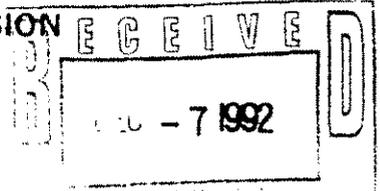




Glenda

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400



GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
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Quewanncoll C. Stephens
Executive Director

2 December 1992

E & G, Inc., dba Ramada Inn
of South Charleston
Post Office Box 8615
South Charleston, WV 25303

Charles Fonguh
Post Office Box 2884
Charleston, WV 25330

John S. Moore, Esquire
424 Division Street
South Charleston, WV 25309

Re: Fonguh v. E & G, Inc., dba Ramada Inn
Docket No. ER-339-87 and ENO-340-87

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to W. Va. Code § 5-11-11, as amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

QUEWANNCOLL C. STEPHENS
EXECUTIVE DIRECTOR

QCS
Enclosures
Certified Mail/Return
Receipt Requested
cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CHARLES FONGUH,

Complainant,

v.

DOCKET NO. ER-339-87
ENO-340-87

E & G, INC., a West Virginia
corporation, doing business
as RAMADA INN,

Respondent.

FINAL ORDER

On November 18, 1992, the West Virginia Human Rights Commission reviewed the Hearing Examiner's Recommended Decision in the above-styled action issued by Hearing Examiner Gail Ferguson. After due consideration of the aforementioned, and after a thorough review of the proposed findings and the transcript of record, the Commission decided to, and does hereby, adopted said Hearing Examiner's Recommended Decision as it own, without modification or amendment.

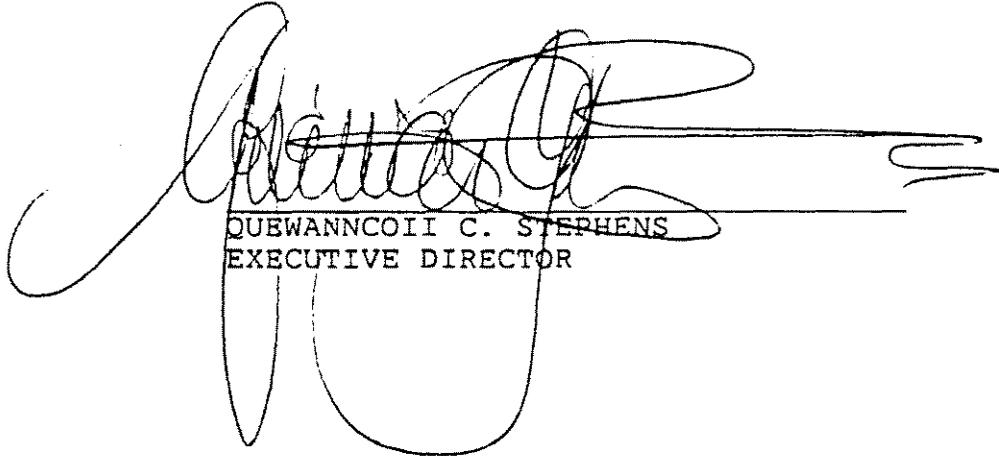
It is, therefore, the order of the Commission that the Hearing Examiner's Recommended Decision be attached hereto and incorporated herein as the Final Order of the West Virginia Human Rights Commission.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 2nd day of December, 1992 in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the Clerk of the Supreme Court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

August 19, 1992

Charles Fonguh
PO Box 2884
Charleston, WV 25330

E & G, Inc. dba
Ramada Inn of South Charleston
PO Box 8615
S. Charleston, WV 25303

John S. Moore, Esq.
424 Division St.
S. Charleston, WV 25309

Jan Fox
Senior Assistant Attorney General
Office of Attorney General
Room E-26
Charleston, WV 25305

Re: Fonguh v. E & G, Inc dba Ramada Inn of South
Charleston ER-339-87 & ENO-340-87

Dear Parties:

Enclosed, please find the recommended decision of Hearing Examiner Gail Ferguson in the above-referenced case. Pursuant to the West Virginia Administrative Regulations, Rules and Regulations Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission, any party affected by this recommended

Charles Fonguh
August 18, 1992
Page Two

decision shall be given fifteen (15) days within which to file, in written form only, exceptions to said proposals and findings; and present, in written form only, argument in support of said exceptions to the Commission.

Sincerely yours,


Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CHARLES FONGUH,

Complainant,

v.

DOCKET NUMBERS: ER-339-87
ENO-340-87

E & G, INC. A WEST VIRGINIA
CORPORATION DBA RAMADA INN,

Respondent.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on October 21, 1988, at the office of the West Virginia Human Rights Commission, before Gail Ferguson, Hearing Examiner.

The complainant, Charles Fonguh, appeared in person and by counsel, Jan L. Fox, Senior Assistant Attorney General. The respondent, E & G Inc., dba Ramada Inn, appeared by representative Lothar Wenger, Director of Food and Beverage of E & G, Inc., and by counsel, F. Chris Gall, Esq. and John S. Moore, Esq.

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 hearing examiner 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.

FINDINGS OF FACT

1. The respondent, E. & G., Inc. does business as Ramada Inn and is located in South Charleston, West Virginia.

2. Charles Fonguh, the complainant, is a African male who was born in Cameroon, Africa on May 14, 1952.

3. On May 20, 1980, the complainant came to the United States as a permanent resident to attend school and to obtain a college degree in economics and accounting.

4. According to the complainant, while in Cameroon, he worked as a cook at Mont Febe, a hotel, for one year and received a two week training program cooking European and African cuisine. The complainant then changed jobs to the American Embassy in Cameroon where he acted as a receptionist and translator between English and French for approximately two years.

5. In order to assist with his living expenses while in the United States, the complainant obtained a job as a cook with Shoney's in South Charleston, West Virginia. He left that position after two months due to lack of work. At the end of that period of time, the

complainant sought to obtain other employment so that he could have income on a steadier basis. The complainant then made application with respondent, herein.

6. When the complainant completed respondent's job application, he did not indicate his previous experience as a cook. According to the complainant, this purposeful omission was based upon advice given him by another student that he should only list experience that would coincide with the jobs currently available with the respondent. Thus, complainant's job application listed only his experience as a busboy, dishwasher and usher.

7. The respondent hired complainant on September 21, 1980 as a dishwasher for the then minimum wage of \$3.10 per hour. On January 1, 1981, complainant received an increase in his salary to \$3.35 per hour, which was the then current minimum wage for employees in the United States.

8. Lothar Wengar was the food and beverage director at the Ramada Inn. Shirley Myers was complainant's immediate supervisor in 1981-82 and again in January of 1987. During the interim period, the complainant had other supervisors. Between 1982 and 1987, the complainant worked for Ms. Myers at the Holiday Inn, where she was instrumental in getting him a second job.

9. Respondent also employs cooks in its kitchen who are higher skilled and command a slightly higher hourly rate than dishwashers based on level of experience.

10. The routine responsibilities of a cook on the line in respondent's kitchen include: broiling, roasting, frying and slicing meats and vegetables, sauteing and sauce making, and finally

preparation of cold foods. These duties require Ramada's cooks to be familiar with food brands and preparation; with cooking different types of meat, poultry, fish and vegetables; and with presentation of these foods. Moreover, legitimate safety considerations require cooks to be skilled or trained to operate the deep fat fryer, mixers and slicing equipment.

11. Dishwashers and cooks at respondent's establishment work in close proximity to each other, and it is not uncommon when the kitchen is busy for the dishwashers to assist the cooks with prep work. Prep work includes such things as getting bread from the oven and cans from the pantry, peeling onions, slicing tomatoes and lining up garnishes for the salad tray.

12. According to the complainant, from the time he began to work for respondent in 1980 through 1987, he repeatedly requested of his supervisors, with the exception of Mr. Wenger, that he be promoted to cook, to no avail. According to Ms. Myers, the complainant never asked her for a promotion to cook or expressed any such desire.

13. Albert Brooks, complainant's witness and formerly a cook with respondent during the relevant period, testified that the complainant had, in his presence, requested a position as cook. Mr. Brooks further stated that when he came to work for respondent as a cook, the complainant assisted in his training by familiarizing him with the kitchen. However, according to Mr. Brooks, during the entire period he worked with the complainant, the complainant never mentioned that he had prior experience as a cook.

14. According to Mr. Brooks, who is black, one of the major reasons he left respondent's employ was because of racially derogatory comments made by Ms. Myers to him and to the complainant. Ms. Myers denies making such statements, and the complainant did not mention or collaborate any racially motivated remarks made by Ms. Myers during the course of any of his testimony. Mr. Brooks testimony is therefore not credited.

15. During the time the complainant was employed by respondent, he continued to pursue his main objective, which was his education, and respondent accommodated this goal by scheduling his work hours and leave time around his class hours and exams.

16. The respondent admitted that when the kitchen was busy, the complainant would help the cooks by doing prep work such as getting bread from the oven, peeling onions; but respondent maintains that the position of cook was skilled and the complainant did not perform any of the duties associated with cooking on the line, particularly because of safety considerations.

17. The complainant's alleged training of subsequent cooks was, in fact, merely orientation to show new cooks where items or equipment was stored.

18. According to respondent's witness, Harvey Berry, a co-worker of complainant's, the complainant had once remarked to him that he didn't want to become a cook as it would interfere with his class scheduling because of the banquets and the volume of business.

19. The complainant and Mr. Wenger, the food and beverage director, maintained a good working relationship and evidenced a sense of rapport and mutual goodwill, frequently conversing about

their respective families and commonalities. Although Mr. Wenger was in the kitchen area 75% of the time every day and the complainant spoke with him daily, the complainant, in seven years never expressed to him a desire to be a cook, never complained to him about not being promoted to cook, never mentioned his cooking experience or complained about racist remarks. According to the complainant this was because it was not the proper chain of command to usurp the direct supervisor.

20. The complainant never revealed to anyone his prior experience as a cook. In January of 1987, a cook quit and respondent was in need of a replacement. The complainant, Mr. Brooks, Ms. Myers and one other employee were congregated in the kitchen area when Mr. Wenger passed and said to Ms. Myers "Why don't you make a cook out of Charles." The complainant took this to mean he had been promoted to cook and went out and bought knives. There was no testimony offered that, at that time, the complainant requested the position of cook.

21. The following day, the complainant continued to assist in prep work, however, Ms. Myers brought a white female, Bonnie Criner, to the kitchen and the complainant was asked to acquaint her with the kitchen. Ms. Criner had listed in her application for employment her prior experience as a cook.

22. After two days of orientating Ms. Criner, the complainant was instructed to return to his dishwashing duties by Ms. Myers. The complainant walked off the job that afternoon.

23. The months of November, December and January constitute the busy season for respondent in the kitchen. According to Ms. Myers, the complainant could not be made a cook right away because they

believed him to be inexperienced and he would have required training, which she could not provide because of the high volume of business.

24. There were 123 cooks hired in the period September 1981--January, 1987.

25. None of the persons hired or promoted to cooks who were alleged to have been similarly inexperienced as complainant were hired or promoted during the busy months of November, December and January.

26. The morning after the complainant walked off the job, Mr. Wenger called the complainant at home and asked him why he had left work, and asked him to come in and discuss the matter. When the complainant arrived, Mr. Wenger asked him why he had quit. The complainant responded that he had not been made a cook and informed Mr. Wenger that he had filed a discrimination suit.

27. The respondent asked him to return to work and promised him the next available cook position. The complainant did not return to work. According to the complainant, he did not believe the respondent would deliver on his promise, as he had already reneged on his decision to make the complainant a cook.

28. Two days later the complainant called Mr. Wenger and advised him he was leaving Charleston for the Cameroon because his father had died. When asked why complainant made contact with Mr. Wenger, if in fact he had quit, the complainant responded that Mr. Wenger was sympathetic and interested in his family.

29. Within three weeks of her hire, Ms. Criner was let go because her job performance proved she did not have the requisite

experience. However, at the time of her hire, she was believed to have possessed greater skills than she actually had.

30. The respondent continued to hold the complainant's position open for approximately six months thereafter, and so notified the complainant by letter.

31. Mr. Wenger again asked the complainant to come to his office to discuss matters at the complainant's unemployment compensation hearing; but was refused.

32. From the time (Jan. 1987 - May 1987) the complainant left for Cameroon and during his stay in Washington, DC and during his stay in Cameroon, he was not available for, or seeking, employment.

33. The complainant returned to this country as early as May, 1987 but did not pick up or open his mail until July, 1987. Nor did he ask his wife to pick up or open his mail for him, although she was in Charleston, West Virginia throughout the period of his absence; and he spoke to her on a daily basis.

34. The complainant's allegedly unopened mail contained the letter from Mr. Wenger notifying the complainant that his position would be held for him until June 30, 1987.

35. The complainant was employed in several jobs, some concurrently, in Washington, DC from July 1987 through December, 1987.

36. The complainant's income from those several jobs amounted to \$10,410.00 from July, 1987 through December 1987.

37. Cooks are paid commensurate with their experience at the Ramada Inn. Their pay rates range from a low of \$3.50 to \$3.75.

38. If the complainant had been employed by the respondent as a relatively inexperienced cook at a pay rate of \$3.50 per hour, during

the period July, 1987 through December, 1987, he would have earned \$3,360.00. Thus, the complainant earned \$7,050.00 more in his other employment in this time period than he would have if he had continued his employment with the respondent.

39. According to the complainant, he quit his Washington, DC job to return to school in January, 1988 noting that he "always quit (his) jobs when school started."

40. The complainant attended school at West Virginia State College during the months of January, 1988 to May, 1988.

41. The complainant again "found" work with his previous employer in Washington, DC only after the Spring semester of school was completed in 1988.

42. The complainant was employed from June, 1988 through August-September, 1988 in Washington, DC at a pay rate of \$5.00 per hour.

43. During this period, it is calculated that the complainant was paid \$2,000.00. The complainant would have only earned \$1,400.00 during the same period if he were employed by the respondent as a cook. Thus, the complainant was relatively better compensated by \$600.00 for this period of time.

44. The complainant again quit his full-time employment to go to school for the Fall semester. (September, 1988-December, 1988).

45. The complainant is currently attending school.

46. No evidence was introduced relevant to the respondent's hiring or promotion practices vis-a-vis national origin.

47. The alleged acts of discrimination prior to January 1987 occurred more than 180 days prior to the filing of the complaint.

CONCLUSIONS OF LAW

1. The complainant is, and has been at all relevant times, a citizen and resident of the State of West Virginia. The West Virginia Human Rights Commission has jurisdiction over the parties herein.

2. The respondent, E. & G., Inc., a West Virginia Corporation dba Ramada Inn, is, and has been at all relevant times herein, an employer within the meaning of the West Virginia Code §5-11-3(d) and §5-11-9(a).

3. On January 20, 1987, a verified complaint executed by the complainant was timely filed under the terms of the commission's rules, section 3.05(d)(3).

4. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-8 through §5-11-10.

5. The complainant has not established a prima facie case of race and national origin discrimination.

6. The complainant has failed to establish a prima facie case of race and national origin discrimination as the evidence insufficiently establishes he has failed to prove the following: (a) that he ever applied for, or expressed any interest in, the position of cook; (b) that he was qualified for the position of cook; and (c) that he was ever rejected inasmuch as he never applied or requested a position as cook.

7. Put simply, the evidence insufficiently establishes that the complainant repeatedly requested promotion to a cook for seven

years. It is apparent, from the record, that the complainant suffered a severe credibility problem. He admitted that he failed to list his prior cooking experience on his application or that he made known his cooking qualifications to respondent. He had great difficulty identifying when he had requested promotion to cook particularly in late 1986 and early 1987. Even more puzzling is why he never spoke to Mr. Wenger of his interest in becoming a cook, given their relationship. Overall, the complainant's actions are inexplicable or supportive of his allegation of race or national origin discrimination. The clear weight of the evidence shows that the respondent did not engage in race or national origin discrimination against the complainant, but rather, sought to accommodate his needs. To be sure, the gravamen of this case is that of miscommunication, not racial animus. The complainant understood the respondent's words to a supervisor "why don't you make Charles a cook?" to mean he was given the position, when in fact the words were suggestive. During this period of time and given the fact that the complainant had not indicated his prior experience or had he established that he was interested in that position, the respondent's decision to give the position to one who appeared to be experienced is justifiable.

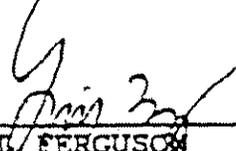
RECOMMENDED ORDER

Pursuant to the above findings of fact and conclusions of law, it is the recommendation of the undersigned examiner that this case be dismissed with prejudice and be closed.

Entered this 7th day of August, 1992.

WV HUMAN RIGHTS COMMISSION

BY



GAIL FERGUSON
HEARING EXAMINER