



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

January 27, 2006

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Philip Graziani
120 Robert E. Lee Ave.
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Virgil Broughton
107 White Oak Lane
Elkins, WV 26241

PHILIP J. GRAZIANI, JR.,

Complainant,

v.

**Docket Number: EREP-256-03
EEOC Number: 17JA300122**

VIRGIL BROUGHTON,

Respondent.

January 27, 2006

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Dear Parties:

Enclosed please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure

Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

“§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge’s final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of the appeal shall be confined to the record.

10.4. The appellant shall submit the original nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant’s petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omission or inaccuracies of the appellant’s statement of the case or errors of law in the appellant’s argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be

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developed and decided by the administrative law judge on remand.

10.8 In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any question, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Very truly yours,



Elizabeth Blair
Administrative Law Judge

EB/smo

Enclosure

cc: Ivin B. Lee, Executive Director
Charlene Marshall, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PHILIP J. GRAZIANI, JR.,

Complainant,

v.

Docket Number: EREP-256-03
EEOC Number: 17JA300122

VIRGIL BROUGHTON,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on September 30 and October 1, 2004 and November 30, December 1 and 2, 2004 at 9:30 AM in Randolph County at the Randolph County Courthouse Annex (Conference Room 4), #4 Randolph Avenue, Elkins, West Virginia 26241, before Elizabeth Blair, Administrative Law Judge. Post hearing briefs from the parties were received through May 2005.

The Complainant, Philip J. Graziani, Jr., appeared in person and his case was presented by Paul R. Sheridan, Deputy Attorney General, Civil Rights Division, Counsel for the West Virginia Human Rights Commission. The Respondent, Virgil Broughton, appeared in person and was represented by his counsel, Pat A. Nichols, Esquire. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof, response and supplemental response briefs through December 22, 2005.

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 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, conclusion and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The Complainant has held the position of City Clerk for the city of Elkins since October 2, 1992. Tr. Vol. I, page 20.
2. The City Clerk is appointed by the City Council for a two (2) year term beginning January 1, of each odd numbered year. The City Clerk answers to the Mayor and through the Mayor to the City Council. Tr. Vol. I, pages 20 and 21, Commission's Exhibit 12, Answer No. 5; Tr. Vol. III, pages 95 and 96.
3. The Respondent, Virgil Broughton, was elected to the position of Mayor of the city of Elkins in March 2001, for a two (2) year term beginning April 1, 2001 and ending March

31, 2003. Virgil Broughton was Mayor during the alleged allegations made by the Complainant, Philip Graziani, Jr. Tr. Vol. I, page 24.

4. The Mayor is the chief executive for the City of Elkins. He is elected by the registered voters of the city of Elkins. Tr. Vol. III, pages 71 and 95.

5. The Mayor of the city of Elkins has no vote except in the matter of a tie with regard to any issue voted on by the City Council. Tr. Vol. I, page 173.

6. The staff of the executive part of the Elkins City Government includes five (5) people: the Mayor, Mayor's Receptionist, Clerk, Deputy Clerk and Payroll Clerk. These persons work closely in associated offices on the second floor of City Hall. (Tr. Vol. I, pages 185 and 186; Tr. Vol. III, pages 94 and 95.) The Mayor's Receptionist is directly answerable to the Mayor, although the Clerk provides some supervision and guidance to the Mayor's Receptionist in the Mayor's absence. The Deputy Clerk and the Payroll Clerk answer directly to the Clerk. All of the staff of the Mayor's Office and the Clerk's Office work closely together. Employees on the second floor are cross-trained so that if someone is absent, others can cover their responsibilities. Tr. Vol. I, pages 21, 22, 23, 29, 30, 94, 95, 109, 110 and 112.

7. Angela Simmons was the Mayor's Receptionist. She was hired on June 24, 2002. She completed her probationary period on September 20, 2002, and was given permanent employment status. Tr. Vol. I, pages 195 and 186, Commission's Exhibit 3, page 3.

8. Angela Broschart was hired as Deputy Clerk in July 1997, and still held the position at the time of the hearing. Tr. Vol. II, page 28.

9. Donna Haddix was Payroll Clerk from May 2002 until August 2004. Tr. Vol. II, page 109.

10. All time relevant hereto, the city of Elkins had no policy for the receiving, investigation and handling of complaints from employees regarding sexual harassment. Tr. Vol. I, pages 32 and 60, Commission's Exhibit 2.

11. Complainant, Philip Graziani, Jr. contacted Harry Smith, City Attorney with the law firm of Jory & Smith, so he, Angela Simmons, Angela Broschart and Sheryl Mills could relate their experiences with Respondent, Virgil Broughton. Tr. Vol I, page 61.

12. This meeting took place on October 2, 2002. Tr. Vol. I, pages 61, 66 and Tr. Vol. IV, page 210.

13. Sheryl Mills was no longer an employee of the city of Elkins. Tr. Vol. I, page 63.

14. On October 2, 2002, Complainant, Angela Simmons, Angela Broschart and Sheryl Mills met with Stephen Jory and Harry Smith. Tr. Vol. I, pages 61 and 66.

15. The purpose of the meeting was to request that the City Attorney contact Mayor Virgil Broughton and request that he restrain from certain behavior that the parties felt was inappropriate in the workplace. The parties requested that the City Attorney not disclose to Mayor Virgil Broughton their names or that this meeting even took place. They requested that Mayor Broughton just be advised and that his behavior needed to be modified and that there would be no mention of this matter in the future. Tr. Vol. I, page 198, 199, 200, and Tr. Vol. IV, page 214.

16. The meeting of October 2, 2002 was never reported to City Council or any of its members or any other agency by the parties or the City Attorneys. No record was made of such meeting in City Hall. Tr. Vol. IV, page 281.

17. On or about October 10, 2002, Mayor Virgil Broughton and Stephen Jory had

a discussion over the concerns that the employees had. This discussion was held without disclosing who made the allegations. Mayor Virgil Broughton left the meeting without knowing who made the allegations or the exact nature of the allegations. Tr. Vol. IV, page 223.

18. On December 2, 2002, Philip Graziani, Jr. called City Attorney Smith to report that there had been retaliatory conduct by Mayor Broughton. Tr. Vol. IV, page 236.

19. Earlier that day, Mayor Broughton had discovered a legal bill from Jory & Smith on his desk with just an amount on it and Mayor Virgil Broughton legitimately asked Angela Simmons what this bill represented. As a result of the question, Angela Simmons reacted believing Mayor Broughton had determined from the legal bill that she had gone to Jory & Smith. No copy of the invoice was introduced in the trial of this matter and testimony about the invoice stated that the invoice did not label the nature of the service that generated the charge. It was merely a legal bill. Tr. Vol. IV, pages 285, 286, 287, 298 and 299.

21. Philip J. Graziani, Jr. on December 3, 2002 stormed into Mayor Broughton's office and had a quarrel with Mayor Virgil Broughton after Angela Simmons reported the issue concerning the legal invoice inquiry to him. Philip J. Graziani, Jr. verbally assaulted Mayor Virgil Broughton and dared him to hit him that day. Tr. Vol. IV, page 317.

22. A regular City Council meeting was scheduled for December 5, 2002 but was cancelled due to a snowstorm. The meeting was rescheduled for December 9, 2002 and Mr. Graziani addressed City Council as a private individual utilizing information he gathered as City Clerk to accuse Mayor Virgil Broughton of improprieties. Tr. Vol. IV, pages 239, 240, 260 and 261.

23. City Council subsequently appointed the Complainant for another two

(2) year term for City Clerk at the December 9, 2002 City Council meeting with a raise in pay of \$3,400.00 for a total of \$42,000.00 yearly salary. Mayor Broughton objected to the reappointment of Philip J. Graziani, Jr., as City Clerk citing many inadequacies that the City Clerk had failed to do as it relates to his job performance as City Clerk as the minutes of the December 9, 2002 meeting reflect. Tr. Vol. I, pages 169 and 170, Vol. II, page 151 and Vol. III, pages 70 and 71.

24. Mayor Virgil Broughton cited the following failures of Philip J. Graziani, Jr., as City Clerk at the December 9, 2002 meeting of the Elkins City Council:

A. failure to file financial statements as required by law in the Elkins *Inter-Mountain*, a local newspaper as per the testimony of Don Smith, Editor.

Respondent's Exhibit "A". Tr. Vol. II, pages 103, 233, 236.

B. failure of the City Clerk to properly prepare agendas to be posted prior to City Council meetings as required by law. Minutes December 9, 2002, City Council meeting. Tr. Vol. IV, pages 42, 145, 146, 148, 149 and 151.

C. failure of the City Clerk to respond to a Department of Environmental Protection letter about the landfill that had been received earlier that year by the City Clerk. Tr. Vol. II, pages 46, 313 and 314.

D. failure to provide City Police Lieutenant, Jack Roy, with the requested financial information necessary to prevent the loss of a domestic violence grant in the Spring of 2002. Tr. Vol. II, pages 208, 209, 213 and 214.

25. The Finance Committee of the city of Elkins did not review the wage raise given to Philip J. Graziani, Jr., prior to his reappointment on December 9, 2002. Further, no

evaluations were ever conducted of the City Clerk's job performance prior to his reappointment by the City Council. Mayor Virgil Broughton expressed concern about the failure of the City Council to utilize proper procedures and channels in the reappointment process of Mr. Graziani with a pay raise. Mayor Virgil Broughton expressed his concern at the December 9, 2002 City Council meeting. Mr. Graziani felt this expression was retaliatory in nature. Tr. Vol. I, page 171, Vol. III, page 70 and 71.

26. Subsequently, Mr. Graziani filed his complaint with the West Virginia Human Rights Commission in January 2003, alleging retaliation. Tr. Vol. I, page 127, 128, 299 and 130.

B.

DISCUSSION

The West Virginia Human Rights Act makes it unlawful for any person to “[e]ngage in any form of threats or reprisal...the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss...” W.Va Code §5-11-9(7)(B). In addition, it is unlawful for any person to “[e]ngage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article. W.Va Code §5-11-9(7)(C).

A discrimination case may be proven under a disparate treatment theory which requires that the Complainant prove a discriminatory intent on the part of the Respondent. The Complainant may prove discriminatory intent by a three-step inferential proof formula first articulated in *McDonnell Douglas Corp. V. Green*, 411 U.S. 792 (1973); and adopted by the

West Virginia Supreme Court in *Shepherdstown Volunteer Fire Dept. V. West Virginia Human Rights Commission*, 172 W.Va 627, 309 S.E. 2d 342 (1983). Under this formula, the Complainant must first establish a prima facie case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally, the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance or pretense. *West Virginia Institute of Technology v. West Virginia Human Rights Commission*, 181 W. Va. 525, 383 S.E. 2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. *Conaway v. Eastern Associated Coal Corporation, supra*. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995), although it need not, as a matter of law, be found. *St. Mary’s Honor Society v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L Ed 2d 407 (1993).

There is also the “mixed motive” analysis under which a Complainant may proceed to show pretext, as established by the United States Supreme Court in *PriceWaterhouse v. Hopkins*, 490, U.S. 228 (1989), and recognized by the West Virginia Supreme Court in *West Virginia Institute of Tech., supra*. “Mixed motive” applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the Complainant need only show that the Complainant’s protected class played some part in the decision, and the

employer can avoid liability only by proving that it would have made the same decision even if the Complainant's protected class had not been considered. *Barefoot, supra*, 193 W. Va. At 485, 457 S.E. 2d at 162 n. 16, 164 n.18.

In order to establish a retaliation claim by circumstantial evidence, the plaintiff must (adduce) introduce facts sufficient to raise an inference that retaliatory motive played a part in the Respondent's adverse action toward the Complainant. *Hanlon*, 454 S.E.2d at 753.

The West Virginia Supreme Court first addressed retaliatory actions or illegal reprisal in the case of *Frank's Shoe Store v. West Virginia Human Rights Commission*, 365 S.E. 2d 251 (W. Va. 1986). The West Virginia Supreme Court of Appeals outlined the elements for a prima facie case:

- (1) that the complainant engaged in protected activity;
- (2) that the complainant's employer was aware of the protected activities;
- (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation); and
- (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. *Id.* at 259. *Frank's Shoe Store*, 365 S.E. 2d at 259; *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996); *Hanlon v. Chambers*, 195 W. Va. 288, 464 S.E.2d 741 (1995); *West Virginia Department of Natural Resources v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994).

The Complainant organized and attended a meeting with Angela Broschart, Angela Simmons, Sheryl Mills and Stephen Jory, attorney for the city of Elkins of the law firm Jory and Smith. Mrs. Broschart was employed as Deputy Clerk and Mrs. Simmons was Mayor

Broughton's Receptionist. While Sheryl Mills had worked as the Mayor's Receptionist, she was not an employee of the Mayor or the City on October 2, 2002, when this meeting took place.

The purpose of this meeting was for these three (3) women to report and request that the Mayor refrain from certain behavior which included words, hugging, kissing and touching that the women felt was inappropriate and possibly sexual harassment. The reporting parties requested that the City Attorney not disclose their names or that this meeting even occurred. They wanted Mr. Jory to advise the Mayor to modify his behavior, or in their words, "we just wanted it to stop." Mrs. Simmons, in her testimony, requested that "there would be no mention of this in the future."

Since the city of Elkins had no sexual harassment or retaliatory discharge policy in place for its employees or elected officials at the time these alleged allegations occurred and were reported, it is unfair to second guess what procedure the Complainant should have followed in voicing these complaints to City Council or any agency. Furthermore, since the complaining parties testified that they did not want their allegations made public, the City Attorney, attempting to accommodate their request, was limited in what he could do. For example, advising the women to file a complaint with the West Virginia Human Rights Commission. However, this allegation should have been a wake up call that the City was in immediate need of a sexual harassment reporting policy and training for all City and elected officials to identify, prevent and report sexual harassment and retaliatory practices.

It appears that Mr. Graziani, acting in his role as City Clerk, engaged in a protected activity when he directed Mrs. Simmons and Mrs. Broschart, employed by the City and/or the Mayor on October 2, 2002, to report possible sexual harassment to the City Attorney. However,

it is troublesome that the Complainant solicited Ms. Mills who was no longer employed by the City and/or the Respondent and did not complain of any ongoing harassment.

It is also perplexing, after observing these mature, married women testify and impressing the undersigned with their composure, strength and ability to eloquently speak and describe incidents, why they needed the assistance of Mr. Graziani to escort them to speak with Mr. Jory.

Given these two (2) factors along with Mr. Graziani's falling out with the Mayor and Mrs. Broughton after his failed attempt to be elected to the House of Delegates, I question whether the Complainant acted in good faith in recruiting these women to report inappropriate behavior. Was his motive really to embarrass the Mayor, his family and have him removed from office? Respondent's counsel seemed to accurately identify this whole unfortunate situation in his Rebuttal [Statement] Paper, when he labeled it as a "grudge match" and in his Closing Argument, as a "power struggle" between City Clerk Graziani and Mayor Broughton. Perhaps "political power struggle" would have more accurately described this series of unfortunate events. Perhaps Mr. Graziani thought that the Mayor and Mrs. Broughton did not do enough to help him get elected to the House of Delegates, blamed them for his defeat and by having the Mayor out of office, Mr. Graziani felt his position and reappointment as City Clerk would be secure and a given, despite his failure to perform his duties.

So, despite the Complainant's motive, concluding that the Complainant engaged in a protected activity of ensuring that potential sexual harassment was reported to the proper party, Mr. Graziani must still satisfy the three (3) remaining elements cited in *Frank's*, in order to establish by a preponderance of the evidence that he was retaliated against.

The second element that the Complainant must satisfy under *Frank's Shoe Store*, is that

his employer was aware of the protected activity. Before we can address this element, we must first identify who is City Clerk Graziani's employer. Is it the city of Elkins or the Mayor? Counsel for the Complainant approached this issue from the standpoint that the Mayor was Mr. Graziani's employer; despite testimony that the City Clerk of the city of Elkins is appointed by the duly elected City Council to a two (2) year term, and awarded pay raises by the City Council. Furthermore, the Complainant was serving as City Clerk prior to the Respondent being elected Mayor and the Mayor has no vote as to any Council matters and powers of appointment except in the case of a tie.

So, if we conclude that the City Council is the Complainant's employer, then Mr. Graziani does not satisfy element number two (2), because there was no testimony that City Council knew about the Complainant's involvement in the protected activity of reporting alleged sexual harassment to the City Attorney until the December 9th City Council meeting. Perhaps this is why the Complainant amended his original Complaint, removing the city of Elkins as a Respondent. Mr. Graziani perceived the difficulty that he would encounter attempting to present a prima facie case that the city of Elkins as his employer, knew of the protected activity, subsequently discharged or retaliated against him, and/or that a discharge followed Complainant's protected activities within such period of time that the court can infer retaliatory motivation.

In light of this, I conclude that the Complainant was employed by the Elkins City Council who appointed him, reappointed him and gave him a pay raise. Again, there was no evidence presented to show that the Elkins City Council knew anything about the Complainant organizing and escorting the Deputy Clerk, the Mayor's Receptionist and the former Mayor's Receptionist

to meet with Mr. Jory to request his assistance in having Mayor Broughton refrain from inappropriate activity.

On the other hand, if it is determined that Mayor Broughton was the Complainant's employer, then I conclude that the Mayor was unaware of Mr. Graziani's protected activity until Mr. Graziani told him about it when he confronted the Mayor in December 2002. Based on the testimony presented, Mayor Broughton did not know who participated in the meeting with Stephen Jory and made no effort to find out. I believed Mr. Jory when he testified that he honored the women's request not to tell Mayor Broughton that they had asked for his assistance in having the Mayor refrain from what they felt was inappropriate behavior. Therefore, the Complainant's employer, Elkins City Council, was unaware of his protected activity thus, Mr. Graziani fails to satisfy the second element under *Frank's*.

The third element identified by the West Virginia Supreme Court in *Frank's* for a prima facie case of retaliatory actions or illegal reprisal, is that the Complainant was subsequently discharged (and absent other evidence tending to establish a retaliatory motivation).

As testimony revealed, not only was the Complainant not terminated, but was reappointed to another two (2) year term and given a \$3,400.00 pay raise at the December 9, 2002, City Council meeting. Fortunately, for Mr. Graziani, who needed to be reappointed as City Clerk on or before January 1, 2003, Councilman Haynes, in a very unusual procedure, without a recommendation from the Finance Committee or the Personnel Committee, moved to reappoint the Complainant. Furthermore, there was no evidence presented that the Finance Committee of the city of Elkins reviewed the wage increase awarded to the Complainant prior to his reappointment on December 9, 2002.

Because Mayor Broughton expressed his concerns about the Complainant's reappointment to the City Clerk position, at the City Council meeting on the 9th, Mr. Graziani interpreted this to be retaliation for telling the Mayor on December 3rd that he was the one who took the women to report sexual harassment to Mr. Jory.

However, testimony and the minutes prepared by City Clerk Graziani of the December 9, 2002 City Council meeting, reflect the Complainant's mis and malfeasance. According to testimony, the Complainant failed to:

A) file the 2000 Financial Report as required by law, in the Elkins *Inter-Mountain*, the local newspaper. In addition to the Respondent's testimony, Don Smith, Editor of the *Inter-Mountain*, testified that the Complainant failed to meet the January 29, 2003, filing deadline. Respondent's Exhibit "I";

B) comply with West Virginia law and file the 2001 Annual Finance Report by September 30, 2002. In fact, it was not filed until January 29, 2003;

C) properly prepare and deliver City Council meeting agendas to the city police so they could distribute them to Council members. Law requires that agendas be posted prior to Council meetings. Minutes of the December 9, 2002, City Council meeting;

D) respond to a Department of Environmental Protection letter about the landfill;

E) timely provide city of Elkins Police Officer, Lieutenant, Jack Roy, with the requested financial information to prevent the loss of a domestic violence grant in the Spring of 2002. Tr. Vol. II, pages 208, 209 and 214.

I find the witnesses who testified about the Complainant's mis and malfeasance to be

creditable. Attempting to hide his disservice to the citizens of Elkins appears to be the City Clerk's motivation for deflecting attention away from himself and onto Mayor Broughton's alleged incidents of sexual harassment. Fortunately for Mr. Graziani, instead of being removed by City Council for his failure to perform his duties and cause the city to violate state laws, possibly incurring fines and suffer embarrassment, he was reappointed to another two (2) year term and given a \$3,400.00 pay raise. Therefore, the undersigned does not find that the Complainant was retaliated against in any way by his employer, the city of Elkins, thus he fails to satisfy the third element. The Complainant also fails to satisfy the fourth and final element set out in *Frank's*, because he was not discharged.

As the Assistant Attorney General stated in the Commission's Post-Hearing Memorandum, "In some cases, as in this particular case, the most important means of protecting equal opportunity is to ensure that the deception does not stand." This case is not about sexual harassment, discrimination or retaliation. It is a political power play whose casualties are the three (3) women who were used by the City Clerk to embarrass the Mayor and his family and have him resign or removed from office. The true victims in this case are the citizens of the City of Elkins who deserve better appointed and elected officials who take their duties seriously, sufficiently performing them and ensuring that their character is beyond reproach and always remembering that they are representing the citizens of Elkins.

The Complainant has failed to meet the burden of proof necessary in this matter to sustain the allegations alleged in his Complaint and subsequent Amended Complaints. The Complainant has suffered no economic damages. In fact, he has succeeded in getting rid of Mayor Broughton, secured another two (2) year appointment and received a \$3,400.00 pay raise. The Complainant

has failed to show that he suffered any emotional distress and therefore, is denied his request for incidental damages to the extent which vastly exceeds the incidental damage cap applicable to the West Virginia Human Rights Commission and which the Commission is permitted to award in the amount of \$3, 277.45.

C.

CONCLUSIONS OF LAW

1. The Complainant is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code Section 5-11-10. However, the Complainant is not an individual aggrieved by an unlawful discriminatory practice.

2. The Respondent, is a “person” and an “employer” as those terms are defined under W. Va. Code section 5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act. However, he is not the Complainant’s “employer”.

3. The Respondent is subject to the provisions of the West Virginia Human Rights Act.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The Complainant has not established a prima facie case of retaliation and therefore the undersigned finds that the Complainant has failed to prove by a preponderance of the

evidence that he was retaliated against.

D.

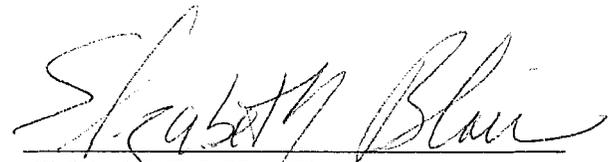
RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law it is hereby **ORDERED** that this case be dismissed with prejudice and be closed.

It is so **ORDERED**.

Entered this 27th day of January, 2006.

WV HUMAN RIGHTS COMMISSION



ELIZABETH BLAIR
ADMINISTRATIVE LAW JUDGE
1321 Plaza East, Room 108-A
Charleston, WV 25301
Ph: 304-558-2616 / Fax: 304-558-0085

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PHILIP J. GRAZIANI, JR.,

Complainant,

v.

Docket Number: EREP-256-03

EEOC Number: 17JA300122

VIRGIL BROUGHTON,

Respondent. CERTIFICATE OF SERVICE

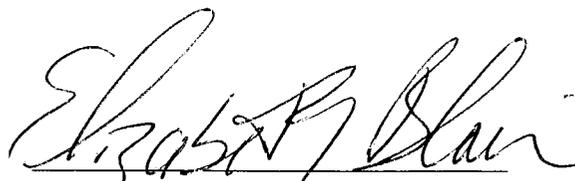
I, Elizabeth Blair, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing **ORDER** by depositing a true copy thereof in the U.S. Mail, postage prepaid this 27th day of January 2006, to the following:

Paul R. Sheridan, Esq.
Deputy Attorney General
Civil Rights Division
PO Box 1789
Charleston, WV 25326-1789

Pat A. Nichols, Esq.
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ELIZABETH BLAIR
ADMINISTRATIVE LAW JUDGE