

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR.
Governor

February 14, 1986

Gloria M. Hammack, Esquire
105 Clarksburg Street
P.O. Box 228
Mannington, WV 26582

Norman T. Farley, Esquire
11 North Kanawha Street
P.O. Box 518
Buckhannon, WV 26201

COPY

RE: Eve v City of Buckhannon Police Department, ES-435-81

Dear Ms. Hammack and Mr. Farley:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Claudia Jean Eve v City of Buckhannon Police Department, ES-435-81.

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 (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
Howard D. Kenney
Executive Director

HDK/kpv /jcp
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED

JAN 16 1986

W.V. HUMAN RIGHTS COMM.

CLAUDIA JEAN EVE,

Complainant,

vs.

Docket No. ES-435-81

CITY OF BUCKHANNON POLICE DEPARTMENT,

Respondent.

ORDER

On the 8th day of January, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner, William F. Byrne. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

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.

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 4 day of Feb., 1986.

Respectfully Submitted

Betty A. Hamilton

CHAIR/VICE-CHAIR
West Virginia Human
Rights Commission

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CLAUDIA JEAN EVE,

Complainant,

vs.

CITY OF BUCKHANNON POLICE DEPARTMENT,

Respondent.

Approved
RRS. 12/5/85
CASE NO. ES-435-81

RECEIVED

DEC 10 1985

W.V. HUMAN RIGHTS COMM.

DECISION

I. Proceedings

This case came on for public hearing before Hearing Examiner, William F. Byrne, on July 9, 1985, in the Upshur County Courthouse, Buckhannon, West Virginia. The Complainant appeared in person and was represented by Gloria M. Hammack, Esquire. The Respondent appeared in the person of Elizabeth J. Poundstone, Recorder and Treasurer of the City of Buckhannon, and was represented by Norman T. Farley, Esquire, and David McCauley, of the firm of Coleman and Wallace. The parties agreed by written stipulation to waive the presence of a Hearing Commissioner, the original of which having been filed and made a part of the record.

On March 13, 1981, the Complainant, Claudia Jean Eve, filed a verified Complaint, alleging that the City of Buckhannon Police Department discriminated against her in a matter of hiring on the basis of her sex, in violation of the West Virginia Human Acts Act (Article 11, Chapter 5, of West Virginia Code, as

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amended). Thereafter, a finding of probable cause was made and the Complaint laid dormant until April 12, 1985, when, following the issuance of a Writ of Mandamus against the Human Rights Commission (hereinafter "Commission") in Allen, et al. vs. West Virginia Human Rights Commission, _____ W.Va. _____, 324 SE2d 99(1984), a Notice of Public Hearing was signed by Human Rights Commission Chairman, Russell Van Cleve, pursuant to W.Va. Code §5-11-10 and served upon all parties.

Thereafter, a pre-hearing telephone conference call was convened on May 7, 1985, at 10:15 a.m. between the Hearing Examiner and counsel for the parties. As a result of said telephone conference, limited discovery was engaged in between the parties and pre-hearing memoranda were ordered and exchanged.

This matter having been set for public hearing by notice for July 9, 1985, at 9:00 a.m., evidence in the form of testimony and exhibits was taken, transcribed stenographically and made a part of the official record of the proceedings. The Complainant entered Exhibits 1 thru 4 and Respondent entered Exhibits 1 thru 12. All Exhibits were received by the Hearing Examiner and made a part of the record.

At the conclusion of the public hearing, the parties were requested by the Hearing Examiner to prepare proposed Findings of Fact and Conclusions of Law, upon receipt of a copy of the official transcript of the Hearing. Said documents were prepared and submitted to the Hearing Examiner, as requested.

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These submissions, along with argument of counsel, were considered in light of the transcribed record and exhibits admitted in evidence.

II. Issues

(1) Did the Respondent unlawfully discriminate against the Complainant, as prohibited by West Virginia Code §5-11-9(a) by refusing to extend to her, because of her sex, an equal opportunity for employment as a police officer with the City of Buckhannon, in February of 1981?

(2) If the Respondent did unlawfully discriminate, what are the appropriate remedies?

III. Findings of Fact

(1) Claudia Jean Eve, the Complainant, is a female, born August 18, 1949.

(2) Respondent, City of Buckhannon, is a municipal corporation, subject to West Virginia Police Civil Service Law, its rules and regulations, and hires police officers through the Police Civil Service Commission of the City of Buckhannon, West Virginia.

(3) The Complainant filed an application for employment and an application for examination for the Police Department, with the Respondent, on or about July 28, 1980. At the time the Complainant filed her application, no openings

for the position of Police Officer with the Police Department of the City of Buckhannon, had been advertised, and the Complainant filed the applications simply to place the same on record with the Respondent while being fully aware that there were no positions available at that time.

(4) A standardized competitive and written examination for the position of Police Officer was administered by the Police Civil Service Commission on or about February 4, 1981, with twelve candidates taking the examination, one of whom was the Complainant.

(5) Six candidates achieved a passing score on the examination, including the Plaintiff, whose score ranked third among the six candidates achieving a passing score.

(6) On February 11, 1981, the entire City Council of the City of Buckhannon, conducted individual interviews and considered the applications and qualifications of each of the six candidates who achieved a passing score on said examination.

(7) The Respondent, through its Police Civil Service Commission, has established the practice of conducting interviews with all persons who passed the competitive examination, and based upon such interview, selects and appoints a qualified candidate, based upon relative merit and fitness of the candidates.

(8) It is the practice of the Police Civil Service Commission of the City of Buckhannon to defer the medical

examination of eligible candidates until after the interview and tentative appointment of said eligible candidate for the purpose of cutting down on the expense of medical examinations. The Respondent previously maintained written minimum and maximum height and weight qualifications for applicants for examination by the Police Civil Service Commission, but the minimum and maximum height and weight qualifications had not been applied since 1977, and were not applied to the Complainant.

(9) There is no evidence that certain height and weight qualifications were specifically required to adequately perform the duties of police work.

(10) The education of the Complainant consisted of a high school diploma, two years of college in the field of Pre-Med and Social Services, and one year of Adult Education Program in New York, in which the Complainant graduated as a Licensed Practical Nurse.

(11) The work experience of the Complainant consisted of employment as a Staff Nurse in two hospitals, and working as an Office Nurse in a doctor's office.

(12) The Complainant received no previous training of any kind as a Police Officer; no training in the field of Law Enforcement.

(13) The Complainant has suffered from Diabetes since the age of nine, and undergoes daily insulin therapy; and as a result of her diabetic condition, the Complainant sustained

vision problems and began undergoing laser treatments for diabetic retinopathy, in March of 1981.

(14) Notwithstanding the Complainant's diabetic condition, the evidence did not establish that the Defendant's diabetic condition precluded her from performing the duties of a Police Officer.

(15) The City of Buckhannon did not maintain a written job description for the position of Police Officer, but the position of Police Officer requires the holder thereof to perform all law enforcement duties of a Municipal Police Officer, including maintaining of law and order in the community, traffic control, criminal investigation, arrests, occasionally breaking up fights and other confrontations and disturbances which may involve violence and/or the threat of violence, and any and all other functions which are normally performed by a Municipal Police Officer.

(16) The Police Department of the City of Buckhannon consisted of six Patrolmen and two Officers, and all Police Officers are required to perform all job functions, with no Police Officers being assigned specific duties in any one area.

(17) The Police Officers of the City of Buckhannon work swing shifts, and on a frequent basis, only one Police Officer is on duty.

(18) The position of Police Officer requires an individual to be able to arrest drunken and disorderly persons, to be able

to break up fights, and to fully and properly confront other disturbances when they occur.

(19) The actual decision for employment of Police Officers is made by all of the Members of City Council, based upon the relative merit and fitness of the candidates.

(20) The position of Police Officer, for which the Complainant had competed, was filled by the unanimous vote of the City Council of the City of Buckhannon, by hiring John Thomas Shannon, a qualified applicant who had achieved a passing score on the written examination.

(21) The educational qualifications of John Thomas Shannon consisted of a high school diploma, training at the basic Military Police School, the Atlantic Fleet Basic Amphibious Assault School and the Military Police Basic Leadership School.

(22) The work experience of said John Thomas Shannon consisted of services of Military Policeman from July, 1977, to July, 1980, during which time the said John Thomas Shannon became qualified or familiarized with various firearms, search and seizure procedures, radar units, training in riot control, and other police procedures; and further consisted of experience as a Correctional Officer from November, 1980, to February, 1981, with the West Virginia Department of Corrections.

(23) By unanimous vote, the City Council of the City of Buckhannon approved the hiring of John Thomas Shannon, to fill the opening for which the Complainant had competed, due to the fact

that John Thomas Shannon had extensive prior police training and experience and was determined to be the best qualified of the six persons having passed the written examination.

(24) The then Mayor of the City of Buckhannon, the Recorder and Treasurer of the City of Buckhannon, the Police Chief of the City of Buckhannon, and three members of the City Council who were involved in the interview and consideration of the Complainant and the other five candidates for the position of Police Officer, made their decision and recommendation to hire John Thomas Shannon on the basis of his prior training and experience in police work, and the sex of the Complainant was not a consideration in the employment process.

(25) Among several factors considered in reaching their decision, the City Council of the City of Buckhannon considered the fact that the Complainant, in her application and during her interview, had indicated that she was a diabetic and undergoing insulin treatments.

(26) During the Complainant's interview, she was introduced by Mayor William R. Short as "the wife of Richard Eve". Mayor Short verified this statement and explained that he introduced the Complainant in this manner as a "courtesy thing" and saw nothing wrong with such an introduction. Mr. Richard Eve, the Complainant's husband, had been a City employee.

(27) Other Respondent witnesses referred to "girls" who had been encouraged to apply as Police Officers.

(28) Although there were provided in the written Police Civil Service Regulations for the City of Buckhannon, minimum and maximum height and weight qualifications, said qualifications were not considered by the Police Civil Service Commission, nor by the City Council to be disqualifying, as evidenced first by the Complainant being permitted to take the written examination for the position of Police Officer; and second, by the Complainant subsequently being interviewed by the City Council of the City of Buckhannon, despite the Complainant not technically qualifying, pursuant to said minimum and maximum height and weight qualifications.

(29) The Police Civil Service Commission and the City Council of the City of Buckhannon had not applied the height and weight restrictions set forth in the Police Civil Service Regulations since 1977. The Complainant and various other applicants were allowed to take the written examination for the position of Police Officer, notwithstanding their failure to meet the minimum and maximum height and weight qualifications.

(30) Although the Respondent did not apply height and weight restrictions in the Complainant's case, they did permit the inclusion of height and weight qualifications in a notice of opening in the Buckhannon Police Department as late as January of 1985.

(31) This inclusion of height and weight qualifications in notice of opening as late as January of 1985, was done in

error and as the result of poor office practices, not as the result of discriminatory motive.

IV. Discussion

The Complainant applied for a job as a Policewoman with the Respondent. She successfully passed the competitive examination, was interviewed along with other successful candidates on February 11, 1981. As a result of this interviewing process, a male candidate, John Thomas Shannon, was appointed to the position of Police Officer. The Complainant charges that she was discriminated against because of her sex. The Respondent has replied that it did not discriminate on the basis of the Complainant's sex, but rather selected the candidate best qualified for the position.

Both parties have presented evidence and argument of compliance and/or non-compliance with the Police Civil Service Statutes and Regulations. The Complainant charges that she was not considered during hiring decisions after February 11, 1981, notwithstanding her right under law to be considered three times, based on certification as an eligible candidate for appointment. West Virginia Code §8-14-15. The Respondent argues that it complied with West Virginia Civil Service law in the manner in which it tested and hired Mr. Shannon, the person selected for the position over the Complainant.

The issue before me is not compliance with West

Virginia Police Civil Service law, but rather with the West Virginia Human Rights Act, which prohibits discrimination in hiring on the basis of sex. Any complaint regarding the application of the Police Civil Service law, West Virginia Code §8-14-1, et seq. should be processed under the relevant and appropriate provisions of said law.

The Complainant attempted to meet her burden of presenting a prima facie case by showing that she is a member of a protected class (female), who applied for a job as a Police Officer for which she was minimally qualified by virtue of passing the Civil Service Examination, and that the position remained open and a man was hired rather than the Complainant. The Respondent countered by presenting evidence of a legitimate reason why a man was hired over the female Complainant and denying discriminatory intent. The Complainant responded by claiming that these reasons and explanations were pretextual and did not explain the actions of the Respondent.

The facts establish that both Complainant and Mr. Shannon were minimally and basically qualified for the position of Police Officer by virtue of their passing the Police Civil Service examination, along with four other persons. All six persons were considered for the open position and after a comparison of credentials, the City Council found that Mr. Shannon was best qualified and offered him the position. Based upon the record as a whole, I find that the City Council acted

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reasonably and in a non-discriminatory manner. Mr. Shannon was highly qualified for the position, based on his prior experience as a Military Policeman. The Complainant had no prior Police experience. Although prior Police experience was not required for an entry level position, any person who applies for such a position who has prior Police experience would clearly be relatively more qualified than one having no such experience.

Furthermore, the matter of the Complainant's health was raised and appropriately considered. The Complainant's diabetes entered into the hiring picture. This is not a handicapped discrimination case and I find that it is reasonable to ask questions regarding health and to take health into consideration when interviewing for a Police Officer's job. This is not to say that a diabetic cannot be a Police Officer. This issue is not before me and evidence was not presented on the subject. The only issue is whether the decision not to hire the Complainant was based upon her sex. I believe that the decision not to hire the Complainant and to hire Mr. Shannon can be reasonably explained and understood on the basis of Mr. Shannon's superior credentials and legitimate concerns at the time for the Complainant's health.

However, even if the Complainant's health was not a barrier to her becoming a Police Officer, Council's questions and concerns about her health were appropriate at the time of the interview. It is noted that the Police Civil Service law

does not require a medical examination of every person who passes the competitive examination. It only requires that a medical examination be given prior to appointment. (West Virginia Code §8-14-13) Therefore, without a medical examination and with the Complainant's application in which she admitted diabetes, such questions were particularly appropriate. The Complainant admitted that she had some vision problems and laser therapy was prescribed as a preventative measure. The Complainant's health was an appropriate subject of discussion.

Furthermore, reviewing the credentials, it is noted that the Complainant had two years of college in the field of Pre-Med and Social Services, training and license as a Licensed Practical Nurse, as well as work experience as a Nurse. Mr. Shannon had credentials which included a high school diploma, training at the Basic Military Police School, and the Military Police Basic Leadership School. In short, Mr. Shannon's qualifications were superior to those of the Complainant, when both were applying for the position of Police Officer.

The Complainant argues that reference during her interview to the fact that she was "the wife of Mr. Richard Eve" and other references to "girls", indicate discriminatory motive on the part of members of Council. While I do not doubt that such remarks can indicate discriminatory motive, and that it does in fact demonstrate a lack of awareness or perhaps consciousness about women's issues and rights, I also know that

such remarks can be made by genuinely fair-minded people, totally innocent of any discriminatory motive. While it is important to appropriately point out these verbal vestiges of another time and generation, we must be careful that the mere words do not brand an individual as discriminatory.

In summary, the reasons set forth by the Respondents to justify the selection of Mr. Shannon over the Complainant were reasonable and not a pretext for discrimination. The Respondent appropriately examined all candidates who were eligible for the position, and based on "relative merit and fitness of the candidates" made the appointment of Mr. Shannon.

V. Conclusions of Law

(1) The Respondent was an employer within the meaning of West Virginia Code, Chapter 5, Article 11, Section 3(d), as amended.

(2) The Complainant is a person within the meaning of West Virginia Code, Chapter 5, Article 11, Section 3(a), as amended.

(3) The Complainant timely filed her Complaint, and the West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of this action.

(4) It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment.

(5) All appointments to positions in the Police Department of the City of Buckhannon shall be made only according to the relative qualification of fitness of the eligible candidates. Eligibility shall be determined on the basis of a competitive examination.

(6) The Police Civil Service Commission shall require individuals applying for admission to any competitive examination, to file a formal application in which such individuals state, among other things, their state of health and physical capacity for the public service, and such other information as may reasonably be required, touching upon the Applicant's qualifications and fitness for the public service. West Virginia Code, Chapter 8, Article 14, Section 12, as amended.

(7) All competitive examinations for appointments or promotions to all positions as police officer in the City of Buckhannon shall be practical in their character, and shall relate to such matters, and include such inquiries, as will fairly and fully test the comparative merit and fitness of the individual or individuals examined to discharge the duties of the employment sought, and any appointee to any position in the Police Department of the City of Buckhannon, before assuming the appointment, must undergo a medical examination which shall be conducted under the supervision of a board appointed for such purpose. Such medical examination is not required to be given

to all applicants, and the medical examination is not required to be given prior to the competitive examination. West Virginia Code, Chapter 8, Article 14, Section 13, as amended.

(8) The City Council of the City of Buckhannon is not bound, under the West Virginia Civil Service Law to accept for employment a person with the highest score on the Police Civil Service Commission written examination, and said appointment must be made with sole reference to the relative merit and fitness of each of the candidates.

(9) The evidentiary standards to be applied by the West Virginia Human Rights Commission during administrative hearings conducted to determine whether or not discriminatory practices have resulted, are generally and partially set forth in the case of Shepherdstown Volunteer Fire Department vs. State of West Virginia Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983). The "frame-work" approvingly cited by the West Virginia Supreme Court of Appeals in Shepherdstown is generally stated as follows: First, the Plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the Plaintiff succeeds in proving the prima facie case, the burden shifts to the Defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the Defendant carry this burden, the Plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not its true reasons, but were a pretext for discrimination.

(10) In the Shepherdstown decision, the West Virginia Supreme Court of Appeals approvingly cited the U.S. Supreme Court decision in McDonnell Douglas Corporation vs. Green, 411 U.S. 792 (1973), in which case it is stated that the Plaintiff's prima facie case of employment discrimination may be established by showing that the Complainant belongs to a protected class; that the Complainant applied and was qualified for a job for which the employer was seeking applicants; that despite her qualifications, the Complainant was rejected; and that after she was rejected, the position remained open and the employer continued to seek applicants from persons of the Complainant's qualifications.

(11) As a part of the determination as to whether or not the fourth criterion stated above in McDonnell Douglas is met, in cases in which discrimination has been alleged, evidence must be presented by the Complainant of inconsistent treatment by the employer between members of the protected class and non-members. The case of State of West Virginia Human Rights Commission vs. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (W.Va. 1985), while representing a discriminatory discharge situation as opposed to a discriminatory hiring case, is instructive as to the West Virginia Supreme Court of Appeals' interpretation of the aforementioned fourth criterion. In Logan-Mingo, the Court approvingly cited the case of Burdette vs. FMC Corporation, 566 F.Supp. 808 (N.D. W.Va. 1983), wherein the

Court stated in part:

"These elements, which a complainant must prove by a preponderance of the evidence, go to the heart of an unlawful discrimination case. 'The ultimate issue in the area of disparate . . . treatment has been framed generally as follows: Whether members of a protected group were accorded different treatment than nonmembers engaged in similar activity.'"

(12) The Complainant failed to establish a prima facie case of discrimination because although she proved by a preponderance of the evidence that

(a) she, a woman, was minimally qualified for the job for which the employer was seeking applicants, in that she passed the competitive examination;

(b) that despite her minimal qualifications in passing the competitive examination, she was not hired;

(c) the member of the non-protected class (male) hired over the Complainant had superior qualifications for the position.

(13) The failure of the Complainant to establish a prima facie case of discrimination in hiring must result in a finding in favor of the Respondent.

(14) Even in the event that the Complainant could be found to have established a prima facie case, the Respondent articulated several legitimate, truthful and non-discriminatory reasons for failing to hire the Complainant, and for the hiring of another more qualified candidate.

(15) The Complainant failed to show by any standard, including a preponderance of the evidence standard, that the reasons articulated by the Respondent were pretextual or not true and not legitimate, and said failure by the Complainant to show by a preponderance of the evidence that the reasons articulated were pretextual, untrue and not legitimate, must result in a finding in favor of the Respondent, and further in the conclusion and dismissal of all further proceedings before the West Virginia Human Rights Commission.

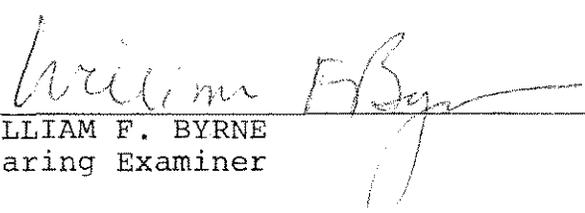
(16) The Respondent, the City of Buckhannon, has not engaged in any unlawful discriminatory practice as defined in the West Virginia Human Rights Act, West Virginia Code, Chapter 5, Article 11, Section 1, et seq., as amended. The Complainant is entitled to no relief, and the Complaint of the Complainant should be dismissed and these proceedings concluded.

VI. Proposed Order

Therefore, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that the Complaint is dismissed.

ENTER this 3rd day of December, 1985.

WILLIAM F. BYRNE
ATTORNEY AT LAW
221 WILLEY STREET
MORGANTOWN, WV 26505
(304) 296-2577


WILLIAM F. BYRNE
Hearing Examiner

CERTIFICATE OF LAW

I, WILLIAM F. BYRNE, Hearing Examiner, do hereby certify that the foregoing DECISION was served upon

copy: Gloria M. Hammack
Attorney at Law
105 Clarksburg Street
P.O. Box 228
Mannington, W.Va. 26582

copy: Norman T. Farley
Attorney at Law
11 N. Kanawha Street
P.O. Box 518
Buckhannon, West Virginia 26201

original: The Honorable Paul R. Stone
Chief Administrative Law Judge
WEST VIRGINIA SUPREME COURT OF APPEALS
STATE CAPITOL, Room E-312
Charleston, West Virginia 25305

by mailing a true form thereof by regular United States mail, postage prepaid, this 3rd day of December, 1985.



WILLIAM F. BYRNE
Hearing Examiner

WILLIAM F. BYRNE
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