



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

GASTON CAPERTON
GOVERNOR

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Quewanncoii C. Stephens
Executive Director

February 28, 1992

Joseph McKenzie
Box 13-A, Beckley Rd.
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Deputy Attorney General
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Mercer County Board
of Education
1420 Honaker Avenue
Princeton, WV 24740

Kathryn R. Bayless, Esquire
1426 Main Street
Suite 302
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Re: McKenzie v. Mercer County Board of Education
Docket No. ER-46-89

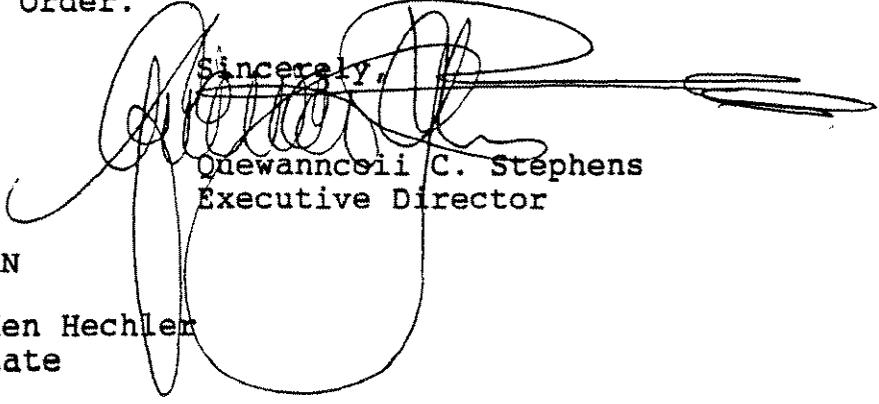
Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above styled and numbered case.

Pursuant to W. Va. Code § 5-11-11, as amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Issues not previously raised to the Commission on appeal are deemed to be waived.

Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for a review of this Final Order.

Sincerely,


Quewanncoii C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL/RETURN
RECEIPT REQUESTED
cc: The Honorable Ken Hechler
Secretary of State

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

JOSEPH MCKENZIE,
Complainant,

v.

DOCKET NO. ER-46-89

MERCER COUNTY BOARD
OF EDUCATION,

Respondent.

FINAL ORDER

On February 19, 1992, the West Virginia Human Rights Commission reviewed the findings of fact and conclusions of law set forth in the Final Decision of the Hearing Examiner filed in the above-styled action by Gail Ferguson. After consideration of the aforementioned Final Decision, and after a thorough review of the transcript of record, arguments and briefs of counsel, the Commission decided to, and does hereby, adopt said Final Decision of the Hearing Examiner as its own, encompassing the findings of fact and conclusions of law set forth therein, without modification or amendment.

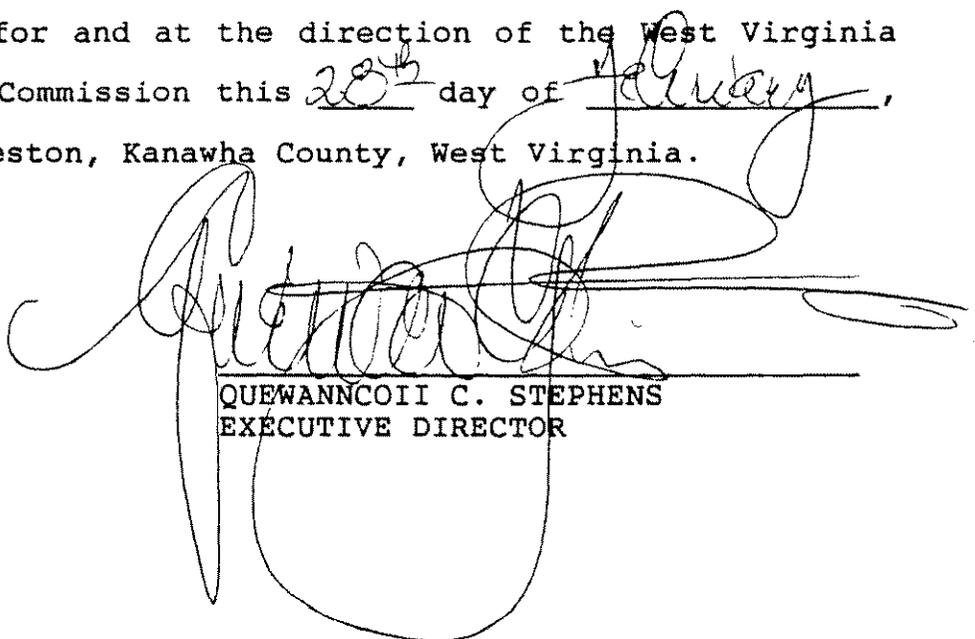
It is, therefore, ADJUDGED, ORDERED and DECREED that the Final Decision of the Hearing Examiner, encompassing the findings of fact and conclusions of law, be attached hereto as this Commission's Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and the counsel, and by first class mail to the Secretary of State, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 20th day of February, 1992 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS
EXECUTIVE DIRECTOR

RECEIVED

AUG 26 1991

ATTORNEY GENERAL
CIVIL RIGHTS DIV.



COPY

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GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

August 22, 1991

Joseph E. McKenzie
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Mary C. Buchmelter
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Charleston, WV 25301

Re: McKenzie v. Mercer County Board of Education
ER-46-89

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner 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 July 1, 1990, 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 hearing examiner'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 examiner, 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 hearing examiner shall not operate as a stay of the decision of the hearing examiner 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 appeal shall be confined to the record.

10.4. The appellant shall submit the original and 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 omissions 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 hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, 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 a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

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

10.8.2. Within the commission's statutory jurisdiction or authority;

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

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. 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 a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner'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 questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,


Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Quewanncoii C. Stephens, Executive Director
Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOSEPH E. MCKENZIE,
Complainant,

V.

DOCKET NUMBER(S): ER-46-89

MERCER COUNTY BOARD OF
EDUCATION,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on October 22, 1990, in Mercer County, Bluefield, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Joseph E. McKenzie, appeared in person and by counsel, Mike Kelly, Deputy Attorney General. The respondent, Mercer County Board of Education, appeared by its representative, Dr. Deborah Akers, Superintendent for Mercer County Schools, and by counsel, Kathryn R. Bayless, Esq.

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 hearing examiner 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.

FINDINGS OF FACT

1. Complainant, Joseph E. McKenzie, is a black male, who at all times relevant to this proceeding, was employed by respondent as a professional educator.

2. Respondent, Mercer County Board of Education, is an employer as that term is defined by WV Code §5-11-3(d).

3. In or about June 1988, complainant, who was then employed by respondent as one of two assistant principals at Princeton Junior High School (PJHS), applied for the vacant position of principal of PJHS. He had been an assistant principal at PJHS for close to three school years.

4. On or about June 28, 1988, the respondent officially rejected the aforementioned application of complainant and instead hired Edward G. ("Ted") Gillespie to be principal of PJHS. Mr. Gillespie, who is white, was, prior to his hire as principal, employed by respondent as the other assistant principal at PJHS. He had been an assistant principal at PJHS for one school year.

5. On or about July 26, 1988, complainant filed a complaint with the West Virginia Human Rights Commission charging respondent

with unlawful discrimination on the basis of race in violation of the West Virginia Human Rights Act, WV Code §5-11-9(a)(1). Complainant alleged that he was not hired as principal of PJHS because he is black. Respondent denied that it violated the Act, stating that complainant was not hired because he "was observed to lack the communication skills possessed" by the other candidates.

6. Complainant (age 47 at the time of hearing) is a lifelong resident of Mercer County, West Virginia. He graduated from Princeton High School in 1960, and from Bluefield State College in 1972 with a Bachelor's Degree in Education. He is an honorably discharged veteran of the U.S. Air Force, having obtained the rank of sergeant.

7. In 1984, complainant obtained a Master's Degree in Education Administration from the West Virginia College of Graduate Studies, and since then has accumulated 30 additional hours of post-graduate credits.

8. Complainant is certified to teach general science, biological science, health and physical education for grades 7 through 12.

9. Complainant attained a provisional administrative certificate from the West Virginia Department of Education in August 1984, and was certified permanently as a professional administrator in September 1989.

10. Complainant began his employment with respondent in 1973. He was hired to teach science at Central Junior High School in Bluefield. He taught there for approximately nine years, until

Central Junior High School and Fairview Junior High School were consolidated into Bluefield Junior High in or about 1982.

11. While employed at Central, complainant, in addition to his regular teaching duties, served as head track coach, head basketball coach for three years, and as assistant coach in basketball and football. When he was head basketball coach, his team won the county championship each year. He was also the sponsor of Central's science and chess clubs, and took on extra lunch and bus duties on a daily basis.

12. During his tenure at Central, complainant was a member of the Mercer County Education Association (MCEA) and served as the school's faculty representative for several years. He was elected vice president of MCEA for one term and served on its executive committee. He was also on a countywide committee in charge of textbook selection for one year, as well as the county's personnel committee.

13. Following the merger of Central and Fairview into Bluefield Junior High School, complainant continued to teach science and coach. He was head track coach and an assistant coach in football, basketball and golf. He served as head basketball coach for one year, again winning a county championship. He continued to be the sponsor of the science and chess clubs, and retained his extra lunch and bus duties.

14. In 1984, after obtaining his provisional administrative certificate, complainant approached the principal of Bluefield Junior High School, Ken Muncy, and requested that he be permitted to work as an administrator for several periods per week in order to gain

experience in that area. Mr. Muncy granted the request and complainant began working in the office one period per day as relief for the assistant principal who was in charge of discipline. He worked in this capacity for approximately one school year. It was an unofficial position for which he received no additional compensation.

15. In 1985, complainant was asked by Mr. Muncy if he would assume the duties of assistant principal on a full-time interim basis until a vacancy could be properly filled. Believing that he would benefit from the experience, complainant agreed. He served as a full-time acting assistant principal at Bluefield Junior High School in October and November 1985, with a majority of his duties involving discipline. Since this was an official, compensated temporary full-time appointment, complainant relinquished all of his teaching duties.

16. In November 1985, while employed as acting assistant principal at Bluefield Junior High School, complainant applied for a vacant permanent position as an assistant principal at PJHS. He was subsequently interviewed by a Dr. Sheppard, the then-acting superintendent of schools for respondent, and William H. Baker, the then-recently hired, and still current, superintendent. Mr. Baker and Dr. Sheppard traveled to Bluefield to interview complainant.

17. During complainant's interview, Mr. Baker stated that he was looking for an applicant who would be a strong disciplinarian. PJHS, according to Mr. Baker, had major discipline problems, and had a poor reputation in the community. Additional problems with uninvited persons coming onto school property had necessitated the construction of a fence around the school's grounds. There had also

been a recent alleged "racial altercation" at the school involving students and outsiders. Complainant responded that discipline was "one of my strongest points" and that if he could not improve the situation at PJHS he would voluntarily resign.

18. Mr. Baker hired complainant, and complainant began work at PJHS in November 1985. The principal of PJHS at that time was Irene Pauley. The other assistant principal was Don White. Both Ms. Pauley and Mr. White are white.

19. Ms. Pauley assigned complainant to be in charge of discipline. He was also advised that he would be required to assume any and all other duties which Ms. Pauley delegated to him.

20. After only a few days in his new position, complainant found widespread dissatisfaction among the faculty with the school's disciplinary system. It was considered too lenient. After reviewing the procedure, complainant decided to alter the discipline system to eliminate a warning step. His revised disciplinary system offered some level of punishment for each act of misbehavior.

21. During his first year at PJHS, complainant had over 6,000 disciplinary referrals from teachers. He spent between 75% and 90% of his time on disciplinary matters.

22. Having primary responsibility for discipline, complainant determined the degree of discipline imposed in each case, though in many instances referral to a pre-set penalty was all that was necessary. He kept in his office a file on all discipline referrals for each student referred, with a running tally on each child's disciplinary history.

23. Between 1985 and 1988, complainant had daily interaction with parents. When a student was suspended or other discipline was imposed, it was his duty to telephone the parents and inform them of what had transpired. He also called the parents of any child who became ill at school.

24. Complainant also frequently arranged conferences between parents and himself, or parents and teachers. He would counsel parents regarding disciplinary and truancy problems, or certain difficulties between their child and a teacher, or problems between their child and other students.

25. In 1986, complainant became the athletic director at PJHS. He still serves in this position and is in charge of overseeing the school's athletic budget.

26. In 1985-86, complainant was responsible for determining the validity of absences from school, often dealing with between 50 and 100 students per day. While performing this duty, he was required to maintain a file on each absent student.

27. Between 1985 and 1988 (and continuing to the present) if a teacher had an inordinate number of disciplinary referrals, complainant observed the teacher in the classroom to determine the source of the problem and to offer his assistance, if necessary. He occasionally would do in-class observation two to three times per week and make a report to Ms. Pauley.

28. Each morning he walked the hallway of his assigned floor, speaking to each of the 20 to 25 teachers and inquiring if there were any problems that he could help them with.

29. The complainant had frequent interaction with substitute teachers, often two or three times per week, assuring that an appropriate lesson plan was in place for them or, if it was not, helping the substitute design one.

30. The complainant addressed the entire student body on the first day of each school year, gave an annual presentation to parents at the seventh grade orientation session, spoke regularly before members of the Parent-Teacher Organization and gave an annual spring orientation talk to sixth graders on their forthcoming junior high years.

31. From 1985 and continuing to the present, complainant routinely arrives at PJHS between 7:15 and 7:30 a.m. and does not leave until 4:15 p.m. As of the date of hearing, he had accumulated over 240 days of sick leave, at the rate of 15 days per year.

32. Complainant has spent his entire professional career with respondent with no breaks in service and no record of any disciplinary action being taken against him. His career as a professional educator has focused exclusively on junior high aged children.

33. Ted Gillespie graduated from Princeton High School in 1957 and from Concord College, with a Bachelor's Degree in Education, 1967. He obtained a Master's Degree in Physical Education in 1970 and a Master's Degree in Education Administration in 1987.

34. Mr. Gillespie is certified to teach math and physical education. He acquired a provisional professional administrative certificate in May 1987, two months before being appointed assistant principal at PJHS.

35. Mr. Gillespie's resume indicates that, prior to being employed by respondent as a math teacher in 1983, he had a work history as follows:

(a) high school math teacher in Virginia and Florida for approximately two and one-half years, serving also as an assistant football coach at each school;

(b) instructor in the athletic departments of Bluefield State College and Concord College, respectively, for a total of six years, again additionally working as an assistant football coach;

(c) July 1977 through May 1980 coal mining equipment and trucks salesperson;

(d) May 1980 through June 1982 second assistant superintendent of the Preston County (West Virginia) public schools; and

(e) September 1982 through June 1983, supervisor of the Media and Materials Center for the Preston County school system.

36. Mr. Gillespie's resume does not list or describe nor does the record otherwise reveal any of his duties during the three years that he worked in an administrative or supervisory capacity with the Preston County school system.

37. A reference regarding Mr. Gillespie from the Director of Personnel of the Preston County Schools indicates that Mr. Gillespie spent at least some of his time in that county as a "permanent substitute teacher."

38. During the entire time of his employment by Preston County Board of Education, Mr. Gillespie had neither a provisional nor a permanent professional administrative certificate.

39. In September 1983, Mr. Gillespie was hired by respondent as a math teacher at Princeton Senior High School. This was the first time that he was employed by respondent.

40. In July 1986, Mr. Gillespie applied for an assistant principalship at PJHS made vacant by the transfer of Mr. White. His application was rejected because he did not have a valid administrative certificate.

41. In July 1987, two months after receiving his provisional administrative certificate, Mr. Gillespie again applied for the assistant principalship at PJHS, a position which had not yet been filled on a permanent basis since Mr. White's departure. This second effort was successful and he was hired effective August 1987.

42. Mr. Gillespie and complainant were both assistant principals at PJHS for the 1987-88 school year. The complainant assisted in familiarizing Mr. Gillespie with aspects of the school, particularly the disciplinary plan, that may have been different from Mr. Gillespie's previous experience.

43. School year 1987-88 was Mr. Gillespie's first experience both as in-school administrator and in the junior high grades. His previous in-school positions had all been in senior high schools. Complainant, on the other hand, had spent his entire 14-year professional career on the junior high level and had been an administrator for two years.

44. During their year as assistant principals at PJHS, complainant continued to be in charge of discipline. His other duties remained basically the same as those of previous years. Mr. Gillespie was in charge of attendance, was "involved with textbooks,"

supervised the buildings, grounds and custodians, and "observed and evaluated a few teachers" in the health and physical education department.

45. The record is devoid of evidence that Mr. Gillespie, during his year as an assistant principal at PJHS or previously, obtained or had any experience in curriculum development.

46. The 1987-88 performance evaluations of complainant and Mr. Gillespie are the only evaluations of these individuals which were done by the same person (Principal Irene Pauley), using virtually the same evaluative criteria. As such, the evaluations are probative of each assistant principal's performance as compared to the other's.

47. Ms. Pauley's evaluation of Mr. Gillespie covered 66 categories. He was found to "exceed" the standard performance in 17 categories (25.7%) and to "meet" the standard in 49.

48. Complainant was evaluated in 55 categories,¹ and found by Ms. Pauley to "exceed" the standard performance in 12 (21.8%) and to meet the standard in 43.

49. In areas in which they were both rated, Mr. Gillespie rated higher than complainant in administering attendance policies, administering health and safety, assuring clean and sanitary conditions in the physical plant, assuring building maintenance and completing reports accurately and on time. Except for the later category, these were areas over which Mr. Gillespie had primary

¹ Mr. Gillespie was rated by Ms. Pauley in more categories due to his duties in such areas as building energy management and maintaining the computer data base, and the fact that he assisted Ms. Pauley in evaluating the health and physical education teachers.

responsibility. For his part, complainant was rated higher in encouraging student leadership.

50. Ms. Pauley gave identical ratings to her assistant principals in the areas of communicating with staff, establishing good public and employee relations, building staff morale, and maintaining and upgrading professional skills.

51. The handwritten comments made by Ms. Pauley on each evaluation are virtually identical, stating that the respective employee exceeded the standard in the areas of his priority responsibilities and met the standard in all other areas.

52. At hearing, Mr. Baker, respondent's superintendent, admitted that Ms. Pauley's 1987-88 evaluations of complainant and Mr. Gillespie were "about the same" and "very close."

53. Mr. David Harvey, who has 16 years as a classroom teacher at PJHS, testified at hearing that from his perspective both assistant principals did good jobs. Mr. Harvey characterized both complainant and Mr. Gillespie as dependable, consistent employees. Mr. Harvey testified that he never experienced any difficulty with communicating with complainant nor did he notice that any other teacher had such a problem.

54. Donald E. Conner, a physical education teacher with 18 years' experience, including eight years at PJHS, offered similar testimony. Mr. Conner did not think that one was more qualified than the other. He did, however, state that complainant had a better rapport with the students, and that since the complainant's hire at PJHS, the disciplinary situation had improved. Mr. Conner testified that he has seen complainant daily and has never observed any

problems with the communication or verbal skills of the complainant; moreover, that the complainant commands the respect of students and has maintained good relations with the faculty.

55. At the end of 1987-88 school year, Ms. Pauley retired from her position as principal of PJHS.

56. The written job description for secondary principal in effect during the relevant period reads in pertinent parts as follows:

"Responsibility or Purpose (Narrative):

The secondary principal is responsible for the supervision, management, and operation of the school or schools to which he/she is assigned. The secondary principal shall provide instructional leadership, setting goals, and priorities for the school, evaluating the extent to which goals are met, and make recommendations for improvement....

Regular Duties (List in General, Major Functions):

- a. Assume administrative and supervisory responsibility for the evaluation of personnel, scheduling, distribution of supplies and equipment, and management of school funds and resources.
- b. Establish and allocate a school budget in accordance with county policy, and establish sound procedures for staff payroll. The principal is responsible to establish a sound accounting system which will allow for proper collection, accounting, safe guarding, and expenditure of all school funds including funds raised by school clubs, organizations, and athletics.
- c. Demonstrate effective management of student personnel through proper maintenance of student records, scheduling, appropriate discipline of students and serving the individual needs of students.
- d. Assist in developing policies and procedures to be considered and adopted by the Board, establish a professional reading program; use proper management techniques and methods; encourage professional growth and inservice workshop activities for all staff members.
- e. Supervise the custodial and food service personnel assigned to his/her school. The secondary principal will work with the coordinator of custodial services

to enhance the quality of work performed by the custodial staff.

- f. Work with the coordinator of food service in a cooperative effort to provide high quality services in this program area.
- g. Provide instructional leadership and support within the school building.
- h. Create a climate conducive to teaching and learning.
- i. Implement a system to monitor student progress.
- j. Establish and implement a school improvement process.
- k. Establish good public and employee relations.
- l. Maintain professional work habits.
- m. Maintain and upgrade his/her professional skills.
- n. Other duties as assigned by Executive Director of Secondary Education.

Special or Occasional (Collateral) Duties:

Take responsibility of any unusual or emergency situation that may occur.

Tools and Equipment Used:

School plant or facility provided.

Working Conditions:

Normal office situation.

Minimum Qualifications--(State Education, Training, and Experience Requirements):

- a. MA in administration.
- b. 5 years successful teaching experience.
- c. West Virginia Administrative Certification.
- d. Doctorate preferred."

57. In early June 1988, Mr. Baker, respondent's superintendent, interviewed the five finalists for Ms. Pauley's former position: the

complainant, Mr. Gillespie, Dan Zirkle, Mack Barber, and Mike McPherson. All of the finalists, except complainant, are white males.

58. Mr. Baker testified that he wanted to hire a "take charge" person who "also could communicate with all the different populations there that they had to deal with." " Like parents, some like teachers, some like students, and who was someone who could take charge of the entire school and put it back to where it ought to be." He also stated that he was looking for a strong disciplinarian.

59. Each interview lasted approximately ten or fifteen minutes. During the interview, Mr. Baker took no written notes, nor did he use written criteria or evaluation forms. Even when later presenting his selection to respondent, Mr. Baker refrained from creating any written account of the selection process.

60. During, if not prior to, the interviews, Mr. Baker eliminated Mr. Zirkle as a candidate. Mr. Baker believed that Mr. Zirkle, who was then principal of another school, was doing an excellent job and should not be transferred. He also eliminated Mr. McPherson, who was being considered for an appointment to a central office administrative position.

61. According to Mr. Baker he likewise did not seriously consider Mack Barber because he thought Mr. Barber had a problem with "hard headedness. During the interview with Mr. Barber, Mr. Baker informed him of this problem and stated that Mr. Barber "needed to be a little more flexible." Within a year after the interview, Mr. Barber was promoted to a principalship.

62. During Mr. Baker's interview of complainant, the complainant outlined his accomplishments in the area of discipline at

PJHS and suggested that the school needed to develop remedial programs in science and math because of low standardized test scores, and to improve faculty morale. Mr. Baker told complainant that he (Mr. Baker) was pleased with the job that he had done at PJHS. Mr. Baker did not offer any criticism of complainant; he did not make any suggestions for improvement, nor did he mention any problems that he believed complainant might have with communication or verbal skills. In fact, the main purpose of the interview, Mr. Baker testified, was not to evaluate complainant as a candidate for principal, but "to tell Joe that he was doing a good job as a disciplinarian, the responsibility that Irene Pauley had given him. That was the reason for the interview. I wanted to communicate that to him." For all intents and purposes, complainant had been eliminated as a candidate prior to the interview.

63. On or about June 28, 1988, respondent, pursuant to Mr. Baker's recommendation, hired Mr. Gillespie as principal of PJHS. Complainant was informed of the selection through the local newspaper. He telephoned respondent to inquire as to the reason that he was not hired, but was told by Stephen Akers, Director of Personnel, that the Board was not legally obliged to furnish him with a reason.

64. A comparison of the past performances and qualifications of complainant and Mr. Gillespie, consisting of the evaluations done by Ms. Pauley; the testimony of Mr. Harvey and Mr. Conner; and respondent's job description for secondary principal establish that the two applicants were similarly qualified.

65. Complainant, however, had more countywide seniority than Mr. Gillespie, and more administrative seniority at the junior high level, particularly at PJHS.

66. It is the position of the respondent that the complainant was not promoted because of a lack of appropriate verbal and communication skills.

67. Mr. Baker testified that he believed that complainant did not have the skills "to be able to get up in front of a group of people and to explain to the people so they can understand directions, or philosophy, or whatever. I think that's part of the communication I'm talking about. Not just poor grammar, but able to communicate so people can understand." He characterized complainant as "hard to understand."

68. Mr. Baker also testified that Mr. Gillespie was better qualified than complainant because he had taught at the college level and had previous central office experience in Preston County.

69. Though expressing a concern that complainant was not an effective communicator in a group situation, Mr. Baker admitted that he had never witnessed or heard complainant speak to a group of students, or a group of teachers or a gathering of parents. Nor, for that matter, had he ever heard Mr. Gillespie address a group. In fact, he had observed no interaction whatsoever between complainant and students, or other faculty members, or parents.

70. Mr. Baker testified that his assessment of complainant's verbal skills was based on his initial interview with complainant in 1985, and various discussions thereafter that occurred during Mr. Baker's occasional visits to PJHS. His in-school conversations with

complainant, Mr. Baker admitted, never included a one-on-one meeting with complainant, but were only "...one way conversations..." in which he spoke to complainant and then gave complainant "his chance to communicate." Such "one way conversations," however, were not about any specific subject: "I didn't talk to him about instructions or curriculum or those kinds of things," Mr. Baker said at hearing. Mr. Baker could not recall any specific conversation with complainant, nor would he estimate the number of conversations that they had had between 1985 and 1988. While alleging that complainant was "hard to understand," he could not cite a single specific instance as an example of complainant's being difficult to comprehend. According to Mr. Baker, "my concern about complainant was his interaction with me; and when he didn't communicate well with me, I don't think he could communicate very well with the parents and others."

71. Complainant credibly testified that between his interview in 1985 and his interview in 1988, he spoke to Mr. Baker no more than three times. The conversations consisted of greetings, polite inquiries into health and farewells. On one occasion he showed a photograph to Mr. Baker of a student engaged in a fight. He added that he had never corresponded in writing with Mr. Baker and had never met with him alone or in a small group, other than during his interviews.

72. Complainant's testimony was supported by that of Mr. Gillespie. While Mr. Baker claimed to have observed both assistance principals, Mr. Gillespie stated that he seldom saw Mr. Baker at PJHS. When Mr. Baker did visit the school, said Mr. Gillespie, their interaction would consist of short salutatory conversations.

73. At the hearing, Mr. Baker was unable to convincingly articulate what the respective duties were of the complainant and Mr. Gillespie as vice principals.

74. Two teachers, Mr. Harvey and Mr. Conner, testified that they observed no problems the complainant had communicating with students, teachers or parents and that he exhibited the positive attributes of leadership, respect and discipline.

75. It was likewise uncontroverted that complainant had daily contact with students, teachers and parents, which consumed a majority of his work time, yet respondent did not call a single witness or cite a single instance in which complainant's verbal skills interfered in any degree with the successful completion of his duties.

76. The explanation given by respondent by testimony of Mr. Baker for its rejection of the complainant, namely his alleged lack of verbal and communication skills, is patently incredulous

77. Respondent's contention that Mr. Gillespie was better qualified for the position than complainant because of his college teaching and administrative experience is similarly suspect.

78. Respondent presented no evidence that Mr. Gillespie's six years of teaching physical education at the college level bore more relationship to the position of principal at PJHS than complainant's 15 years as a teacher and administrator in junior high.

79. Moreover, respondent presented no evidence that described, outlined or even hinted at Mr. Gillespie's duties when he was second assistant superintendent in Preston County or to the relevancy of that experience to the job in question.

80. The evidence reveals that the respondent had little knowledge of Mr. Gillespie's duties in Preston County and, therefore, could not rationally have given that experience great weight.

81. An after-the-fact document labeled "Final Assessment Report for Joe McKenzie, June 12-13, 1989." is afforded no probative weight, as this document was not relied upon as the basis for complainant's rejection as it was not in existence at that time.

82. Clinton Henry, a black educator, testified that he is a resident of Mercer County, has M.S. degrees in both mental retardation and education administration and received his professional administrator's certificate in 1977. According to Mr. Henry, for a period of approximately ten years (1973-1983), he applied for various teaching and administrative positions with respondent, but was rejected on each occasion in favor of a white applicant. Without more, Mr. Henry's testimony is of little probative value as corroborative evidence of pretext.

83. Janet Williams, who is also black, testified that she is employed by respondent as an elementary school principal, and that prior to her appointment as principal, that she was repeatedly rejected in her pursuit of an administrative position although highly qualified. According to Ms. Williams, on one occasion a white applicant was chosen over her for a principal's position because the other applicant had experience as a dean of women at a college. At that time, Ms. Williams had 11 years of exemplary service at the same school. Without more, Ms. Williams' testimony is afforded little probative weight.

84. Joint Exhibits 4 and 5, respondent's EEO-5 reports for 1986 and 1988 offered by the complainant to demonstrate a pattern of treatment against blacks by respondent in its hiring practices, is statistically insufficient, without more, as additional evidence of pretextuality.

85. The parties stipulated to the following calculations regarding back pay:

- (a) For the school year 1988-89, complainant was paid \$29,238.90 as assistant principal. He would have earned \$33,278.19 if he had been selected as principal;
- (b) For 1989-90, he earned \$32,259.61, and would have earned \$36,770.96 if serving as a principal; and
- (c) For the current fiscal year, he will be paid \$36,409.79 and he would earn \$41,414.86 as a principal.

86. Total wages lost by complainant from 1988 through the end of the 1990-91 school year are \$13,555.70.

87. The parties also stipulated that complainant, if successful in this action, should be compensated for loss of social security, pension and other benefits he would have received had he been selected as principal of PJHS.

88. After learning that he had not been hired for the principal's position, complainant felt hurt and depressed and thereafter, suffered physical problems associated with depression and anxiety.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act, WV Code §5-11-1 et seq. Section 5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...."

The term "discriminate" or "discrimination" as defined in §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race...."

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful race discrimination, or the commission acting on their behalf, must ultimately show by a preponderance of the evidence that:

1. the employer excluded him or her from, or failed or refused to extend to him or her, an equal opportunity;
2. race was a motivating or substantial factor causing the employer to exclude the complainant from, or fail or refuse to extend to him or her, an equal opportunity, Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989); and
3. the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

A complainant may prove a case by direct evidence of discriminatory intent or, as is more often done in disparate treatment cases, such as sub judice, by the three-step

inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dept. v. State Human Rights Commission, 309 S.E.2d 342 (1983).

The latter method of proof of discriminatory intent, on which the complainant herein relies, requires that the complainant first establish a prima facie case of discrimination. The burden of production then shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant must show that the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." Institute of Technology v. Human Rights Commission, 383 S.E.2d 490, 496 (1989) (citing Black's Law Dictionary, 1069, 5th ed., 1979). A proffered reason is a pretext if it was not "the true reason for the decision." Conaway v. Eastern Associated Coal, 358, S.E.2d 423, 430 (1986).

In an action to redress an unlawful discriminatory practice in employment, the initial burden is on the complainant to prove by a preponderance of the evidence a prima facie case of discrimination. In a case of alleged failure to promote because of race, which is the most applicable model given the facts at bar, the prima facie burden is met upon a showing that: (1) complainant belongs to a minority group; (2) complainant applied for a promotion for which he was qualified; and (3) complainant was denied the promotion while others

who were similarly qualified, but who are not members of the protected group, were promoted. See, Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981); Kolb v. State of Ohio, 721 F. Supp. 885 (N.D. Ohio 1989); Edwards v. Marsh, 664 F.Supp. 1564 (E.D. Mich. 1986).

The prima facie burden is not onerous, but is merely designed to eliminate "the most common nondiscriminatory reasons" for an applicant's rejection. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

Here, there is no serious doubt that the complainant made out a prima facie case of discrimination. First, it is undenied that complainant, a black male, is a member of a group protected by the Human Rights Act.

Second, it is similarly clear that complainant applied for a promotion to principal of Princeton Junior High School (PJHS) and that he was qualified for the same based on the objective qualifications set forth in respondent's job description for secondary principal.

Third, it is not disputed that complainant was denied the promotion while another, similarly qualified applicant, Ted Gillespie, who is not a member of a protected group, was promoted.

Having established a prima facie case, the complainant creates a presumption that the employer unlawfully discriminated against" the complainant. Burdine, 450 U.S. at 254; Shepherdstown, 309 S.E.2d at 352, and "the burden then shifted to the defendant... to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a

legitimate, nondiscriminatory reason." Burdine, at 254. Though the burden on respondent is only one of production, not persuasion, to accomplish it as respondent "must clearly set forth through the introduction of admissible evidence the reason for the [complainant's] rejection." Ibid. The explanation provided "must be clearly and reasonably specific," Burdine, at 258, and "must be legally sufficient to justify a judgment for the defendant." Id. at 254.

If the respondent articulates a legitimate, nondiscriminatory reason for rejecting the complainant, "then the complainant [or the commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination." Shepherdstown, at 352. The complainant "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, at 256.

Here, the explanations articulated by respondent in answer to the complainant's prima facie case were: (1) the complainant was rejected because of his poor verbal and communication skills; and (2) Gillespie was better qualified than complainant because he had taught at a college level and had served in an administrative capacity with the Board of Education of Preston County.

A full review of the evidence, with particular attention focused on the 1987-88 evaluations of complainant and Mr. Gillespie, the testimony of Mr. Harvey and Mr. Conner, and Mr. Baker's testimony,

indicates that the reasons proffered by respondent to explain complainant's rejection are pretext and unworthy of credence.

The record is devoid of any competent evidence as to alleged deficiencies of the complainant in verbal and communicative skills. To be sure, the overwhelming weight of the evidence, including the alluded to evaluations and testimonial tributes to the complainant by co-workers coupled with the observation of the trier of fact as to these traits which to some degree are objectively discernible, establish respondent's explanation to be a fiction.

Here, respondent offered no evidence whatsoever that the complainant's perceived language problems would have any effect on his ability to perform a principal's duties. In fact, the testimony and the exhibits adduced by the complainant show that the concerns articulated by respondent, such as complainant's inability to communicate with students, teachers or parents, are pretextual. The complainant's evaluations in areas related to communication skills are exactly the same as those of Mr. Gillespie and his language abilities were believed sufficient by both Mr. Harvey and Mr. Conner, teachers who have worked with complainant for more than five years. Respondent produced no evidence whatsoever from a student, teacher or parent indicating that complainant's verbal skills presented any problem or would in any way interfere with a material part of a principal's duties.

Respondent's assertion that Mr. Gillespie was more qualified than complainant because of the former's college teaching and administrative experience similarly rests on unsupported ground. Again, respondent produced no evidence that such experience is even

mentioned in the applicable job description or that there is a rational link between such experience and the likelihood of success as a junior high principal, or that it is routinely used as significant criteria in similar hiring decisions.

The legitimacy of respondent's reliance on Mr. Gillespie's administrative experience is further tarnished by Mr. Baker's admission that he had no information about, and made no inquiry concerning, the exact nature of Mr. Gillespie's duties in Preston County.

Simply stated, the complainant was perceived to be less qualified because of his race without any basis in fact and accordingly was never considered a viable candidate for principal of PJHS. The credible evidence shows that complainant and Mr. Gillespie were similarly qualified. Complainant, however, had more seniority in every conceivable category than did Mr. Gillespie, from countywide seniority, to years in as an assistant principal, to years at PJHS.

Though his greater seniority did not require that respondent hire complainant, "seniority -- even without a statute, is often a consideration in employment decisions." Perilli v. Board of Education of Monongalia County, 387 S.E.2d 315, 319 (W.VA. 1989). Therefore, even though complainant had "no right to promotion based on seniority, the fact that [he] was the most senior person applying would be one piece of relevant evidence, given the tie breaking use of seniority in most organizations." Ibid. See also, Dillon v. Board of Education of County of Wyoming, 351 S.E.2d 58 (1986). Absent racial considerations on the part of respondent, all other reasons having been vitiated, it is clear that his much

greater seniority should have tipped the scales in favor of complainant and that he should have been hired as principal of PJHS. Indeed, as the Supreme Court of Appeals said in Dillon, "...where several applicants have the same or similar qualifications, there is no rational basis for selecting one applicant over the others except seniority." 351 S.E.2d at 62.²

It should be noted, as pointed out by one court, that although entities such as respondent have wide discretion in personnel decision making, that this discretion must be exercised reasonably, in the interest of the school and not in a manner which is arbitrary or capricious. Dillon, infra. While it is true that the acceptance of subjectivity increases in decisions involving academia, the pivotal point becomes whether the procedure is fair and uniformly applied and whether safeguards are present. In the instant case they were not, and inured to the detriment of the complainant. The selection process utilized by respondent is and was a ready mechanism for discrimination. Rowe v. General Motors, 457 F.2d 384 (1972).

The factfinder, in reaching her decision on the ultimate issue, may look at "facts concerning the employer's general policy and practice with respect to minority employment." McDonnell Douglas Corp. v. Green, 411 U.S. 804, 805 (1973). In such a case, the complainant may present statistics tending to make discrimination or

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As the Dillon Court also noted:
Consistently positive evaluations reflect not only professional accomplishment, but indicate invaluable, practical knowledge that can be brought to a new position. In this context, seniority itself connotes some element of qualification. 351 S.E.2d at 62.

other circumstantial or individual corroborative evidence of discriminatory motive on the part of respondent. The evidence presented by the complainant toward this end is not sufficient nor is its outcome determinative of the issue at bar.

Here, reviewing the testimony and exhibits as a whole, and weighing the credibility and demeanor of witnesses, the complainant has established by an overwhelming preponderance of the evidence that the respondent treated complainant less favorably than Mr. Gillespie by failing or refusing to extend to him an equal employment opportunity because of his race.

CONCLUSIONS OF LAW

1. The complainant, Joseph E. McKenzie, 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, Mercer County Board of Education, is an employer 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 race 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 race discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$13,555.70, plus statutory interest.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to back benefits, including social security and pension contributions, commensurate with the award of backpay;

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to reinstatement to the next available principal's position within respondent's jurisdiction; and, if respondent is unable to place complainant in a principal's position by the beginning of the 1991-92 school year, then in lieu thereof it shall pay him the difference between his salary as assistant principal at PJHS and the amount he would be earning if employed as a principal, with said payments to continue until such time as complainant is placed in a principalship or other equivalent administrative position.

10. 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 \$2,500.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

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 pay to the complainant \$13,555.70, as outlined in findings of fact numbers 85 and 86 and conclusion of law number 7.

3. Within 31 days of receipt of this decision, the respondent shall pay to the complainant back benefits as outlined in finding of fact number 92 and conclusion of law number 8.

4. The complainant shall be instated to the next available principal's position within respondent's jurisdiction; and, if respondent is unable to place complainant in a principal's position by the beginning of the 1991-92 school year, then in lieu thereof it shall pay him the difference between his salary as assistant principal at PJHS and the amount he would be earning if employed as a principal, with said payments to continue until such time as complainant is placed in a principalship or other equivalent administrative position, as outlined in conclusion of law number 9.

5. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,500.00.

6. The respondent shall pay ten percent per annum interest on all monetary relief.

It is so ORDERED.

Entered this 22 day of August, 1991.

WV HUMAN RIGHTS COMMISSION

BY



GAIL FERGUSON
HEARING EXAMINER