



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

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March 28, 1990

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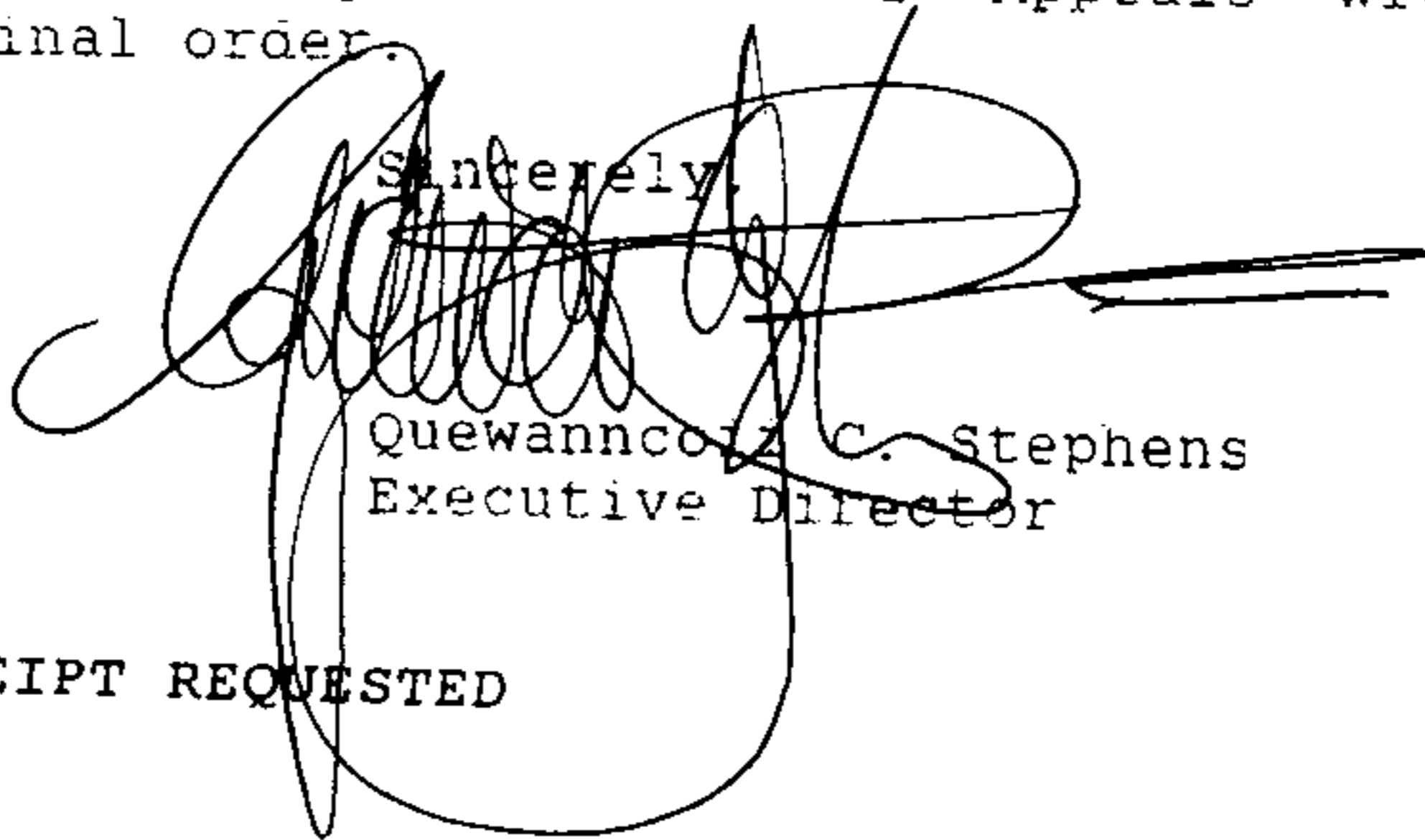
Mike Kelly
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Charleston, WV 25301

Re: Moody v. Anna Lee Lambert, Executrix of the Estate of
Andrew Lambert
HR-398-77

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 July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,



Qewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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 non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GEORGE MOODY,

Complainant,

v.

DOCKET NO. HR-398-77

ANNA LEE LAMBERT, EXECUTRIX
OF THE ESTATE OF
ANDREW LAMBERT,

Respondent.

FINAL ORDER

On 10 January 1990 the West Virginia Human Rights Commission reviewed and discussed the above-styled matter. Upon mature consideration of the Order of the Circuit Court of Kanawha County previously entered herein, the recommended findings of fact of the hearing examiner, the recommended and proposed conclusions of law, and the argument of counsel, the Commission found and concluded as follows:

BACKGROUND

On 25 April 1977 complainant, George Moody, filed a complaint with the West Virginia Human Rights Commission alleging that he had been denied an opportunity to rent a house because of his race. Mr. Moody, who is black, named as the respondent Mr. Andrew Lambert, who was white. Prior to this matter going to hearing, Mr. Lambert died. Upon complainant's motion, the hearing examiner ruled that the action survived as against Mr. Lambert's estate and the style was accordingly amended.

A public hearing was held on 3 June 1985, at which no member of the Human Rights Commission was present, nor was the presence of a commissioner waived on the record. The hearing examiner's proposed findings of fact and conclusions of law were submitted on 8 July 1985, to which the complainant timely excepted.

On 10 October 1985 the Human Rights Commission entered its final order rejecting the hearing examiner's recommendation that it find in favor of respondent. The Commission's Order articulated findings of fact different from those found by the hearing examiner, and rendered conclusions of law based on those substituted facts. The Commission held respondent liable to Mr. Moody in the amount of \$5,000.00.

The respondent appealed the Commission's Order to the Circuit Court of Kanawha County, which, on 3 May 1988, reversed the Commission and remanded the case for further consideration. Since a hearing commissioner was not present at the hearing, the Court ruled, the Commission could not substitute its findings of fact for those of the hearing examiner, who was the only finder of fact who had the opportunity to observe the witnesses' character and demeanor. On remand, said the Court, the Commission had three options:

- (1) The Commission could adopt the hearing examiner's

findings of fact and conclusions of law as submitted; or

(2) It could adopt the hearing examiner's findings of fact, but make its own conclusions of law based thereon; or

(3) It could conduct a new hearing.

At its 10 January 1990 meeting, after careful review of its options, the Commission decided to, and does hereby, adopt the findings of fact as recommended by the hearing examiner, which facts are set forth again below.

FINDINGS OF FACT

1. The complainant, George Moody, is a black male and is within the protected class of the Human Rights Act.

2. The complainant had answered an advertisement concerning a house for rent on 20 April 1977. It was alleged that, after having been shown the rental property and having talked to the purported Andrew Lambert, he was denied rental of the house.

3. The rent on the house which the complainant wanted to lease from the respondent, now deceased, was \$200.00 per month.

4. The testimony of the complainant was that he desired to live in the neighborhood where this house was situated and that the rent was within his means.

5. After the respondent refused to rent the house to the complainant, a fair-skinned female by the name of Melissa Bailey attempted to rent the same house from the respondent. According to her testimony, she was offered the property for the compensation of \$200.00 per months rent.

6. The said Melissa Bailey testified that the respondent would rent the house to her because he did not wish to rent to blacks because they were always partying and making a nuisance to other tenants in the neighborhood.

7. Melissa Bailey also testified that the respondent showed no evidence of interest, bias or prejudice toward her because, she felt, that the respondent considered her a white female.

8. The complainant testified that because the respondent refused to rent the said house, he had to move to a different area of the community and he was forced to pay \$325.00 per month for a suitable housing accommodation for himself and his children. This is \$125.00 per month more than he had anticipated having to pay.

9. The complainant testified that he lived in these other quarters from 1 May 1977 until 13 April 1978 for a total increase in rent of \$1,500.00. He is claiming this increase as part of damages in this human rights action.

10. In April of 1978, the complainant moved to other quarters, which he claims are more suitable for him, at a rate of \$350.00. This is \$150.00 more than the rent of the respondent's advertised property.

11. The complainant has continued to live at that location since 1978. Several witnesses, tenants of Andrew Lambert at or about the time the respondent refused to rent to the complainant have all testified to the fact that they were of mixed (inter-racial) marriages. That is, one of the parties was either a black male or female and his/her partner was of a different race.

12. These parties who have testified on behalf of the respondent stated overwhelmingly that the respondent was a man who, during many years of their knowledge of him and association with him, was very fair minded and one who did not harbor prejudice against individuals.

13. These parties also testified that the respondent's rental properties were always open to parties of a minority race in that fifty (50) percent or more of his apartments were

rented by persons of minority races.

Having decided to adopt the findings of fact as recommended by the hearing examiner, the Commission then had to determine whether to adopt or reject the examiner's conclusions of law. For reasons set forth below, the Commission decided to, and does hereby, reject said conclusions because they are affected by an error of law.

DISCUSSION

The three-step analytical framework first established for employment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and later adapted for use in matters arising out of alleged violations of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., Shepherdstown V.F.D. v. West Virginia Human Rights Commission, 309 S.E.2d (342 (1983)), is similarly applicable when a party alleges that s/he was denied an equal opportunity to rent or buy a house because of her/his race.

As adapted for alleged discriminatory housing practices, the McDonnell Douglas/Shepherdstown framework demands that a complainant first establish a prima facie case of discrimination by showing that:

- (a) S/he is a member of a protected class;

(b) S/he applied for a housing accommodation and was qualified to rent or own it;

(c) S/he was refused or rejected from such accommodation, and;

(d) The housing accommodation remained available.

Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2nd Cir. 1979).

As noted by the hearing examiner (recommended conclusions of law No. 5), Mr. Moody easily established a prima facie case of discrimination. Moreover, he produced direct evidence of discriminatory intent through the testimony of Melissa Bailey. Ms. Bailey, who Mr. Lambert apparently believed was white and to whom he offered to rent the premises after rejecting Mr. Moody (findings of fact No. 5), testified that Mr. Lambert said that "he did not wish to rent to blacks because they were always partying and making a nuisance to other tenants in the neighborhood." (Finding of fact No. 6).

Once the complainant established a prima facie case, the burden of production shifted to the respondent to articulate a legitimate non-discriminatory reason for refusing to rent to the complainant. As case law makes clear, the burden on

the respondent was to articulate a specific reason that this specific complainant was rejected. The reason that respondent must address this particular complainant's allegations is simple: "Placing this burden of production on the [respondent] thus serves simultaneously to meet the [complainant's] prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the [complainant] will have a full and fair opportunity to demonstrate pretext. The sufficiency of the [respondent's] evidence should be evaluated by the extent to which it fulfills these functions." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-256 (1981).

It is beyond cavil that a complainant would be deprived of a "full and fair opportunity to demonstrate pretext," Ibid., if respondent could lawfully remain silent in the face of the allegations against him, or could meet his burden by showing that other members of a protected class were, at a different time, treated in a non-discriminatory manner. For example, a landlord who privately imposes a ceiling on minority tenancies, say 50%, should not be allowed to defend his rejection of a black applicant by pointing to other minority tenants as conclusive proof that he did not discriminate against this particular minority tenant because of his race if, in fact, that is precisely what he did in order not to exceed his self-imposed ceiling. Proof that a respondent may have a racially balanced work force or has

historically offered housing opportunities on a non-racial basis, while not wholly irrelevant to the issue of discriminatory intent, can never be used to conclusively demonstrate that respondent's actions were not unlawfully discriminatory in a particular instance. See, Furnco Const. Corp. v. Waters, 438 U.S. 567, 580 (1978). Each person has a right to be free from racially based decision making and each person must be afforded the opportunity to show that a decision affecting him or her was racially motivated. Such an opportunity is denied when a respondent fails or refuses to give the basis of the decision. A complainant cannot fully and fairly respond to that which is never stated.

Here, the hearing examiner's findings of fact reveal that respondent never articulated the reason that Mr. Lambert rejected Mr. Moody. Instead, the respondent rested entirely on Mr. Lambert's non-discriminatory treatment of other black or interracial tenants.

By failing to explain why Mr. Lambert rejected Mr. Moody, respondent fell short of the burden placed upon landlords by the McDonnell Douglas/Shepherdstown test and, as a matter of law, the Commission must enter judgment for complainant. Our decision has ample support in law. As the court stated in Robinson v. 12 Lofts Realty, Inc. 610 F.2d 1032 (2nd Cir. 1979), a respondent in a housing case must "come forward with evidence to show that his actions were not motivated by

considerations of race. If the [respondent] does not present such evidence, the [complainant] will be entitled to relief [Respondent] must offer evidence of the reasons its action was taken." 610 F.2d at 1039.

Similar results were upheld in Resident Advisory Board v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), ["unrebutted proof of discriminatory effect alone may justify a federal equitable response." 564 F.2d at 146] and Smith v. Anchor Building Corporation, 536 F.2d 231 (8th Cir. 1976), [". . . where a black rental applicant meets the objective requirements of the landlord, and the rental would likely have been consummated where he or she a white applicant, a prima facie inference of discrimination arises as a matter of law. If the inference is not satisfactorily explained away, discrimination is established." 536 F.2d at 233.]

Mr. Moody having prevailed, he is entitled to compensatory damages upon proof of out-of-pocket monetary loss. State Human Rights Commission v. Pauley, 212 S.E.2d 77, (1975). Here, he is entitled to the difference between his rent if he had rented from Andrew Lambert and the higher rent that he was forced to pay when Andrew Lambert would not rent to him. We award him this difference in rent for a reasonable period of time, that being from 1 May 1977 to 13 April 1978. Complainant also has a right to incidental damages for the humiliation, embarrassment, emotional and mental distress and

loss of personal dignity suffered by him as a result of the respondent's unlawful acts. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (1977).

CONCLUSIONS OF LAW

1. At all times referred to herein, Andrew Lambert was the "owner" of "real property" located in Charleston, Kanawha County, West Virginia as those terms are defined by W., Va. Code § 5-11-3(p) and (1).

2. At all times referred to herein, George Moody was a resident of the State of West Virginia and a person within the meaning of W. Va. Code § 5-11-3(a).

3. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to W. Va. Code §§ 5-11-8, 5-11-9 and 5-11-10.

4. The West Virginia Human Rights Act is violated when an owner of real property refuses to rent or lease to a person because of that person's race. W. Va. Code § 5-11-9(a)(7)(A).

5. The complainant established a prima facie case that he was denied the opportunity to rent or lease real property because of his race.

6. The respondent failed to articulate a legitimate non-discriminatory reasons for its actions against complainant and, as a matter of law, the Commission must enter judgment on behalf of complainant.

RELIEF AND ORDER

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

1. The complaint of George Moody is sustained.
2. The respondent shall cease and desist from engaging in any unlawful discriminatory practices in the renting or leasing of real property.
3. Respondent shall reimburse the complainant \$1,500.00 for out-of-pocket monetary losses suffered by complainant when he was required to find other quarters for himself and his family.
4. The complainant is entitled to an award of \$500.00 as incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personal dignity.

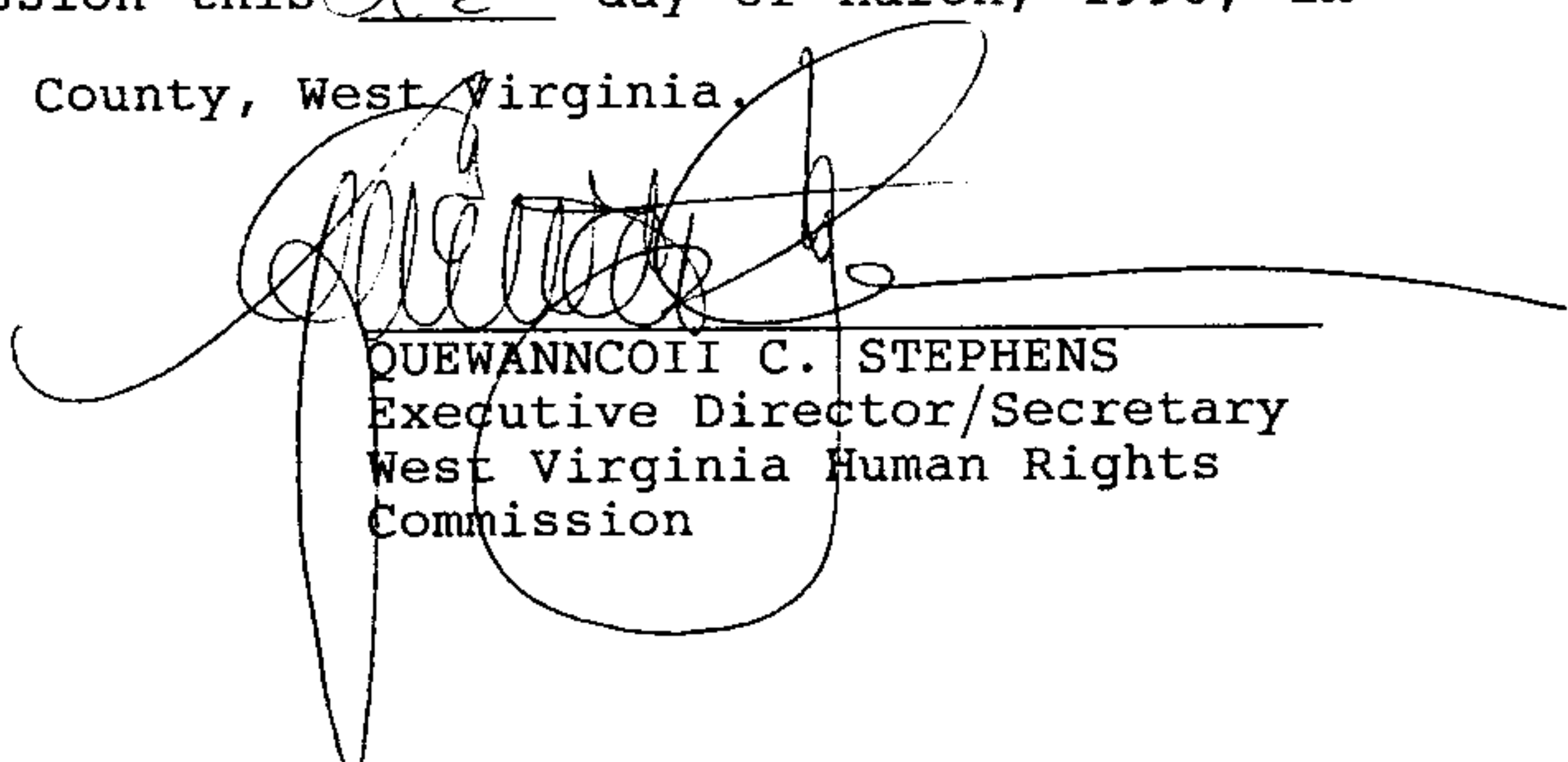
It is finally ORDERED that the respondent shall provide to the West Virginia Human Rights Commission proof of

compliance with this decision, within thirty-five (35) days of service of said decision, by copies of cancelled checks, affidavits or other means calculated to provide such proof.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 2^d day of March, 1990, in Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS
Executive Director/Secretary
West Virginia Human Rights
Commission