



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
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23 July 1992

Quewanncoll C. Stephens
Executive Director

Sharon Neerhoof
105 Cora Street
Charleston, WV 25302

Leonard H. Higgins, Esquire
300 Security Building
Charleston, WV 25301

WV Society for the Blind
and Severely Disabled
1427 Lee Street, East
Charleston, WV 25301

Peggy Collins, Esquire
Kopelman, Collins & Dodrill
9 Pennsylvania Avenue
Charleston, WV 25302

Re: Neerhoof v. West Virginia
Society for the Blind
Docket No. REP-71-86 & EB-72-86

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

Sincerely,

QUEWANNCOLL C. STEPHENS
EXECUTIVE DIRECTOR

Enclosures
Certified Mail/Return
Receipt Requested

cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHARON K. NEERHOOF,

Complainant,

v.

DOCKET NO. REP-71-86
EB-72-86

WEST VIRGINIA SOCIETY
FOR THE BLIND,

Respondent.

FINAL ORDER

On August 29 and 30, 1991, this matter came on for final evidentiary hearing before Hearing Examiner Richard M. Riffe. On October 17, 1991, after consideration of the testimony and other evidence, the hearing examiner issued his Decision. This Decision directed that the case be dismissed and removed from the docket of the West Virginia Human Rights Commission.

No appeal having been filed pursuant to W. Va. Code § 5-11-8(d)(3) and § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, this Decision of the Hearing Examiner has been reviewed only as to whether it is in excess of the statutory authority and jurisdiction of the Commission, in accordance with § 77-2-10.9. of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. Other defects in said Decision, if there be any, have been waived. Finding no excess of statutory authority or jurisdiction, the Hearing

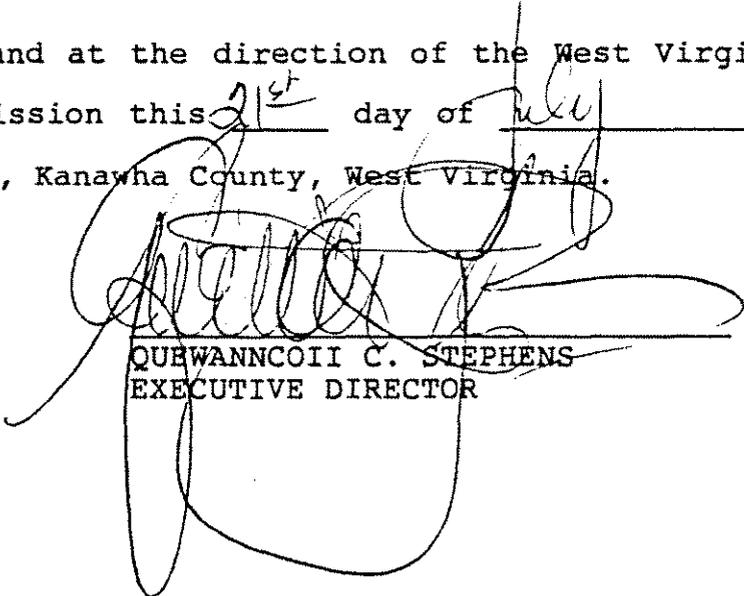
Examiner's Decision attached hereto is hereby issued as the Final Order of the West Virginia Human Rights Commission.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, 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 21st day of July, 1992 in Charleston, Kanawha County, West Virginia.



QUEWANNCOTT C. STEPHENS
EXECUTIVE DIRECTOR

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.



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616

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October 17, 1991

Quewanncoii C. Stephens
Executive Director

Peggy Collins, Esquire
Attorney at Law
9 Pennsylvania Avenue
Charleston, West Virginia 25302

Leonard Higgins, Esquire
Attorney at Law
300 Security Building
Charleston, West Virginia 25301

Re: Sharon K. Nearhoof vs.
West Virginia Society for
the Blind and Severely Disabled
Rep-71-86 & EB-72-86

Dear Ms. Collins and Mr. Higgins:

Enclosed hereunder please find an Order which I have entered in these claims. Appended hereto please also find a photocopy of the regulations related to appeals.

Sincerely,

A handwritten signature in black ink, appearing to read "Riffe".

Richard M. Riffe
Hearing Examiner

RMR/kpv

Enclosures: Order and appeal rights

Copy of regulations related
to appeals

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

SHARON K. NEERHOOF,

Complainant,

vs.

DOCKET NO. REP-71-86
EB-72-86

WV SOCIETY FOR THE BLIND,

Respondent.

ORDER

This matter came on for final evidentiary hearing ~~after proper~~ notice on August 29 and 30, 1991, before Hearing Examiner Richard M. Riffe at 1321 Plaza East, Charleston, West Virginia. Complainant appeared in person and by counsel, Leonard Higgins, and Respondent appeared by counsel, Peggy L. Collins. The findings of fact and conclusions of law made herein are based upon a preponderance of the evidence, taking into account each witness' appearance, demeanor, motive, state of mind, strength of memory, and considering bias, prejudice, interest if any of the witnesses, and considering the consistency and plausibility of the testimony in light of all other testimony from any witness and in light of all other evidence of record, documentary and testimonial.

PROCEDURAL HISTORY

Sharon K. Neerhoof filed a Complaint with the Human Rights Commission on August 12, 1985, against the Department of Vocational Rehabilitation and the West Virginia Society for the Blind and Severely Disabled. The Complainant alleged that she was discriminated against because of Reprisal, in that: (a) Richard Collett places sighted persons, whenever possible, in positions

that could be filled by a blind person; (b) Since filing a complaint (ER-175-85) with the West Virginia Human Rights Commission, she has been harassed by Richard Collett; (c) She was replaced by a sighted person.

An evidentiary hearing was held on February 2 and 4, 1986, before Hearing Examiner John Richardson. Hearing Examiner Richardson entered a recommended decision on June 11, 1986, recommending no finding of discrimination or retaliation, By Order issued on October 22, 1986, the Human Rights Commission deferred a decision on either accepting or rejecting Hearing Examiner Richardson's recommendations and remanded for further hearing to determine whether violations of federal and state law occurred in Complainant's removal from the vendor position at Charleston City Hall.

The remanded case was assigned to Hearing Examiner Carter Zerbe who, after an evidentiary hearing, entered a recommended decision on April 14, 1988, concluding that the Randolph-Sheppard Act applied to the vending stand at Charleston City Hall and was not complied with in respect to Complainant's removal from the vending stand.

By Order entered August 1, 1988, the Human Rights Commission adopted Hearing Examiner Zerbe's conclusions regarding the Randolph-Sheppard Act and his findings and conclusions relative to the Randolph-Sheppard Act not being complied with in the termination of Complainant's concession. The Commission also remanded the case to hearing examiner to determine whether violations of the Randolph-Sheppard Act consisted of handicap

discrimination within the meaning of the West Virginia Human Rights Act and what remedy, if any, was appropriate.

In preparing for the remanded case, it was discovered that the transcript of the evidentiary hearing held on February 2 and 4, 1986, before Hearing Examiner John Richardson was last signed out by Douglas Miller, Complainant's former counsel, and is lost. Complainant refused to submit the case on the findings of fact reflected in Hearing Examiner Richardson's recommendations, and a second evidentiary hearing was scheduled before Hearing Examiner Richard Riffe. The Hearing Examiner recognized the Commission's August 1, 1988, Order as the law of the case on whether the Randolph-Sheppard Act applied and was complied with in this case. As such, the August 1, 1988, Order is adopted and incorporated by reference in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The two basic allegations Complainant makes are discrimination because of blindness and retaliatory discharge. These issues will be considered in separate sections.

I. Discrimination

1. To present a prima facie case of employment discrimination under the Human Rights Act, the Complainant must offer proof that she is a member of a protected class, that the employer made an adverse decision concerning the Complainant, and that but for the Complainant's protected status the adverse decision would not have been made. Conaway v. Eastern Associated Coal, Inc., 358 S.E.2d 423 (W. Va. 1986); Romney v. Human Rights Comm'n, ___ S.E.2d ___ (W. Va. 1991).

2. The following findings on these factors from the evidence adduced at hearing are made:

a. Complainant is blind and, as such, qualifies as a member of a protected class;

b. Complainant was subject to an adverse employment decision, particularly the termination of her concession at Charleston City Hall;

c. The fact that Complainant is blind and the employer did not follow accepted procedures, i.e. its own rules and the Randolph-Sheppard Act, in its method for terminating her concession at Charleston City Hall gives rise to the inference that perhaps it was the Complainant's protected status that gave rise to the employment decision;

d. Sufficient evidence was introduced, albeit barely, to show a nexus between Complainant's protected status and the adverse decision.

3. Complainant having stated a prima facie case, the burden then shifts to the Respondent to present a non-discriminatory reason for its action sufficient to overcome the inference of discriminatory intent.

4. The following findings are made regarding Respondent's non-discriminatory reason for its action:

a. There was substantial discord between Complainant and the employees at Charleston City Hall;

b. The discord was the subject of numerous complaints by Charleston City Hall employees regarding Complainant;

c. The City of Charleston pressured the Respondent to remove Complainant from the concession at City Hall with the threat of elimination of the concession stand if Complainant was not removed;

d. Respondent made numerous attempts to assist and accommodate Complainant and resolve the discord at City Hall until the City threatened the elimination of the concession;

e. The Respondent's motive in removing Complainant from the City Hall concession was to protect its concession and was not related to Complainant's blindness.

5. The Respondent having rebutted the claim of unlawful handicap discrimination, the burden of proof shifts back to the Complainant to show that Respondent's proffered reason is a mere pretext for a discriminatory motive.

6. There was no evidence offered of pretext at the hearing in this matter.

7. Respondent's actions in removing Complainant from the City Hall concession do not rise to the level of unlawful handicap discrimination.

8. Complainant has failed to prove unlawful employment discrimination.

II. Retaliatory Discharge

1. In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, the burden is upon the Complainant to prove by a preponderance of the evidence: (1) the Complainant engaged in a protected activity; (2) the Complainant's

employer was aware of the protected activity; (3) the Complainant was subsequently discharged; and (4) Complainant's discharge followed her protected activity within such a period of time that the court can infer retaliatory motivation. Brammer v. West V. Human Rights Comm'n, 394 S.E.2d 340 (W. Va. 1991).

2. The following findings regarding the factors listed above are made:

a. Complainant engaged in a protected activity, i.e. the filing of a complaint under the Human Rights Act relative to her failure to obtain the concession at the Courthouse Annex.

b. Respondent was aware that Complainant had filed the aforesaid complaint.

c. Complainant was subsequently discharged within the meaning of Brammer.

d. Complainant's discharge did not follow immediately after her filing of a complaint but it followed sufficiently close to the protected activity to give rise to an inference that the discharge might be connected were it not for Respondent's proffered reason for Complainant's discharge set forth in Section I, Paragraph 4 of this Order.

3. Complainant's testimony regarding direct retaliatory threats by Richard Collett, then Director of the West Virginia Society for the Blind, is not credited. Complainant's discovery deposition was taken by Respondent's counsel on January ____, 1986, approximately seven (7) months after her removal from the City Hall

concession. Despite being repeatedly pressed by Respondent's counsel for the facts upon which her claims of discrimination and retaliation were based, Complainant neither testified nor implied anywhere in the deposition transcript that direct threats were made to her by Respondent.

4. Complainant's discharge was based upon the City of Charleston's threat to eliminate the concession at City Hall unless Complainant was removed from the stand and upon the documented conflicts between Complainant and the City Hall workers and not upon any discriminatory or retaliatory motivation.

5. Complainant has failed to prove retaliatory discharge.

III. Failure to Follow the Randolph-Sheppard Act

By Order dated August 1, 1988, the West Virginia Human Rights Commission adopted Hearing Examiner Carter Zerbe's findings and conclusions that Respondent had failed to follow the Randolph-Sheppard Act in its removal of Complainant from the City Hall concession, which order is the law of this case. The Commission also remanded the matter and specifically directed that a determination be made as to whether the failure to follow the Act was an unlawful discriminatory act under the Human Rights Act and, if so, what is the remedy. The following findings and conclusions are made in regard to this matter:

1. Respondent's failure to follow the Randolph-Sheppard Act was not the result of or proof of an unlawful discriminatory motive.

2. Complainant effectively exercised a request for administrative review of and an evidentiary hearing on the decision

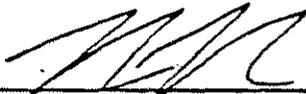
to remove her from the City Hall concession, which Respondent did not grant to her.

3. Such procedural irregularities are not tantamount to an improper discriminatory act or motive under the West Virginia Human Rights Act.

4. Respondent's failure to follow the Randolph-Sheppard Act was not an unlawful discriminatory act under the West Virginia Human Rights Act.

CONCLUSION

These being the findings and conclusions of the Hearing Examiner, it is hereby ORDERED that the complaints against the Respondent be dismissed and held for naught and that this case be removed from the docket of the Human Rights Commission.



RICHARD M. RIFFE
Hearing Examiner
West Virginia Human Rights Commission

Enter: 17 Oct 1991

§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.

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing ORDER by depositing a true copy thereof in the U.S. Mail, certified, this 17th October 1991 to the following:

Leonard Higgins, Esquire
300 Security Building
Charleston, WV 25301

Peggy Collins, Esquire
9 Pennsylvania Avenue
Charleston, WV 25301



Richard M. Riffe
Hearing Examiner

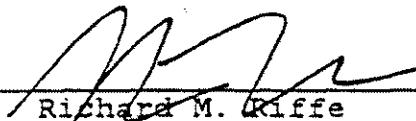
CERTIFICATE OF SERVICE

I, Richard M. Riffe, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing ORDER by depositing a true copy thereof in the U.S. Mail, certified, this 1 November 1991 to the following:

Sharon Neerhoof
105 Cora Street
Charleston, WV 25302

WV Society for the Blind/
and Severally Disabled
1427 Lee Street
Charleston, West Virginia 25301
c/o Richard Collett

Mary Catherine Buchmelter (Regular Mail)
Deputy Attorney General
812 Quarrier Street
L & S Building - 5th Floor
Charleston, WV 25901


Richard M. Riffe
Hearing Examiner