

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PATRICIA RAMEY,

Complainant,

v.

DOCKET NUMBER: ES-251-91

WV DIV. OF VETERANS AFFAIRS,  
BARBOURSVILLE VETERANS HOME,

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A.

BOILER PLATE

This matter came on for hearing on 27 January 1993 in Kanawha County, at the Office of the West Virginia Human Rights Commission, Charleston, West Virginia. The complainant appeared in person and by her attorney Dwight Staples; the respondent appeared by its attorney Samuel Cook and by its personal representative, Gail Harper.

The parties waived submission of proposed findings of fact and conclusions of law, electing instead to hear a "bench decision" at the close of the evidence. I waited for two months for respondent's counsel to prepare an order reflecting the decision and, when none was forthcoming, I called him on 31 March 1993 to inquire of its status. He said that he hadn't known that he was supposed to prepare the order, but that he would. To date respondent's counsel still hasn't prepared the order, so I have gone ahead and done so.

Where the testimony of any witness is not consistent with the findings of fact as stated herein, that testimony was not credited.

Where any finding of fact should have been labeled a conclusion of law or vice versa, it should be so read. The findings of fact are based upon the evidence produced taking into account each witness' motive, state of mind, strength of memory and demeanor while on the witness stand and considering the plausibility of the evidence in view of the other evidence of record.

B.

FINDINGS OF FACT

Patricia Ramey claims that the respondent was animated by an unlawful discriminatory motive when it punished her for "substituting" with another employee. "Substitution" is an employment practice which is recognized by the federal Fair Labor Standards Act. Substitution occurs when Employee A works in the stead of Employee B, though Employee B is scheduled to work; Employee B receives pay for the work Employee A did in her name. Apparently, substitution is a practice which an employer may, but is not required, to permit.

Prior to Frederick Hubbard assuming the senior management position at the Barboursville Veterans Home, there had been a labor dispute between Brenda Hack and the Veterans Home. The decision from that case, entered by the Civil Service Commission in 1988, appears in the record as Complainant's Exhibit 1. It notes that "the exchange of shifts was a common practice among the nursing staff at the home". The Civil Service Commission, in reversing the employer's decision to discipline Ms. Hack, strongly recommended that the

respondent develop and communicate to staff a definitive policy on whether it would permit substitution and if so, what procedures would be used. In an apparent attempt to comply with this recommendation, the respondent came up with some forms which were thereafter used by employees engaging in substitution.

It appears that the introduction of these forms pre-dates Mr. Hubbard's tenure, but the exact date of their inception is unclear. The employee most likely to have had institutional knowledge of the dates and circumstances of the institution and revision of forms and manuals and such was Deborah Thacker, a nineteen year State employee, a nine year Veteran's Home employee and the personnel clerk at the Home. She, however, was perhaps the most obviously dishonest witness I have ever encountered, so many of the details which she should have related will never be known.

In my notes I recorded, "She's testifying incredibly--hostile--adamant." She claimed that the Home never allowed substitution despite that the practice was institutionalized in the forms admitted as Complainant's Exhibits 2 and 3 (and despite findings to that effect by the Civil Service Commission in 1988, the Grievance Board in 1991 and this Commission now). She claimed not to know that one particular employee had substituted, despite that she had previously heard him testify that he had. Her testimony was incredible and her demeanor bizarre. I also recorded, contemporaneously with hearing her testimony, "She's playing games--evasive" and "She is lying". I conclude that Deborah Thacker is a bold-faced liar.

When Frederick Hubbard took over the Home in July of 1989, he concluded that there was too much confusion and too much animosity arising out of the practice of substitution. He checked with his superiors and with State personnel experts and learned that substitution could be prohibited by management; he decided to eliminate the practice. By January of 1991 the practice was expressly forbidden in the Home's employee handbook. Complainant's Exhibits 14 and 15. The rule found its way to the manual at least in part as a result of Ms. Ramey's litigation.

Ms. Ramey is a union activist and takes an aggressive role in labor-management relations. She apparently labored under the misapprehension that the Hack decision stood for the proposition that federal law required an employer to permit substitution; in fact, she told Mr. Hubbard that it did.

Therefore, notwithstanding Mr. Hubbard's attempts to eliminate the practice of substitution, Ms. Ramey again engaged in the practice on 3 December 1990.

In response, Mr. Hubbard consulted with his supervisors and State personnel experts and determined to discipline Ms. Ramey for engaging in the practice. The respondent (unwisely) chose to characterize Ms. Ramey's conduct as "falsification" of her time sheet and "inappropriate receipt of state funds" in addition to the more reasonable charge of "insubordination" for engaging in substitution. They suspended her for five days. It is that discipline about which she complains in this case.

Ms. Ramey grieved the decision to discipline her to the West Virginia Education and State Employees Grievance Board. The Board

awarded her the full relief she sought granting her five days back wages and reversing the suspension order. The gist of the Board's decision was that, though respondent could prohibit the practice of substitution, it hadn't adequately gotten the word out to staff that it intended to do so before disciplining Ms. Ramey. I most definitely agree with the Grievance Board's determination that Ms. Ramey neither "falsified" records nor misappropriated State funds. The respondent's allegations that she did are reckless and inappropriate.

In addition to disciplining Ms. Ramey, the respondent disciplined two other females on the nursing staff who had participated in the substitution scheme. At about the same time several men who worked for security at the Home were engaging (fairly openly) in the practice of substitution. The gist of complainant's claim herein is that she is the victim of sex discrimination since respondent disciplined the women, but not the men. While this disparate discipline between the genders does present a prima facie case and raise the inference of discrimination, I do not believe that respondent was animated by an illegal discriminatory motive when it disciplined Ms. Ramey.

I found Mr. Hubbard to be extremely forthright and credible. For example, Ms. Ramey claims that she asked him if she could engage in the act of substitution that resulted in her discipline herein. Rather than adamantly asserting that she was lying about this, he says that he doesn't think she asked him that in advance. He says that if she did, he doesn't remember it. Although he did have some

performance anxiety, I found him to be thoughtful, reasonable, fair in his answers and honest. I credit his testimony entirely.

Mr. Hubbard says that he wasn't aware that the security guards were substituting. I believe him. I think that he was trying to eliminate the practice of substitution so he dealt with the case that was "in his face," so to speak. I think the women were disciplined not because they were women, but because the complainant was aggressively challenging management's prerogative, while the security guards were just quietly going about their business beyond the periphery of Mr. Hubbard's "field of view".

I'm not willing to label Mssrs. Hubbard and Harper (his superior) as sexists and liars on such thin evidence. While I agree with the Grievance Board's decision to give Ms. Ramey her back wages (because, giving her the benefit of the doubt, respondent hadn't adequately communicated its intent to eliminate substitution) I simply don't believe that the decision was gender-based. And while I further agree that respondent's decision to characterize her conduct as involving "falsification" of records and "improper receipt of State funds" was outrageous and possibly even slanderous, I don't think it was gender based.

### C.

#### CONCLUSIONS OF LAW

1. Complainant established a prima facie case of disparate treatment, discriminatory discipline by proving by a preponderance of the evidence that she is a member of a protected class (a woman) that

she was disciplined (suspended for five days) and that nonmembers of the protected group (the security guards) were not disciplined though they engaged in similar conduct (substitution). State v. Logan-Mingo Area Mental Health, 329 S.E.2d 77 (WV 1985).

2. This created a rebuttable presumption of discrimination and shifted to the respondent the burden of articulating a legitimate nondiscriminatory reason for the adverse employment action. Id., Conaway v. Eastern Assoc., 358 S.E.2d 423 (WV 1986).

3. The respondent met its rebuttal burden by articulating that Mr. Hubbard was attempting to eliminate the practice of substitution and that he was unaware at that time that the security guards were still engaged in the practice. Id. at 429.

4. "The fact-finder believes that the proffered reason was the true reason for the decision", and that the employer is "guilty of poor business practices [but] is not guilty of discrimination." Id. at 430.

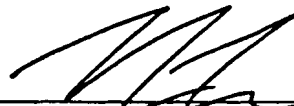
D.

#### CONCLUSION

Anyone adversely affected by this order may appeal as set out in Exhibit A. This claim is dismissed.

WV HUMAN RIGHTS COMMISSION

ENTER: 11 May 93

BY:   
RICHARD M. RIEFE  
ADMINISTRATIVE LAW JUDGE

Ramey v. Div. Vet Affairs et al.