had applied. State law requires that anyone working on a permitted surface mine to have a valid surface miner's certificate. Complainant testified that he had such a certificate, but he clearly did not. Complainant's testimony was not credible because of his evasive demeanor on cross-examination and because of various inconsistencies in his testimony and in his job applications. Significantly, complainant's claim that he had such a card was refuted by the credible testimony of Cline as well as the Faerber affidavit. Complainant's claim that he had his card at home also fell by the wayside. The overwhelming weight of the credible evidence supports a conclusion that complainant is not qualified because of his lack of the legally required certification for the job complainant sought.

In view of the lack of complainant to establish that he was qualified for the job which he sought, it must be concluded that complainant has not established a prima facie case of discrimination.

A mere claim of certification, which is undermined by factors of demeanor and credibility, and which is refuted overwhelmingly by the record evidence, is not a sufficient showing to conclude that, without explanation by respondent, an inference of discrimination has been raised. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). Accordingly, there is no reason to proceed to the next step in the analysis.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter, with prejudice.

  
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James Gerl  
Hearing Examiner

ENTERED: October 18, 1988