

COPY



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

January 8, 1986

Bruce R. Walker, Esquire
Assistant Attorney General
1204 Kanawha Boulevard, E.
Charleston, WV 25301

John H. Shott, Esquire
P. O. Box 873
Bluefield, WV 24701

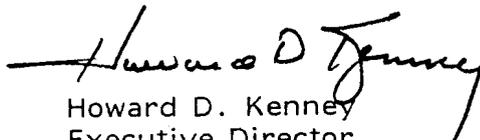
RE: Kelsor V Mercer County Board of Education/ER-169-79

Dear Mr. Walker and Mr. Shott:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Kelsor V Mercer County Board of Education ER-169-79.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/kpv

Enclosure
CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION DEC 17 1985
W.V. HUMAN RIGHTS COMM.

BERTHA J. KELSOR,

Complainant,

vs.

Docket No.: ER-169-79

MERCER COUNTY BOARD OF EDUCATION,

RESPONDENT.

ORDER

On the 11th day of December, 1985, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Charles A. Riffie, II. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law by adding to paragraph 2 of the Recommendation (p. 10) after the figure \$5,464.14, the following language: "plus pre-judgment interest at ten percent (10%) per annum from the beginning of the school term of 1978 until August 12, 1985, the date of this hearing."

The Commission further amends paragraph 2 of the Recommendation by deleting the figure "\$1,000.00" and substituting therefor the figure "\$5,000.00" for damages for embarrassment, humiliation etc.

It is hereby ORDERED that the Hearing Examiner's Findings of

Fact and Conclusions of Law be attached hereto and made a part of this Order, except insofar as they are amended by this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 19th day of Dec., 1985.

Respectfully Submitted,


CHAIR/VICE-CHAIR
West Virginia Human
Rights Commission

WEST VIRGINIA SUPREME COURT OF APPEALS FOR
THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Approved
W.V. S
10/18/85

BERTHA J. KELSOR,
Complainant,

RECEIVED

OCT 29 1985

vs.

W.V. HUMAN RIGHTS COMM. Docket No. ER 169-79

RECEIVED

MERCER COUNTY BOARD
OF EDUCATION,

OCT 15 1985

Respondent.

ADMINISTRATIVE DIRECTOR
SUPREME COURT OF APPEALS

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION**

Pursuant to a Notice issued and served upon the Complainant and the Respondent and subsequent to a pre-hearing conference on June 17, 1985, and pursuant to a date agreed upon between Counsel for Complainant and Counsel for Respondent, this matter came on for hearing on August 12, 1985 at 9:50 A.M. in the City Council Chambers, City Hall, Princeton, West Virginia, at which time the Complainant appeared in person and by Counsel, Bruce Ray Walker, Assistant Attorney General of the State of West Virginia; the Respondent appeared in the person of James A. Leslie, Jr., Treasurer of Respondent, and by Counsel, John H. Shott; and there also appeared the Hearing Examiner, Charles A. Riffie, II, and the electronic recording technician, Pat Wendell, designated by the Supreme Court of Appeals of West Virginia to record the evidence. Both the Complainant, in person and the Respondent, by and through Counsel, waived the necessity of the appearance of a Commissioner at the Hearing.

It appearing that Notice as required by law, setting forth the time and place of the hearing and the matters to be heard had regularly been served upon the Respondent and that this matter was properly set for hearing in accordance

with the procedural regulations adopted by the Commission, and the Complainant and Respondent appearing in person and by their representatives, the hearing was convened at the aforesaid time and place.

After hearing the testimony of witnesses and evidence presented on behalf of both the Complainant and Respondent, and upon consideration of proposed Findings of Facts and Conclusions of Law, submitted by both Counsel for Complainant and for Respondent, the Hearing Examiner recommends that the Commission adopt the following proposed Findings of Fact and Conclusions of Law and enter an Order in accordance with the same.

FINDINGS OF FACT

1. Complainant, a black female, submitted an application for a receptionist's job with Respondent, advertised on or about August 13, 1978 in a local Princeton, West Virginia newspaper.

2. Respondent, The Mercer County Board of Education, is an employer of more than twelve (12) employees in the State of West Virginia and on or about August 13, 1978 advertised in a local newspaper for the position of receptionist which needed to be filled within two weeks from that date.

3. A total of one hundred ten (110) applications for the advertised position were received, including the application of Complainant.

4. James A. Leslie, Jr., Treasurer of Respondent, was the person who prepared the advertisement and who had the sole responsibility for reviewing the applications and recommending the applicant to be hired for the position, and further had responsibility for the business and financial matters of the school system.

5. Mr. Leslie testified that August is normally a hectic period for the Board of Education due to requirements for filing fiscal year end reports with the State Department of Education by August 31 and the beginning of the school term in

September. Mr. Leslie testified that due to the demands of his other duties he was unable to interview all of the applicants in time to make a recommendation within the required period.

6. Mr. Leslie also testified that the normal procedure was to interview ten to twelve percent (10% - 12%) of the applicants but in any event he initially screened all applications and selected twenty-five (25) applications as being better in appearance, format and qualifications, as well as being typewritten, and had his secretary notify the twenty-five (25) applicants for the interview process. Only twenty-two (22) appeared and were interviewed. Complainant was not one of those persons selected for an interview.

7. The job to be filled required a person who could maintain accurate records in a neat and orderly fashion for payroll purposes, with an ability to meet the public, a pleasant telephone personality, and a neat appearance, and the advertisement published set forth the following qualifications for the job: "neat appearance, ability to meet the public, pleasant telephone personality".

8. Mr. Leslie testified that the one hundred ten (110) applications were displayed to a representative of the Human Rights Commission during a fact-finding conference on October 25, 1978, and, according to Mr. Leslie were either filed with the Commission on that date or discarded. Neither the Commission nor the Respondent has been able to locate those applications prior to the hearing conducted in this matter.

9. Mr. Leslie testified that to the best of his recollection Mrs. Kelsor's application was handwritten and not typewritten; that he had never met with her prior to her submitting application for the position; and that he further did not know, talk with, or have any contact with Complainant prior to filing the application or filling the job vacancy.

10. Mr. Leslie testified that there was no written or oral policy in effect at the time the vacancy was filled to exclude or discriminate in any manner against members of a minority race.

11. Complainant testified that she had past work experience as a teacher's aid with the Respondent at a school which was closed due to lack of federal funds; that she had also worked as a telephone operator, nurse and clerk in a previous customer service position. Complainant testified that her primary training was in nursing, for which she had twenty-six (26) years previous experience as an LPN.

12. A former member of the Board of Education in Mercer County, Harold Tomchin, testified that it seemed to be the custom of Respondent not to hire blacks to work in the central office and that he did not recall any discussion in reference to hiring minorities or otherwise in central administration positions.

13. Mr. Tomchin, a former Board of Education Member and having resided in the Bluefield-Princeton area for approximately seventy (70) years testified that Bluefield has about a ten percent (10%) black population and Princeton has about a five percent (5%) black population.

14. The salary for the position applied for by the Complainant was \$620.00 per month.

15. Complainant applied for, was interviewed for, and was employed as a teacher's aid beginning November 21, 1979 and continuing through the end of that school term at a rate of pay of \$50.00 per month less than she would have received had she been hired for the receptionist position for which she applied.

16. For the years 1978 through 1983, the Complainant earned the following amounts from various employments: 1978-\$7,610.00; 1979-\$6,742.00; 1980-\$6,992.00; 1981-\$3,226.00; 1982-\$12,325.00; and 1983-\$10,216.00.

17. Complainant's mother died January 14, 1984, and for approximately one (1) year prior to that date, Complainant testified that she voluntarily removed

herself from the job market to provide full-time nursing care for her mother. For approximately six (6) weeks subsequent to her mother's death, Complainant worked at Kroger's and earned \$418.00 before voluntarily resigning. After that resignation, Complainant did not seek other employment, even though she was physically able to work.

18. Respondent offered and Complainant accepted a job as a custodian for the school year 1980-1981, from which employment, Complainant resigned after one (1) day because of the physical requirements of said job which she testified she could not do. Testimony shows that this employment would have been available to Complainant through 1985 and would have paid her \$50.00 per month less than she would have received had she been offered employment as a receptionist.

19. Had Complainant been hired as a receptionist, Complainant would have earned the following amounts:

<u>Period (school term)</u>	<u>Amount</u>
1978-1979	\$ 2,201.00
1979-1980	\$ 7,965.35
1980-1981	\$ 9,762.19
1981-1982	\$11,208.60
1982-1983	\$11,044.60
1983-1984	\$12,305.14

20. Respondent's failure to interview or hire the Complainant for the receptionist position caused the Complainant inconvenience, embarrassment, mental anguish, and humiliation.

21. Two (2) white females were hired for the position Complainant applied for, one of whom had worked in the Respondent's central office for approximately eighteen (18) years and had similar work experiences as those required for the position sought to be filled. Complainant was not interviewed or hired although she was qualified for the position.

CONCLUSIONS OF LAW

1. Complainant is a black female and within the protected class of individuals within the meaning of the West Virginia Human Rights Act, hereinafter referred to as the "Act". (West Virginia Code 5-11-3(a) and (h); and 5-11-9(a).

2. Respondent is an "employer" within the meaning of the Act. West Virginia Code 5-11-3(d).

3. Complainant bears the burden of proving the allegations set forth in her Complaint that the Respondent discriminated against her because of her race in its decision not to hire her. Shepherdstown V.F.B. West Virginia Human Rights Commission, 309 S.E. 2d 342 (W.Va. 1983).

A. To establish a prima facie case, Complainant must prove by a preponderance of the evidence to avoid a directed verdict the following:

(1) That the Complainant belongs to a protected group under the statute;

(2) That Complainant applied and was qualified for the position or opening;

(3) That Complainant was rejected despite her qualifications; and

(4) That after rejection, Respondent continued to accept the applications of similarly qualified persons. Shepherdstown V.F.B., supra, citing McDonnell Douglas Corporation vs. Green, 411 U.S. 792, 36 L.Ed. 2d 668, 93 Ct. (1871-1973).

4. Once a prima facie case has been proven, the burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for not hiring Complainant. If such a reason is articulated, the Complainant must be afforded a fair opportunity to demonstrate that the employer's assigned reason for not hiring Complainant was a pretext or discriminatory in its application. (McDonnell Douglas Corp. v. Green, supra).

5. The intention in enacting Title VII and the West Virginia Human Rights Act, was to invalidate all employment practices which, in their final effect or

consequence, discriminate against protected categories even though no prohibited discriminatory motivation is present. See Griggs v. Duke Power Company, 401 U.S. 424 (1979).

6. Title VII and the West Virginia Human Rights Act proscribe not only overt discrimination but also practices that are fair on its face but discriminatory in operation. The touchstone is business necessity. If the employment practice operating to exclude a member of a protected class cannot be shown to be related to job performance, the practice is prohibited. The burden is on Respondent to offer a business necessity reason and evidence for consideration of its actions for interviewing only twenty-two (22) persons initially screened out of the one hundred ten (110) applications, especially when the criteria for evaluation set forth in an advertisement for the job concerned "neat appearance, ability to meet the public, and pleasant telephone personality".

7. Certain jobs may legitimately consider subjective factors in the evaluation of the job applicants so long as those factors can be shown to have been properly weighted vis-a-vis other objective factors. The burden is on the Respondent to come forward with credible evidence to explain the rejection of a qualified minority applicant. This burden becomes heavier still when the rejection is based upon subjective factors or on practices which are fair in form but discriminatory in operation. Arlene Decker v. United Career Center, (W.V. Human Rights Commission _____); Griggs v. Duke Power Co., supra; distinguishing Robinson v. Lorillard Co., 444 F. 2d 791 (4th Cir. 1971).

8. A review of the evidence as a whole, inclusive of Respondent's description of the job demands on the Treasurer of Respondent at this time, nonetheless leads to the conclusion that the otherwise facially neutral screening and interviewing policy of Respondent in application to this case adversely impacts this case in a discriminatory manner given the history of no blacks being hired in the central

administration of Respondent, the demographic composition of the Princeton area offered through the testimony of a former Board member of Respondent, and further, in failing to grant an interview to the Complainant, no reasonable inquiry could have been made into the subjective requirements for hiring, being "a neat appearance, ability to meet the public, and pleasant telephone personality".

9. Complainant has met the initial burden of proving by a preponderance of the evidence that:

- (a) She belongs to a protected group under the Act;
- (b) That she applied and was qualified for the position or opening;
- (c) That she was rejected despite her qualifications; and
- (d) That after rejection, Respondent continued to accept the application

of similarly qualified persons.

10. Complainant has further met her burden in proving that the reasons articulated by Respondent for not hiring Complainant were discriminatory in application.

11. No business necessity has been offered or proven by Respondent which would preclude a conclusion of adverse impact discrimination in the instant case.

12. The Commission may, as part of its cease and desist orders award Complainant incidental damages as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity, without proof of monetary loss. State Human Rights Commission v. Pearlman Realty Agency, 239 S.E. 2d 145 (W.Va. 1977).

13. The Commission may award a victim of discrimination, who has prevailed on the merits, back pay, including fringe benefits and bonuses--provided that back pay should be reduced by interim earnings. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1974); Johnson v. City of Keystone, ER 2-76; Thompson v. Blount Brothers

Corporation, EA 292-75 and ER 293-75; Pamela Evans Franco v. Montgomery General Hospital, ES-146-77.

RECOMMENDATION

THEREFORE, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that an Order be entered by the Commission as follows:

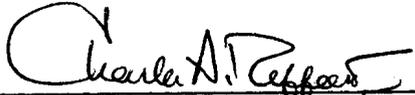
1. Respondent, its officers, agents, employees, members, successors, assigns, and all persons and organizations who acted in concert or in participation with them are hereby permanently Ordered to cease and desist at all places of business or operations of Respondent from engaging in any actions which deny full and equal membership rights to any individual or otherwise to discriminate against such individuals on the basis of race, sex, religion, color, national origin, blindness, age or handicap with respect to hiring, tenure, terms and conditions of employment or any matter directly or indirectly related to employment.

2. It is further ORDERED that Respondent shall pay to the Complainant compensation for loss of wages suffered by Complainant as a result of Respondent's unlawful discriminatory practices. Back pay shall be determined as if the Complainant had occupied the position for which she applied and was not hired, that of receptionist-record keeper, from the beginning of the school term 1978 through the date of her voluntary removal from the job market to provide full-time nursing care for her mother which, from the record, was January, 1983 and for a period of six (6) weeks during the year 1984 when she returned to the job market before voluntarily resigning, after which the Complainant did not seek other employment even though she was physically able to work; offset only by wages earned by the Complainant from the period of the school year commencing in 1978 through the time that she voluntarily removed herself from the job market in January, 1983

and by wages in the amount of \$418.00 she earned during 1984, returning to work after her mother's death. The total wage which could have been earned at the receptionist-record keeper position paid at the monthly rate of \$620.00 per month for the period of time covered by this Order is \$35,167.14; total offsets to which Respondent is entitled are \$29,703.00. Accordingly, judgment is entered in favor of Complainant for back pay in the amount of \$5,464.14 and \$1,000.00 as and for damages for embarrassment, humiliation, emotional and mental distress and loss of personal dignity. Complainant is awarded post judgment interest at the legal rate of interest from the date of the entry of this Order by the Commission together with costs.

3. It is further recommended that Respondent shall comply with Commission's Order within thirty (30) days from the date of entry by the Human Rights Commission.

DATED this 10th day of October, 1985.


CHARLES A. RIFFÉE, II
Hearing Examiner