



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

Gaston Caperton
Governor

TELEPHONE (304) 558-2616
FAX (304) 558-0065
TDD - (304) 558-2976

Herman H. Jones
Executive Director

May 17, 1996

Jayell E. Froats
Post Office Box 2421
Weirton, WV 26062

WV School Service Personnel Assoc.
1610 Washington Street, East
Charleston, WV 25311

Sandra K. Henson, Esq.
Ass. Attorney General
Civil Rights Division
812 Quarrier St., Rm. 500
Charleston, WV 25301

John Everett Roush, Esq.
WV School Service Personnel Assoc.
1610 Washington Street, East
Charleston, WV 25311

Re: Froats v. West Virginia School
Service Personnel Association
Docket No. EREP-358-93A

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, 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,

HERMAN H. JONES
EXECUTIVE DIRECTOR

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

Entered for and at the direction of the West Virginia Human Rights Commission this 17th day of May 1996, in Charleston, Kanawha County, West Virginia.



HERMAN H. JONES
EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

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.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAYELL E. FROATS,

Complainant,

v.

DOCKET NUMBER(S): EREP-358-93A

WV SCHOOL SERVICE PERSONNEL
ASSOCIATION,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on the 24th day of October, 1995, in Kanawha County, at the Human Rights Commission (Conference Room B), 1321 Plaza east, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Jayell E. Froats, appeared in person and by counsel, Sandra Henson, Assistant Attorney General and Mary K. Buchmelter, Deputy Attorney General. The respondent, West Virginia School Service Personnel Association, appeared in person by its representative Kenneth C. Legg, Executive Secretary, and by counsel, John Everett Roush.

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 administrative law judge 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.

A.

FINDINGS OF FACT

1. Complainant, Jayell E. Froats, resides in Weirton, West Virginia and has been employed by the Hancock County Schools as a bus driver for a little more than the past 25 years.

2. Complainant was a member of the West Virginia School Service Personnel Association (WVSSPA hereinafter) from 1970 through 1985, and then rejoined the WVSSPA and its County affiliate, Hancock

County School Service Personnel Association (HCSSPA hereinafter) for the 1991-1992 school year.

3. In March 1992 the complainant filed a discrimination case against the respondent, Docket No. ESAREL-411-92, the merits of which are not at issue in the present claim.

4. Shortly after filing the initial human rights complaint, the complainant received a reduction in force notice that her position would be terminated the following year, at which time complainant notified the president of the HCSSPA that she had requested a hearing on the reduction in force matter and desired representation from the respondent organization.

5. The respondent provides legal representation to members from time to time in relation to employment grievances, termination of employment, suspensions, transfers, reductions in force, Workers Compensation hearings, and unemployment hearings.

6. The respondent organization, by written policy, reserved the right to refuse legal representation where it determines that the basis of the claim by the member is without merit or frivolous, that the claim of the member is contrary to the philosophical or legal position of the respondent on a particular issue, or that the provision of the legal representation would create a conflict of interest with the respondent or with other members who are already represented.

7. The respondent specifically provided in written policy that costs associated with provision of legal services are the responsibility of the member exclusively in terms of obtaining medical reports, transcripts, etc.

8. Upon appearing for her reduction in force hearing the respondent's lawyer informed those present at the School Board hearing that respondent could not represent the complainant because the complainant had a conflict of interest with the respondent.

9. The matter was continued on that date and subsequently complainant retained Daniel McCune to represent her in the reduction in force hearing for a total cost of \$72.00, of which \$50.00 represented Mr. McCune's fee and \$22.00 was for reimbursement of costs.

10. Sometime prior to September 8, 1992, the complainant tendered payment of her WVSSPA and HCSSPA membership dues to the county affiliate.

11. By letter dated September 8, 1992 Marcia Kobilly, President of HCSSPA returned complainant's check and denied membership specifically because of complainant's litigation which was ongoing against the respondent at that time, with copies of the letter going to the WVSSPA and the assistant superintendent of the Hancock County Schools.

12. The respondent has no written rules relating to membership application, but testimony indicated that respondent preferred that its members sign up through the county affiliate, although members could apply directly to the WVSSPA as well.

13. Upon having her membership denied by the county affiliate the complainant did not reapply to, or appeal to, the WVSSPA for membership for the 1992-1993 school year, there being no written procedure for either of these options.

14. As a matter of fact it is determined that further application or recourse to the WVSSPA would have been a futile act as the respondent clearly intimated to complainant through its agents that the WVSSPA had been consulted in regards to the denial.

15. It is further found as a matter of fact that reapplication for membership in subsequent years would also have been a futile act, as complainant's reapplication in 1995 was similarly put on hold by respondent, and thus the denial of membership for the intervening school years for which complainant was otherwise eligible for membership but did not tender membership dues, resulted in a continuing violation of the complainant's right to membership, which was denied because complainant had filed a discrimination case against the respondent.

16. Complainant incurred compensable injuries in October of 1993, which remain in litigation, for which she has retained M. Eric Frankovitch to represent her on a Workers' Compensation 20% contingent fee contract.

17. Complainant also incurred \$500.00 in legal fees for a grievance hearing held April 21, 1995.

18. Complainant was embarrassed and angry about having the fact that WVSSPA would not be representing her disclosed in a public fashion, to the school board.

19. Complainant felt rejected personally by the membership denial and was particularly embarrassed and humiliated by the fact that the respondent encouraged membership from everyone else, while rejecting her.

B.

DISCUSSION

West Virginia Code §5-11-9(7)(C) provides that it is unlawful for any person or labor organization to "Engage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article or because he has filed a complaint, testified, or assisted in any proceeding under this article." West Virginia Code §5-11-3(a) defines person as "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Subsection (f) of WV Code §5-11-3 defines labor organization to include "any organization which exists for the purpose, in whole or in part, for collective bargaining or for dealing with employers concerning grievances, terms or conditions of employment or for other mutual aid or protection in relation to employment." The respondent is both a person and a labor organization as defined under WV Code §5-11-1 et seq. and has discriminated against the complainant under the Act by refusing to allow her to renew her membership with the respondent.

The West Virginia Supreme Court has held in Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E.2d 251 (W.Va. 1986), that to establish unlawful retaliatory discharge under the West Virginia Human Rights Act, the burden is on the complainant to prove by preponderance of the evidence: that the complainant engaged

in a protected activity; that complainant's employer was aware of the protected activity; that complainant was subsequently discharged; and, absent other evidence tending to establish retaliatory motivation, that complainant's discharge followed his or her protected activity within such periods of time that the court can infer retaliatory motivation. Although this case concerns a failure to allow membership renewal by a labor organization, the same analysis may be applied. The complainant in the present case had filed a complaint of discrimination against the respondent under the West Virginia Human Rights Act. The respondent was admittedly aware of the action, as they asserted a conflict of interest on that basis. Shortly thereafter the complainant was denied membership in respondent labor organization, while those who were disqualified from representation on other basis were not expelled or refused membership renewal. Thus it may be inferred that the respondents refused membership to the complainant in retaliation for having filed the initial discrimination complaint against the respondent.

Respondent contends that they did not discriminate against complainant as a result of her filing of a discrimination case against respondent, but merely saved complainant from wasting her money, when the respondent would not be able to represent her due to a conflict of interest and that legal representation was the only benefit of membership. This argument misses the point. Other members may be ineligible for legal services due to conflicting interests with the respondent or other members already represented by respondent and those members were neither expelled nor denied renewal

of membership merely because their cases could not be handled by respondent due to the conflicts. Thus regardless of whether respondent's paternalistic denial of her membership was altruistically motivated, it was explicitly based, by the respondent's own agents' admissions, upon the underlying fact that complainant had filed a discrimination claim against the respondent. The respondent has otherwise discriminated against the complainant because she had filed a human rights complaint against the respondent under WV Code §5-11-1 et seq. and that is what is forbidden under the West Virginia Human Rights Act. Based upon the demeanor of the witnesses and their testimony, it is found that refusal to renew complainant's membership would not have occurred but for respondent's agents' wish to retaliate against the complainant for filing her initial discrimination complaint against respondent. The preponderance of the evidence is that a retaliatory intent existed in addition to any altruistic concern for complainant's interests, especially in light of respondent's failure to offer membership to complainant even after the initial discrimination complaint was resolved, when to do so would have largely removed any remaining basis for a discrimination charge.

Complainant argues that the complainant should be awarded legal fees and costs associated with various causes of action related to her employment, in which the respondent frequently assists its membership. Such a step is unwarranted in the face of the fact that the discriminatory act upon which the complaint is based, is simply that she was denied membership in retaliation for filing her

underlying complaint. Had complainant not been discriminated against in this fashion and had been instead a member during the period, the respondent would nevertheless be arguably precluded from representing her under the West Virginia Rules of Professional Conduct, Rule 1.7, the Comment to which states in part, "Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." One cannot be unsympathetic to respondents plight should it be required to represent the complainant in her employment related cases and then suffer the penalty of having their counsel disqualified from representing the respondent in its defense of the complainant's underlying claim of discrimination. To hold otherwise would create an absolute right to representation at the expense of the respondent, which is quite contrary to the written policy, which states clearly that such services may be provided to members, and then only under certain conditions. Costs associated with legal representation are clearly the responsibility of the member. In the written policy regarding legal representation, the respondent states that it may refuse legal representation when such would create a conflict of interest with the respondent. Thus any actual damages associated with any particular legal representation would be too speculative to award as the respondent may not have been obligated to represent the complainant in any particular instance. The complainant failed to give adequate notice of the specific allegations giving rise to claims for each particular instance of failure to provide legal assistance on the basis of reprisal in her complaint or by amended complaint and therefore it would not be lawful to make such an

award. See Footo Min. Co. V. W. Va. Human Rights, 387 S.E.2d 118 (W. Va. 1989) and McJunkin Corp. v. Human Rights Comm'n, 369 S.E.2d 720 (W. Va. 1988).

Nevertheless, it is of great concern that regardless of the merits of complainant's earlier discrimination complaint, the respondent's agents have evidenced ill will toward the complainant based upon her earlier defection from their organization, which seem to cause the respondent to deny complainant equal access to those legal services to which other members are entitled under their normal evaluation process. As both sides contend, complainant is greatly concerned with legal representation in employment matters and tried membership in a rival association affiliated with the West Virginia Education Association in part to obtain better representation in grievance matters. The complainant is free to join one or another or both organizations as she sees fit, and should be encouraged in her efforts to find the most supportive labor organization for her legal needs. Although the refusal to provide legal representation which motivated the complainant's original discrimination complaint was not based upon retaliation for filing the complaint, the reasons leading to that initial refusal have become inseparably mixed with respondent's agents' subsequent resentment against complainant for filing that initial complaint. This has led to respondent's continuing reliance on that conflict of interest created by complainant's ongoing discrimination litigation to escape providing legal representation to the complainant which it would otherwise provide under its own criteria. At some point the initial discrimination claim was resolved. Yet rather than inviting

complainant to rejoin, which would have removed any conflict of interest by resolving the pending retaliation complaint and render complainant eligible for such representation, respondent instead chose to continue its refusal to allow her membership. This in itself evidences that refusing to provide legal representation at this point is in retaliation for the filing of discrimination complaints. Denying legal representation in retaliation for the filing of a discrimination complaint is illegal under the West Virginia Human Rights Act and will not be tolerated when such denial of otherwise discretionary benefits is based on motives other than those reasons enumerated in respondent's own policy regarding provision of legal representation to members.

The West Virginia Human Rights Commission, as part of its cease and desist orders, may award complainant incidental damages as compensation for mental distress and loss of personal dignity. See State Human Rights Comm'n v. Pearlman Realty Agency, 161 W.Va. 1, 239 S.E.2d 145 (1977). In Bishop Coal Co. v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989) the \$1,000.00 dollar cap on incidental damages was reaffirmed by the West Virginia Supreme Court with the caveat that it be adjusted with the consumer price index and approved \$2,500.00 in that case. It is found that the complainant suffered great humiliation and embarrassment as a result of being denied membership in retaliation for filing her discrimination complaint. This humiliation was made worse by the public nature of the respondent's unwillingness to represent the complainant's interests at the reduction in force hearing and the subsequent disclosure to the

School Board that her membership renewal had been refused by respondents. The respondent's refusal to provide legal representation, while having some support in Rule 1.7 of the West Virginia Rules of Professional Conduct, is far from being necessary or required thereunder. In fact the respondent could have provided legal representation to the complainant in her employment matters and obtained outside counsel to defend against the discrimination claim against them by the complainant. There is much to suggest that such refusal to represent the complainant was actually motivated by a pure desire to retaliate against the complainant for filing her earlier complaint on the basis of sex, age and religion. Her anger is justified and the loss of dignity implicit in the respondent's refusal to accept her membership while actively seeking that of other potential members is undeniable. There are many organizations to which we each may belong which provide no tangible benefits beyond that psychological satisfaction which comes from the mere fact of belonging to such organizations. Thus it is appropriate that the complainant receive the maximum award of incidental damages in the amount of \$2,950.00.

C.

CONCLUSIONS OF LAW

1. The complainant, Jayell E. Froats, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, WV School Service personnel Association, is a person and labor organization as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established a prima facie case of retaliatory discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful discrimination.

7. The complainant is not entitled to damages for failure of respondent to provide legal services to the complainant, as a result of the unlawful discriminatory action of the respondent, as there is no absolute right to legal representation by the respondent by virtue of membership in respondent organization, and because no amendment to

the initial complaint gave notice to respondent that those instances of refusal to represent after the complaint was filed were in dispute.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$2,950.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of costs in the aggregate amount of \$208.50.

10. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to membership in respondent organization for the 1992-1993 and all subsequent school years during which complainant was employed by Hancock County Schools as a bus driver, and for which complainant tenders membership dues.

11. The complainant is entitled to relief assuring that her future requests for legal representation by respondent will not be denied in retaliation for the filing of her discrimination complaint, regardless of any conflict of interest created by complainant having to file subsequent discrimination complaints to enforce this decision.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall reinstate the complainant's membership in the West Virginia School Service Personnel Association for the 1992-1993 and all subsequent years, during which complainant was employed by Hancock County Schools as a bus driver, and for which complainant tenders membership dues.

3. Within 31 days of receipt of this decision, the respondent shall pay to the Commission its costs in the amount of \$208.50.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum pre-judgment and post-judgment interest on all monetary relief.

6. Respondent is ordered to cease and desist from denying legal representation to complainant, upon reinstatement of membership, in future matters except as provided by its policy; and any future discrimination complaint filed by complainant to secure compliance with this decision shall not constitute and may not be asserted by respondents to create a conflict of interest under its legal representation policy. Any dispute arising between respondent and complainant in regards to this enumerated paragraph of relief shall be submitted for initial arbitration by any designee of the Human Rights Commission or its Executive Director.

7. The respondent is directed to arrange and pay for a day long seminar on alternative dispute resolution and the West Virginia

Human Rights Act for all of its officers, agents and employees, to be conducted by persons or firms approved by the Human Rights Commission or its Executive Director or their designee, sometime within a year from the receipt of this decision.

8. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 23rd day of January, 1996.

WV HUMAN RIGHTS COMMISSION

BY: Robert B. Wilson
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

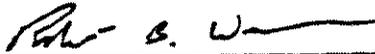
I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 24th day of January, 1996, to the following:

Jayell E. Froats
RD1 Box 41H6
Weirton, WV 26062

WV School Service Personnel
Association
1610 Washington St. E.
Charleston, WV 25311

Sandra K. Henson
Assistant Attorney General
812 Quarrier St.
Charleston, WV 25301

John Everett Roush, Esq.
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ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE