



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

January 16, 1998

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Re: Dalip Sarin v. Arch of West Virginia, Inc.
Docket No. EACRELNO-425-92

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, 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,

HERMAN H. JONES
EXECUTIVE DIRECTOR

HHJ/jk
Enclosures
Certified Mail/Return
Receipt Requested
cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DALIP SARIN,

Complainant,

v.

DOCKET NO. EACRELNO-425-92

ARCH OF WEST VIRGINIA, INC.,

Respondent.

FINAL ORDER

On January 8, 1998, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Mike Kelly. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, with the following minor clerical modifications:

On pages 21 and 22, Conclusion of Law No. 11 is modified to read as follows:

11. Based on a showing of pretext, and my negative assessment of Mr. Barata's credibility, I infer and conclude as a matter of law that more likely than not Mr. Sarin was denied an interview for the position of senior mining engineer because of his age, color, national origin or religion. *Skaggs v. Elk Run Coal Co.*, ___ W. Va. ___, 479 S.E.2d 561 (1996).

It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order, except as amended by this Final Order hereinabove.

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 16th day of January 1998, in Charleston, Kanawha County, West Virginia.



**HERMAN H. JONES, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

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 West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity 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, person or entity 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**

DALIP SARIN,

Complainant,

v.

Docket No. EACRELNO-425-92

ARCH OF WEST VIRGINIA, INC.,

Respondent.

**FINAL DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

This matter matured for public hearing on 3 April 1996. The hearing was held at the Kanawha County Circuit Court Judicial Annex, Charleston, Kanawha County, West Virginia. Complainant was present in person and the case was presented on his behalf by the West Virginia Human Rights Commission and its counsel, Senior Assistant Attorney General Paul R. Sheridan. Respondent was present by its counsel, Frenchette Potter and Robert G. Jones, corporate counsel from St. Louis, Missouri, and Michael G. McKown and Robinson & McElwee.¹ Respondent waived its right to have a corporate representative present for all proceedings.

¹ Ms. Potter and Mr. Jones appeared in this action after meeting the requirements set forth in Rule 8.0 admission pro hac vice of the Rules for Admission to the Practice of Law.

This decision is written after due consideration of all the evidence, the reading of the entire transcript and all exhibits, and review of the post-hearing recommended findings of fact and conclusions of law, and related argument, submitted by the Commission and the respondent.

I ISSUES TO BE DECIDED

1. Whether respondent violated W.Va. Code §5-11-9(1) by failing or refusing to interview complainant for the position of senior mining engineer because of his age, national origin, color or religion.

2. Whether respondent violated W.Va. Code §5-11-9(1) by failing or refusing to interview complainant for the position of surface mine shift superintendent.

II FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the

transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true²:

A. Preliminary and Background Facts

1. Dalip Sarin is a resident of Charleston, Kanawha County, West Virginia. Mr. Sarin is a native of India, having been born in New Dehli on 8 March 1941. He describes his skin color as brown and is a practicing Hindu. He regards himself as speaking English with an Indian accent. He has lived in the United States since 1984 and became a citizen of this country in 1991.

2. Respondent Arch of West Virginia, Inc. (Arch or AOWV) is an employer as that term is defined by W.Va. Code §5-11-3(d). Arch is in the business of coal mining and operates a surface mine in Logan County, West Virginia. As of the date of hearing, Arch of West Virginia, Inc. was known as Apogee Coal Company doing business as Arch of West Virginia. AOWV and Apogee are subsidiaries of Arch Mineral Corp., which is headquartered in St. Louis, Missouri.

² To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

3. Mr. Sarin has a bachelor of science degree in engineering which he obtained at the Indian School of Mines in 1962. He also obtained a degree in business management in India, and was awarded a masters degree in mine safety from Marshall University in 1986, and a second masters degree in environmental studies in 1992 from the West Virginia College of Graduate Studies. As of the date of hearing, Mr. Sarin was a certified professional engineer, a certified safety professional, a certified surface mine foreman and a certified underground mine foreman.

4. Mr. Sarin has the following experience in the mining industry:

(a) From 1962 to 1965, he was employed by Andrew Yule & Co., a British corporation, with deep and surface mines in India. Mr. Sarin worked primarily as an inspector of room and pillar workings, inclines, drifting and jacksetting operations and ventilation and dusting operations;

(b) From 1965 to 1969, he worked for Assam Railways & Trading Co., another British corporation operating deep and surface mines in Assam State, India, which borders Burma. Mr. Sarin was assistant manager and was in charge of various safety and environmental inspections;

(c) From 1969 to 1971, Mr. Sarin was employed as the safety officer for Amalgamated Coalfields, Ltd., in India;

(d) From 1971 to 1978, he worked for Rajaram Bandehor Pale Mines in India as a manager of mines and was responsible for production planning, development and construction. The operations he managed were mountaintop removal projects with a steep topography similar to West Virginia. Toward his last years with this company, he was promoted to a superintendent of mines position with overall responsibility for production and quality assurance;

(e) From 1978 to 1980, he was chief mining engineer for National Mineral Development Corp. in India;

(f) From 1980 to 1983, he worked in the copper mining industry in Zambia, Africa; and

(g) In 1983 and 1984, he served as a mining advisor to the Mineral Development Board, Ministry of Steel and Mines of the government of India.

5. Of most relevance to this litigation, Mr. Sarin had work experience with "draglines"³ while employed by Assam Railways, Ragaram Mines and the National Mineral Development Corp. and also while employed in the African copper industry. Several of his work projects involved "truck and shovels" operations and mountaintop removal.

6. Mr. Sarin's first employment in the United States was as a senior engineer with Ike and Associates in West Virginia. He worked in the areas of mining permits, coal refuse facilities, coal preparation plants and sediment ponds. He worked for Ike from 1984 to 1986.

7. From 1986 to 1989, Mr. Sarin worked as an Engineer I in the construction grants program of the West Virginia Department of Natural Resources. His work involved reviewing facility plans and engineering designs and overseeing construction of waste water treatment plants.

³ A "dragline" is best described as an excavating machine which casts a bucket attached by cable and then draws the bucket back toward the machine.

8. From 1989 up to the date of hearing, Mr. Sarin was an engineer with West Virginia Department of Environmental Protection. He was hired as an Engineer III and promoted to Engineer IV. He reviews coal mine permits and coal refuse facilities. Mr. Sarin oversees the work of fifteen engineers in five regional offices.

B. Complainant Applies for Employment with Respondent

9. Complainant first applied for employment with Arch in 1989 for the available position of senior mining engineer. He was interviewed, but not hired. The interview was conducted by Carlos Smith, respondent's manager of environmental affairs. It is unclear if Arch ever hired someone to fill that position.⁴

10. On or about 12 December 1991, respondent placed a blind newspaper advertisement for the position of "senior mining engineer". The ad states, in relevant part, as follows:

Major southern West Virginia coal company is seeking a Senior Mining Engineer . . .

The Senior Mining Engineer position requires several years of surface mining engineering experience. Duties for the position will include:

Mine and reclamation planning
Assist with monthly stripping reports
Assisting with preparation of 5 year budget forecast
Equipment studies

⁴ Since Mr. Sarin did not file a timely complaint regarding his rejection in 1989, and the 1989 rejection involved different agents and supervisors of respondent, respondent's failure to hire him at that time is given no weight or consideration in this case.

Assisting with the permitting process

The ideal candidate will have a BS in Engineering with experience in mine planning for mountain top removal utilizing truck-shovel prestripping and dragline mining. Computer skills on both personal computer and main frames using Minex software a plus.

* * *

Fernando Alfredo Barata, then respondent's manager of environmental and engineering affairs, was instrumental in drafting the ad and admitted that it described the duties and responsibilities of the position.

11. On or about 21 December 1991, Mr. Sarin responded to the 12 December ad. He sent to the blind box a handwritten cover letter, a resume (different, and more elaborate, than the one he submitted in 1989), a copy of his master of science degree, copies of his registered professional engineer certificates from West Virginia and Kentucky, copies of his mine foreman certificates and copies of various certifications related to safety training.

12. Mr. Sarin's handwritten cover letter specifically notes that he has "experience in mountain top removal operations using truck and shovel and draglines." (HRC Ex. 2). These areas of experience are also referenced on page 3 of his resume.

13. On 7 January 1992, respondent sent complainant an application form, release and optional EEO data sheet to be completed and returned with a resume within seven days.

14. On or about 10 January 1992, Mr. Sarin returned the completed forms to respondent, along with three letters of reference.

15. I find as fact that Mr. Sarin's application, letters of reference, cover letter and resume with attachments were received by respondent sometime shortly after 10 January 1992. These documents were initially in the possession of Victoria Bevins, a secretary with respondent's human resources department.

16. Also in January 1992, complainant sent in a resume in response to a blind advertisement for a surface mine shift superintendent. That ad had also been placed by respondent.

17. In response to the receipt of complainant's resume for the shift superintendent position, Ms. Bevins wrote a letter to Mr. Sarin, dated 11 February 1992, informing him that that position had already been filled.

18. When he received Ms. Bevins' letter, complainant called respondent and spoke to Charlene Necessary, Arch's manager of compensation, benefits and personnel services. Mr. Sarin had not yet heard back from the company, one way or the other, in regard to the senior mining engineer position and he made inquiry as to his status for that job. Ms. Necessary informed Mr. Sarin that both positions, shift superintendent and senior mining engineer, had been filled.

C. Respondent's Selection Process

19. Respondent's human resources department is responsible for accepting responses to employment ads, sending out application forms, receiving and logging completed application forms, and forwarding the completed forms and attachments to the appropriate hiring authority.

20. Ms. Bevins received complainant's completed application packet for the position of senior mining engineer shortly after 10 January 1992. When Ms. Bevins reviewed the EEO form, she noticed that complainant was a minority. She testified credibly that she immediately took the entire packet, including the EEO form, to Alvin Gleason, manager of human resources. Mr. Gleason directed her to take the packet to Mr. Barata, which she did. In her haste to take the material to her superiors, Ms. Bevins neglected to copy it and gave Mr. Barata the originals. She also informed him directly that Mr. Sarin was a minority.

21. Mr. Barata, who had hiring authority, chose to interview the following candidates out of the five to ten applicants for the senior mining engineer position: John M. Praskwicz, R. Derrick O'Neal and Craig S. Aaron.⁵ All three of these gentlemen are white, born in the United States and under the age of 40.

⁵ There was some confusion as to whether Mr. Barata interviewed applicant Laurence Abbott. I find as fact that Mr. Barata did not interview Mr. Abbott for the senior mining engineer position and that the confusion created by the contradictory evidence given by him was inadvertent.

22. Mr. Barata chose not to interview Dalip Sarin.

23. In making his selection as to who would be interviewed, Mr. Barata testified that he reviewed the Arch application form, only skimmed the resumes and did not read the cover letters at all. For reasons set forth below, I find that Mr. Barata's testimony on this point is not credible.

24. I credit as true Mr. Barata's testimony that he was seeking to hire an engineer with experience in mountaintop removal and dragline operations since that is the method of coal removal used by respondent at its Logan County operation. I must conclude, however, that Mr. Barata was also looking for a person with the skills mentioned in the blind ad since he was responsible for the ad's content. The skills mentioned in the ad are mine and reclamation planning, ability to assist in monthly reports, budget forecasts, and the permitting process, and ability to conduct equipment studies. To the extent that Mr. Barata claimed to be looking exclusively for applicants with experience in mountaintop removal and dragline operations, I find such testimony to be unworthy of belief.

D. The Comparators and Mr. Sarin

26. John M. Praskwicz was interviewed for the senior mining engineer position on 27 January 1992. Mr. Praskwicz's application (the only document which Mr. Barata claims he thoroughly reviewed) does not reveal any mountaintop removal or dragline experience. In fact when asked on the application "Length of Surface Mining Experience?", this applicant wrote "N/A". His

application does state he is a "senior project engineer with mid-sized consulting firm, very experienced in Southern W. Va. with surface mine projects. Familiar with Arch of WV's operations since I am the engineer for one of your lessors." (HRC Ex. 12).

27. Mr. Praskwicz's resume does not mention or suggest experience in mountaintop removal or dragline operations. It does indicate that he is experienced in the areas of feasibility studies, permitting and evaluations, which are akin to those skills mentioned in the blind ad.

28. Mr. Barata testified credibly that he chose to interview Mr. Praskwicz because of his (Mr. Barata's) familiarity with Gaddy Engineering Co., the applicant's employer. Mr. Barata acknowledged that he knew Gaddy was a consulting firm and was not in the business of direct coal production.

29. Mr. Praskwicz was not hired because he had no experience with mountaintop removal and dragline operations.

30. Based on the selection of Mr. Praskwicz for interview, despite his limited experience in coal production, I find as fact that respondent viewed experience with mountaintop removal and dragline operations as a desirable, but not an essential, qualification for being interviewed for the senior mining engineer position.

31. R. Derrick O'Neal was interviewed for the senior mining engineer position in January 1992. His application indicates work experience in the areas of mine design, mine planning, reclamation plans, and mine inspections. As of the date of his interview, he had six years engineering experience. His application does not reveal any mountaintop removal or dragline experience. (HRC Ex. 13).

32. Mr. O'Neal's resume reveals experience in mine planning, field construction, and managing coal properties. His resume makes no mention of mountaintop removal or dragline experience.

33. Mr. Barata claimed that he interviewed Mr. O'Neal because he (Mr. Barata) had learned that Mr. O'Neal had been involved in a dragline study for one of his former employers. The study is not mentioned in Mr. O'Neal's application or resume and to the extent Mr. Barata alleged that this was the only reason he interviewed Mr. O'Neal, I find his testimony to be unworthy of belief.

34. I find that more likely than not Mr. O'Neal was interviewed primarily for the skills set out in detail in his application and resume, which are similar to the qualifications mentioned in the ad composed by Mr. Barata.

35. For reasons not clear in the record, Mr. O'Neal was not hired for the senior mining engineer position.

36. Craig S. Aaron was interviewed for the senior mining engineer position on 27 January 1992. His application reveals that he had eight years experience as a mining engineer. He did not describe his major duties on the application, but wrote "See attached resume." Mr. Aaron's resume lists his experience in the areas of mine planning, yard and tonnage calculations, assisting in reclamation activities, calculation of coal reserves and recoveries and numerous activities related to mine hydrology. (HRC Ex. 15).

37. Mr. Aaron's resume also indicates that he was a "mine engineer for one year in draglines and remaining time in the truck/shovel operations" while employed by Cyprus Mountain Coals from June 1988 to October 1990. Mr. Barata had visited the Cyprus mine site and knew that it was a mountaintop removal dragline operation.

38. Mr. Barata's testimony that he chose to interview Mr. Aaron on the basis of his application only, which did not list his duties as a mining engineer and which said "See attached resume", is dismissed as not credible. I find as fact that Mr. Barata chose to interview Mr. Aaron after reviewing his application and his resume. I further find as fact that Mr. Aaron was chosen to be interviewed because of his wide experience in mining engineering and because of his one year experience with dragline operations.

39. Mr. Aaron was ultimately offered the senior mining engineer position. He accepted the offer and began work on 24 February 1992. His starting salary was \$48,500 per year, plus \$275 per month in mileage reimbursement.

40. Mr. Barata testified that he did not interview Mr. Sarin because complainant's application and the first two pages of his resume did not reveal any dragline experience. He alleged that he did not read, at all, the last three pages of complainant's resume or his cover letter, both of which refer to Mr. Sarin's experience with draglines. For the following reasons I reject this testimony and find it to be unworthy of belief:

(a) In an affidavit submitted to the Commission during its investigation of this complaint, Mr. Barata stated clearly that he reviewed Mr. Sarin's resume and it "did not reveal any dragline operation experience", (HRC Ex. 39);

(b) The affidavit implies that Mr. Barata reviewed complainant's entire resume and does not state that he thoroughly reviewed the application only and merely skimmed the first two pages of the resume, which was his position at hearing;

(c) Respondent's application form leaves so little room for the details of an applicant's experience and career accomplishments that it defies common sense to rely on the application as the primary source of knowledge about an applicant when, as is the case for each applicant actually interviewed, the resume provides a much broader understanding of their skills and achievements;

(d) With only five to ten application packets to review for such an important position as senior mining engineer, Mr. Barata's testimony that he completely ignored each applicant's cover letter is simply not believable; and

(e) In fact, both Mr. Sarin's resume and cover letter state his experience in mountaintop removal and dragline operations.

41. Mr. Barata admitted at hearing that had he reviewed Mr. Sarin's complete resume in January 1992 he would have interviewed Mr. Sarin for the senior mining engineer position. Based on this admission, I find as fact that Dalip Sarin had sufficient qualifications and experience in January 1992 to warrant an interview for the senior mining engineer position.

42. I find as fact that the reason given by respondent for its failure to interview Mr. Sarin, i.e. his failure to list his mountaintop removal and dragline experience on his application and the first two pages of his resume, is not the true reason for his rejection, but is pretextual. This finding is based on the following considerations:

- (a) Those reasons set forth in Finding of Fact 40;
- (b) The testimony of respondent's key decisionmaker Fernando A. Barata, was, generally, evasive, shifting and contradictory, giving the appearance of one who was concealing the truth; and
- (c) While Ms. Necessary, respondent's manager of personnel, testified credibly that she was informed that Mr. Sarin's lack of dragline experience was the only reason he was rejected, respondent nonetheless attempted to shift its defense to include an allegation that Mr. Sarin was rejected due to receipt of a poor reference when he applied for a position in 1989, which allegation I find to be unworthy of belief given that:

- (i) the alleged sources of the bad reference were not called as witnesses in this matter, nor was any explanation offered as to their absence; and

(ii) Mr. Sarin presented credible, un rebutted testimony that he did not become acquainted with the alleged sources until May 1990, the year after they supposedly gave him a bad reference.

43. Based on a finding of pretext, as well as a finding that Mr. Barata's testimony was unworthy of belief and mendacious, I find as fact that more likely than not Dalip Sarin was rejected for an interview for the position of senior mining engineer because of his age, color, religion or national origin.

E. Comparing Complainant's Qualifications to Mr. Aaron's

44. Based on the blind ad, as well as the nature of respondent's operations in Logan County, I find as fact that in January 1992 respondent was seeking to hire a mining engineer with the following qualifications: a BS in engineering; experience with mountaintop removal utilizing truck-shovel prestripping and dragline mining; experience in mine and reclamation planning and the permitting process; experience in budget forecasting; experience in preparing monthly reports and equipment studies; and ability to use a computer.

45. As of January 1992, Craig S. Aaron, the successful applicant, had a BS degree in engineering, one year of experience with draglines; approximately eighteen months experience with truck/shovel operations; over three years experience with mine planning and forecasting; over three

years experience in reclamation work; over one year experience with the permitting process; and had related experience with use of a computer.

46. As of January 1992, Dalip Sarin had a BS degree in engineering, an MS in Mine Safety and was working on a second MS in environmental engineering; he had approximately three years experience with various permitting processes; more than ten years experience with dragline operations, albeit overseas and not in Southern West Virginia or Eastern Kentucky; almost seven years experience with mountaintop removal, again overseas; more than seven years experience with mine planning; and had nine college credit hours in computer science.

47. Balancing the more extensive and varied qualifications and experience of Mr. Sarin with Mr. Aaron's experience with mountaintop removal and dragline operations in a geographic area more familiar to respondent, I cannot find as fact that Mr. Sarin would have been hired absent discrimination, nor can I find as fact that he would not have been selected for the open position absent discrimination.⁶

⁶ Mr. Aaron was not called as a witness at hearing and no significant attempt was made by respondent to show that he would have been hired over Mr. Sarin even in the absence of discrimination.

F. Surface Mine Shift Superintendent Position

48. In early January 1992, respondent placed a blind ad for a surface mine shift superintendent.

49. On or about 10 January 1992, complainant spoke to Ms. Bevins by phone regarding the above position. She told him that completion of a separate application packet was necessary and that she would send him one. She never did.

50. On or about 12 January 1992, Mr. Sarin mailed to respondent a cover letter and resume in response to the ad for the shift superintendent position.

51. Prior to receipt of Mr. Sarin's cover letter and resume, and, apparently, on the same day that complainant spoke to Ms. Bevins, respondent offered the shift superintendent position to George Noble.

52. On 11 February 1992, Ms. Bevins informed Mr. Sarin in writing that the shift superintendent position had been filled. (HRC Ex. 7).

53. I find as fact that complainant was not interviewed for the shift superintendent position because it was already filled prior to receipt of his resume.

54. I find as fact that respondent did not unlawfully discriminate against Dalip Sarin when it hired George Noble for the shift superintendent position prior to receipt of Mr. Sarin's resume.

G. Damages

55. The Commission produced evidence that as a result of not being hired for the senior mining engineer position Mr. Sarin suffered a net loss of wages and benefits in the amount of \$72,633.02 for the period of February 1992 thru July 1996. This evidence was not challenged or rebutted by respondent.

56. The evidence showed that Mr. Sarin will suffer a continuing net loss of wages and benefits in the approximate amount of \$1,558 per month.

III. CONCLUSIONS OF LAW

1. The complainant, Dalip Sarin, is an individual claiming to be aggrieved by an unlawful discriminatory practice and is a proper complainant for purposes of the West Virginia Human Rights Act. W.Va. Code §§ 5-11-3(a) and 5-11-10.

2. The respondent, Arch of West Virginia (AOWV), is an employer as defined by W. Va. Code §5-11-3(d), and is a proper respondent in this action.

3. The complaint in this matter was timely filed pursuant to W. Va. Code §5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and subject matter of the complaint.

5. Under the West Virginia Human Rights Act it is unlawful for an employer "to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment . . .". W. Va. Code §5-11-9(1). (Emphasis added). The term "discriminate" or "discrimination" as defined by W. Va. Code §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of . . . religion, color, national origin . . . [or] age . . ."

6. The HRA is violated when an employer refuses to extend to a job applicant an equal opportunity to be interviewed for an available position because of the applicant's age, religion, color or national origin.

7. This case having been heard in its entirety on the merits, it is not necessary to address the question of whether the Commission established a prima ~~facte~~ case. At this stage, the issue before the ALJ is the "ultimate question of discrimination *vel non*." *U.S. Postal Service Bd. of Governors*

v. Aikens, 460 U.S. 711, 714 (1983); *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E. 2d 152 (1995).

8. The burden on the Commission was to show by a preponderance of the evidence that the reason articulated by respondent for its failure to interview Dalip Sarin is not the true reason that Mr. Sarin was not interviewed but is a mere pretext, and that more likely than not respondent was motivated by an unlawful discriminatory reason. *Barefoot, supra*.

9. The term "pretext" has been held to mean "an ostensible reason or motive assigned as a color or cove for the real reason or motive; false appearance; pretense." *West Virginia Institute of Technology v. West Virginia Human Rights Commission*, 181 W.Va. 525, 383 S.E. 2d 490, 496 (1989). A proffered reason is pretext if it is not "the true reason for the decision." *Conaway v. Eastern Associated Coal Corporation*, 174 W.Va. 164, 358 S.E. 2d 423, 430 (1986). Where pretext is shown, discrimination may be inferred, *Barefoot*, 457 S.E. 2d at 164, n. 19, though discrimination need not be found as a matter of law. *St. Mary's Honor Society v. Hicks*, 113 S. Ct. 2742 (1993).

10. I conclude as a matter of law that the Commission showed by a preponderance of the evidence that respondent's explanation for its failure to interview Mr. Sarin for the position of senior mining engineer is not the true reason he was denied an interview, but is mere pretext.

11. Based on a showing of pretext, and my negative assessment of Mr. Barata's credibility, I infer and conclude as a matter of law that more likely than not Ms. Sarin was denied an interview

for the position of senior mining engineer because of his age, color or national origin. *Skaggs v. Elk Run Coal Co.*, ____ W.Va. ____, 479 S.E. 2d 561 (1996).

12. Respondent violated W.Va. Code §5-11-9(1) by failing or refusing to interview complainant for the position of senior mining engineer.

13. Upon a finding of unlawful discrimination complainant is entitled to full relief unless respondent can show by a preponderance of the evidence that, even in the absence of discrimination, Mr. Sarin would not have been selected for the senior mining engineer position. *Skaggs, supra; Nanty v. Barrows Co.*, 660 F. 2d 1327 (9th Cir. 1981).

14. Based on a careful scrutiny of all available evidence, I conclude as a matter of law that respondent failed to show by a preponderance of the evidence that it would have selected Craig S. Aaron over Dalip Sarin for the position of senior mining engineer even absent unlawful discrimination. Since the evidentiary burden as to this point is on respondent, respondent must bear the consequences when the evidence of record is not conclusive, one way or the other, as to which candidate was better qualified.

15. The Commission having prevailed in regard to the senior mining engineer position, complainant is entitled to the following "make whole" relief, *Albermarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975):

- (a) Respondent shall instate Mr. Sarin to the first available position as a senior mining engineer, or a comparable position;
- (b) Until hired by respondent, Mr. Sarin is awarded front pay of \$1,558 per month, which is the difference between Mr. Aaron's salary in July 1996 and complainant's then current pay;
- (c) Complainant is awarded back pay in the amount of \$72,633 for the period February 1992 to July 1996;
- (d) Complainant is awarded back pay in the amount of \$17,138 for the period of August 1996 thru June 1996;
- (e) Complainant is awarded prejudgment interest at the rate of 10% per annum, compounded quarterly, from the date each monthly payment became due up to the date of this decision;
- (f) Complainant is awarded post-judgment interest at the rate of 10% per annum, compounded quarterly, from the date of this decision until paid; and
- (g) Complainant is awarded incidental damages in the amount of \$3,200 as compensation for the humiliation, embarrassment and loss of personal dignity suffered by him as a result of respondent's unlawful act.

16. The respondent shall reimburse the Commission and Attorney General their costs in the amount of \$996.65.

17. A Cease and Desist Order is hereby directed against respondent and it is ORDERED to refrain from engaging in acts of unlawful discrimination in violation of the West Virginia Human Rights Act.

18. The claim of discrimination regarding the surface mine shift superintendent position is DISMISSED for lack of sufficient evidence.

WV HUMAN RIGHTS COMMISSION

ENTER: 3 July 1997

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
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