



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.  
Governor

September 23, 1988

Jeffrey S. Frame  
2309 Monroe Ave.  
St. Albans, WV 25177

Arden Ashley, Mayor  
City of Nitro/ Nitro Fire Dept.  
Nitro City Hall  
Nitro, WV 25143

Stephen D. Herndon  
Deputy Attorney General  
State Capitol Bldg. E-26  
Charleston, WV 25305

Phillip D. Gaujot, Esq.  
113 Goff Mountain Rd.  
Cross Lanes, WV 25313

Re: Frame v. City of Nitro/Nitro Fire Dept.  
EH-214-87

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,

A handwritten signature in cursive script, appearing to read "Howard D. Kenney".

Howard D. Kenney  
Executive Director

HDK/mst  
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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

Enr. H. B. 2638]

3

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

JEFFREY S. FRAME,

Complainant,

vs.

Docket No. EH-214-87

CITY OF NITRO/NITRO FIRE  
DEPARTMENT,

Respondent.

**O R D E R**

On the 31st day of August, 1988, the West Virginia Human Rights Commission reviewed the proposed order and decision of the Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned, the commission does hereby adopt said proposed order and decision, encompassing proposed findings of facts and conclusions of law, as its own.

It is hereby ORDERED that the Hearing Examiner's proposed order and decision, encompassing findings of facts and conclusions of law, be attached hereto and made a part of this final order.

It is finally ORDERED that this case be dismissed with prejudice.

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 days to request a reconsideration of this final order and that they may seek judicial review.

ENTERED this 16<sup>th</sup> day of Sept, 1988.

Respectfully Submitted,

George Rutherford  
CHAIR/VICE-CHAIR  
WV HUMAN RIGHTS COMMISSION

**RECEIVED**

JUL 12 1988

W.V. HUMAN RIGHTS COMM.

JEFFRY S. FRAME,

Complainant,

v.

DOCKET NO. EH-214-87

CITY OF NITRO/NITRO FIRE  
DEPARTMENT,

Respondent.

**EXAMINER'S RECOMMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on the 18th day of August, 1987. The hearing was held at 405 Capitol Street, Daniel Boone Building, Fourth Floor Conference Room, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner, and Jack McComas, Hearing Commissioner.

The Complainant appeared in person and by his counsel, Stephen D. Herndon. The Respondent appeared by its counsel, Phillip D. Gaujot and its representative Arden Ashley.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the

Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

#### **ISSUE**

1. Whether the Respondent is a handicapped person within the meaning of the West Virginia Human Rights Act.

2. Whether the Respondent unlawfully refused to hire the Complainant due to a perceived handicap.

3. If so, to what relief is the Complainant entitled.

#### **FINDINGS OF FACT**

1. At the time of the hearing the Complainant was 29 years of age and was employed as a paramedic.

2. In April, 1986 the Complainant applied for a position as a firefighter with the city of Nitro.

3. The Complainant had prior experience as a volunteer fireman with the West Side Volunteer Fire Department, where he served as a junior firefighter for a year and as a Lieutenant since 1976.

4. The Complainant was certified by the West Virginia University Firefighters Extension Service.

5. During the application process with the Respondent, the Complainant took a written test and a physical/agility test.

6. The Complainant earned a score of One Hundred (100) on the written test. This was the highest score possible.

7. The physical agility test was given on a pass/fail basis. The Complainant passed the physical agility test.

8. The Complainant and two other candidates were referred from the list, as being the top scorers, of those having taken the written and physical/agility tests.

9. The other two candidates that were referred were disqualified due to irregularities in their backgrounds. Accordingly, there were two other candidates certified to the Mayor for consideration with the Complainant for the potential position with the Respondent.

10. The ultimate decision as to who received the position rested with the Mayor.

11. The Complainant interviewed with Mayor Ashley. After which, he interviewed respectively with Chief Hedrick and Sgt. Angel, both employees of the Respondent and assigned to its fire department.

12. The Complainant takes no issue with the interview process. In fact he characterizes the interview process as having been performed in a fair fashion.

13. During the interview with Sgt. Angel, the Complainant was asked certain questions concerning his hearing problem. It is evident that the Complainant's hearing aids were in view to Chief Hedrick and Sgt. Angel each interviewer. However, Sgt. Angel was the only interviewer who inquired directly of the Complainant about the hearing loss problem. Mayor Ashley testified that the Complainant's hair was over his ears during the time he interviewed the Complainant and he did not notice any hearing aid apparatus in the Complainant's ears).

14. The Complainant advised Sgt. Angel that the hearing

loss was congenital. Sgt. Angel requested, and the Complainant provided, a copy of an audiology report from Complainant's attending audiologist.

15. Complainant's audiologist is also a volunteer fireman.

16. In addition, Complainant had his audiologist call Mayor Ashley. During the conversation, the audiologist agreed to, and did send, Mayor Ashley a letter with further explanation of Complainant's hearing problem.

17. By letter dated August 27, 1986, the Complainant was advised that he was not chosen for the position. That a candidate, of the two referred after the initial disqualifications, was chosen for the position. That individual had scored Ninety-Five (95) on the written test.

18. After discovering who had been hired, the Complainant wrote a letter to the Respondent inquiring as to whether his hearing problem was the reason for his failure to be hired. Also in that letter, the Complainant offered that he would waive his right to seek any disability under any employment offered to him by the Respondent, which may arise as a result of his hearing problem.

19. On August 28, 1986, the Complainant sent a letter to Mayor Ashley thanking him for his consideration, of the Complainant, for the position as firefighter.

20. On August 26, 1986, the Complainant filed his West Virginia Human Rights Commission complaint alleging that he had been the victim of handicap discrimination.

21. The Complainant felt that the decision not to hire him was based upon his hearing problem.

22. For the time period relevant hereto, the Respondent utilized a specialized high pressure firefighting technique.

23. The candidate who was chosen for the job, subject of this litigation, had previous experience with the Respondent's fire department and specifically with the high pressure firefighting technique used by it.

24. The Complainant did not have the experience with the specialized firefighting technique utilized by the Respondent. However, the Complainant did indicate that he was aware of the technique due to having read some material on the technique.

25. Other than the specialized firefighting technique, the Complainant and the candidate chosen for the position were similarly qualified.

26. The Complainant's audiologist was of the opinion that the Complainant could have performed the position of firefighter with the Respondent in a satisfactory fashion.

27. On November 3, 1986 the Complainant received a letter from Mayor Ashley, regarding the Mayor's discontent with the Complainant's having contacted politicians regarding his failure to receive the position of firefighter.

28. By letter dated November 4, 1986, Mayor Ashley advised the Complainant he was standing by his earlier decision and if the Complainant felt he was aggrieved that the Complainant should pursue whatever action the Complainant deemed appropriate.

29. The decision as to who would be hired was made by

the Mayor based upon the following criteria: appearance, conduct, training, and level of self assurance.

30. In comparison, the Complainant did not possess the experience with the specialized firefighting technique utilized by the Respondent, the Mayor perceived the Complainant as being overly assertive, and, felt that the candidate chosen for the job presented a better physical appearance than the Complainant (aparantly the Mayor's position was that the Complainant was slightly overweight for his height).

31. At the time the Mayor made the decision to hire the other candidate, he was aware that the candidate chosen for the position had prior experience with the Respondent's fire department.

32. At the date of hearing, the Respondent's fire department was in the process of retiring a fireman who had served his career with a hearing impairment.

33. The record reflects that there were aparantly were no problems experienced by this hearing impaired firefighter.

#### **DISCUSSION**

It is not disputed in this case that the Complainant is a qualified handicapped individual within the meaning of the West Virginia Human Rights Act. The Complainant possesses a congenital hearing problem which drastically reduces his hearing ability to the effect that a hearing apparatus is needed to increase the same.

Viewing the evidence most favorable to the Complainant,

the Complainant established a prima facie case of handicap discrimination at the close of his case-in-chief, by establishing that he is a handicapped person, within the meaning of the West Virginia Human Rights Act; that he scored higher on the written test than the person chosen for the position; that he was allegedly similarly qualified to perform the job for which the Respondent was seeking applicants; that he was rejected for the position; and that the Respondent hired a person for the position who was not a member of the protected group. McDonnell Douglas Corporation V. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). Sheppardstown Volunteer Fire Department v. State Of West Virginia Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983).

The Respondent articulated legitimate nondiscriminatory reasons for its failure to hire the Complainant by establishing that the Respondent utilizes a specialized firefighting technique which requires special skill. The candidate chosen possessed this prior experience. Additionally, the Respondent established that the Mayor, who had the responsibility of making such decisions, was more impressed with the overall criteria of the candidate chosen for the job, as compared to the Complainant, for reasons that the Complainant appeared to be overly assertive, somewhat overweight and lacked the training in the specialized firefighting technique. The Examiner finds these reasons to be credible, and as the same pertains to the specialized firefighting experience, to the distinction and prior experience with the specialized firefighting experience significant.

The Complainant failed to establish that prior training

in the specialized firefighting technique utilized by the Respondent was pretext for unlawful discrimination against him on the basis of his hearing impairment. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1989, 67 L.Ed. 2d 207 (1981).

#### CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. The Complainant established a prima facie case of handicap discrimination by proving that: he is a handicapped person within the meaning of the West Virginia Human Rights Act; that he applied for a position with the Respondent for which he was qualified; that he was rejected for the position; and a person not as qualified and not within the protected group was hired for the position.

3. The Respondent articulated legitimate nondiscriminatory reasons for its failure to hire the Complainant. The most significant reason being that the Respondent utilized a specialized firefighting technique that required special skills. The candidate chosen for the position, in lieu of the Complainant, possessed prior experience in this firefighting technique.

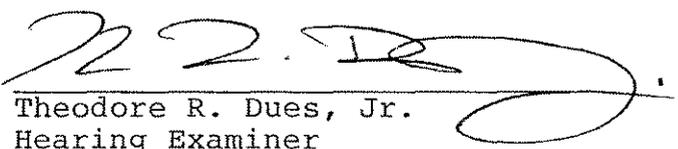
4. The Complainant failed to establish that the articulated reasons for his failure to be hired was pretext for unlawful handicap discrimination.

PROPOSED ORDER

Accordingly, the Examiner does hereby recommend to the Commission that judgement be awarded for the Respondent.

DATED: July 7, 1988

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner