



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCH A. MOORE, JR.
Governor

April 14, 1986

Allan Karlin, Esq.
160 Chancery Row
Morgantown, WV 26505

Paul Richard Hull, Esq.
Senior Assistant Attorney General
Rm. E-26, State Capitol
Chas., WV 25305

Jon A. Reed, Esq.
Ann V. Gordon, Esq.
Assistant Attorney Generals
WV Board of Regents
P. O. Box 3368
Chas., WV 25333

RE: ES-16-76 & ES-379-77
Jessie M. Turney & Jack McGlaughlin, et al

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Jessie M. Turney & Jack McGlaughlin.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
(etm)

Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JESSIE M. TURNEY and
JACK McGLAUGHLIN,

Complainants,

vs.

Docket Nos. ES-16-76, ES-379-77

WVU HOSPITAL and the WEST
VIRGINIA BOARD OF REGENTS,

Respondents.

O R D E R

On the 12th day of March, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Michael Nogay. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the amendments set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law in the section entitled "DETERMINATION" by adding thereto the following paragraph:

(6) The individual complainant, Jessie M. Turney, is entitled to receive incidental damages for humiliation suffered as a result of the discriminatory acts of the respondents in the amount of \$5,000.00.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order, as amended.

It is further ORDERED that these cases be remanded to the

Commission staff to take whatever actions are necessary, including but not limited to re-assignment to a hearing examiner, to determine the amount of back pay due pursuant to paragraphs (1) and (3) of the DETERMINATION section of the hearing examiner's decision, and that any such award for back pay shall include pre-judgment interest at the rate of ten percent (10%) per annum from April 1, 1975, through the date the determined amount of back pay is ordered by the Commission.

The Respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21st day of March, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED

DEC 27 1985

W.V. HUMAN RIGHTS COMMISSION

On the Complaint of

JESSIE M. TURNEY and
JACK McLAUGHLIN
(consolidated cases),
Complainants,

*Approved
12/20/85*

vs.

WVU HOSPITAL and the WEST
VIRGINIA BOARD OF REGENTS,
Respondents.

Case Nos. ES-16-76
and ES-379-77
(Monongalia County)

RECOMMENDED DECISION

I. INTRODUCTION

These cases were consolidated by the hearing examiner upon agreement of the parties. Jack McLaughlin was substituted for Charles T. Lazzell, by agreement, as the named complainant in Case No. ES-379-77, inasmuch as Mr. Lazzell had originally filed the Complaint in his capacity as President of Laborer's International Union of North America, Local 814, and had subsequently been succeeded by Mr. McLaughlin as its business manager. Public hearings in these cases were held in Morgantown, Monongalia County, West Virginia, on October 9, 1985, October 25, 1985, and October 28, 1985. The presence of a hearing commissioner was waived by the parties.

II. CONTENTIONS/ISSUES

The complaint of Jessie M. Turney in ES-16-76 was filed after she believed she was discriminated on the basis of sex on or about April 1, 1975 when West Virginia University Hospital failed to place her in a position known as "Custodian II." Two years later, on or about March 24, 1977, the

LAW OFFICES

ELLIOTT & NOGAY

ITE 7

PROFESSIONAL PLAZA

15 PENNSYLVANIA AVE.

MARTIN, W. VA 26062

president of the union which represents Custodian I's and Custodian II's at West Virginia University and Potomac State College filed a complaint with the Commission alleging that, although Custodian I's and II's performed essentially the same job functions, Custodian II's were paid more and were comprised essentially of males, while females were hired as Custodian I's and paid less. This "disparate treatment" complaint involved substantially the same factual and legal questions as the earlier Turney complaint.

Complainant's counsel called numerous lay and expert witnesses in establishing its prima facie case of sex discrimination. Respondent's defenses were essentially that (1) It was compelled to litigate this case ten (10) years after most events and that "laches" should bar a hearing; (2) that West Virginia University Hospital no longer exists; (3) that in 1972 and thereafter, the U.S. Department of Labor determined that the Custodian I and Custodian II positions were different enough to justify such a dual classification; (4) that in fact such differences existed in the two jobs which justified such dual classification, and women did not seek the job of Custodian II; (5) that the Board of Regents is a state agency which is constitutionally immune from the jurisdiction of the Commission especially insofar as money damages are concerned.

Both parties submitted post-hearing briefs which were considered by the hearing examiner.

III. FINDINGS OF FACT

By a preponderance of the evidence, the hearing examiner finds the following facts:

(1) Jessie M. Turney, complainant, is a female. Laborers International Union of North America, Local 814, is a local union which has represented both male and female employees of West Virginia University and Potomac State College. Charles T. Lazzell, its former president, was subsequently succeeded by Jack McLaughlin.

(2) The work force at West Virginia University, located in Morgantown, and Potomac State College located in Keyser, is governed by the West Virginia Board of Regents, a corporation created by statute in 1969, and is charged with control, supervision and management of the educational, business, and financial policies and affairs of all the state colleges located in the State of West Virginia. Respondent, West Virginia University Hospital, no longer exists. It is now owned by a private non-profit corporation and its functions have been taken over by said corporation. There was and is no corporate entity known as "WVU Hospital." This was a mere clerical error, however, in the complaint. The West Virginia Board of Regents is an employer within the meaning of the West Virginia Human Rights Act, and at all times relevant to this case, the Board of Regents was responsible for hiring, promotion, and terms and conditions of employment of those administrative units which employed Custodian I's and II's,

including West Virginia University Hospital, the West Virginia University Physical Plant, the West Virginia University Housing Department and Potomac State College.

(3) On April 4, 1975, and July 7, 1975, Jessie M. Turney formally applied for a Custodian II position with the West Virginia University Hospital Housekeeping Department, a subdivision of respondent, West Virginia University Board of Regents. At least a month prior to her formal application, Jessie M. Turney expressed an interest to Mr. Charles Blue, personnel officer at West Virginia University, and Mr. McNally, executive housekeeper at West Virginia University Hospital, in the Custodian II position. She was told that formal application was not necessary but that her request for Custodian II would be added to her then existing request for transfer.

(4) The qualification requirements set out by West Virginia University for the Custodian II position at the time of Jessie M. Turney's application described a position of unskilled labor.

Jessie M. Turney was clearly qualified for the Custodian II position but was not offered a Custodian II job in 1975. She was not hired for the Custodian II position at West Virginia University Hospital until July, 1978. Males were hired into the Custodian II position at West Virginia University Hospital between March, 1975, and July, 1978. A large number of these males were "hired" as opposed to

transferred or promoted into the Custodian II position between 1975 and 1983. In 1983, the Custodian I and Custodian II positions were collapsed into one position after a study conducted by the West Virginia University Office of Personnel in 1982 concluded that the wage differential between Custodian I's and Custodian II's was not justified on the basis of tasks actually performed. Males who were hired "off the street" as opposed to being transferred or promoted to the Custodian II position frequently had no custodial experience prior to hiring. In fact, some males hired as Custodian II's were hired directly from high school and had no previous custodial experience.

(5) Females were rarely hired directly into the Custodian II position from 1975 through 1983, but were allowed to reach that position only after working as a Custodian I. Males were not required to have Custodian I experience to be hired as Custodian II's. There was no bona fide skill, knowledge, or other requirement of the Custodian II position that required custodial experience. The general job description for Custodian II did not make experience as a Custodian I a bona fide prerequisite for a Custodian II position.

In three of four administrative units (Potomac State College, West Virginia University Hospital and West Virginia University Housing), there were substantial and significant differences in the numbers of men and women in the positions of

Custodian I and Custodian II from 1972 through 1983. In 1976, for instance, at these facilities, there were 3 male Custodian I's and 120 female Custodian I's; there were 67 male Custodian II's, but only 5 female Custodian II's. At Potomac State, West Virginia University Hospital and West Virginia University Housing, Custodian I's tended to be women and Custodian II's tended to be men in proportions that could not have occurred by chance. In fact, expert testimony revealed that the likelihood that the gender distribution in the Custodian I and II positions at West Virginia University Housing and at the West Virginia University Hospital occurred by chance was less than one in 10,000. The likelihood that gender distribution in Custodian I and II positions at Potomac State occurred by chance was "extremely unlikely." Therefore, a statistician would have to look for some other explanation for such variations.

(6) Women in Custodian I positions were discouraged from applying for Custodian II positions, particularly by their supervisors. The Custodian II position was, at all times prior to 1983, a higher paying position than the Custodian I position. Respondent collapsed the Custodian I and Custodian II position in July, 1983, following the aforesaid study and a court decision in another jurisdiction.

The job description of the Custodian I position in 1972, the date of creation of the Custodian and Custodian II positions (these positions were previously known as "maid" and

"custodian," respectively), was essentially the same as the Custodian I position in 1982, immediately prior to respondent's consolidation of the Custodian I and Custodian II positions. The job description of the Custodian II position in 1972, the date of creation of the Custodian I and II positions, was essentially the same as the Custodian II position in 1982, immediately prior to respondent's consolidation of the Custodian I and Custodian II positions.

(7) From 1972 through 1983, the Custodian I and Custodian II positions were substantially equal in terms of the amount of effort ("excursion levels") required by those positions in all four (4) departments. For example, some Custodian I's were using the scrubbing and buffing machines between 1972 and 1983. Also, from 1972 through 1983, Custodian I's and Custodian II's performed similar mixes of light, moderate and heavy work. From 1972 through 1983, the skill levels required to perform the job requirements of Custodian I and Custodian II were substantially equal.

From 1972 through 1983, the levels of responsibility required to perform the job requirements of Custodian I and Custodian II were substantially equal and did not involve any significant training differences.

(8) Women who worked in the position of Custodian I for the respondent at Potomac State College, the West Virginia University Hospital, West Virginia University Housing, and West Virginia University Physical Plant, are entitled to damages

equal to the wages they would have received if they had been paid at the rate of a Custodian II for the years from 1975 through 1983. The class action, however, was not filed until March, 1977.

(9) By stipulation of the parties, a report from the U.S. Department of Labor dated January 21, 1981, was admitted and made a part of the record, with certain objections reserved by complainants.

D. CONCLUSIONS OF LAW

By a preponderance of the evidence, the hearing examiner finds as follows:

1. Jessie Turney is an individual aggrieved by an unlawful discriminatory practice and is a proper complainant under the West Virginia Human Rights Act. Jack McLaughlin, in his capacity as President of the Laborers Local 814, is a proper complainant for the purpose of seeking class relief under the West Virginia Human Rights Act. The West Virginia Board of Regents is an employer as defined in the West Virginia Human Rights Act.

2. Complainants have established a prima facie case that the respondent discriminated against Jessie Turney and all other women who occupied the position of Custodian I or were denied a Custodian II position during all relevant times covered by these complaints on the basis of sex.

Complainants have demonstrated that the reasons articulated by Respondent for its conduct and pay

classifications are pretextual, inasmuch as the positions were essentially identical in terms of skill and effort required and ultimately expended.

Respondent, West Virginia Board of Regents, has discriminated against complainant Jessie Turney and a class of complainants consisting of women who occupied the position of Custodian I at the West Virginia University Hospital, West Virginia University Housing, West Virginia University Physical Plant and Potomac State College from 1972 until 1983, when the positions of Custodian I and Custodian II were consolidated.

E. DETERMINATION

It is therefore the opinion of the undersigned hearing examiner that the Respondent, West Virginia Board of Regents, is in violation of the West Virginia Human Rights Act in Case Nos. ES-16-76 and ES-379-77. It is the recommendation of the undersigned hearing examiner that the following relief be awarded:

(1) Complainants are entitled to retroactive pay and any adjustments necessary in their current pay to eliminate all vestiges of discrimination, and to costs and reasonable attorney fees. Respondent is not immune from an award of money damages. See, Blake v. West Virginia Board of Regents, 279 S.E.2d 169 at 181 (W.Va. 1981); Clarke v. West Virginia Board of Regents, 301 S.E.2d 618 at 620-21 (W.Va. 1983); Hooper v. Jensen and West Virginia Board of Regents, 328 S.E.2d 519 (W.Va. 1985).

LAW OFFICES

SELLITTI & NOGAY

SUITE 7

PROFESSIONAL PLAZA

1125 PENNSYLVANIA AVE.

WEIRTON, W. VA. 26062

(2) Any determinations by the U.S. Department of Labor are not, and should not be, binding upon the independent authority of this Commission to prevent sex discrimination.

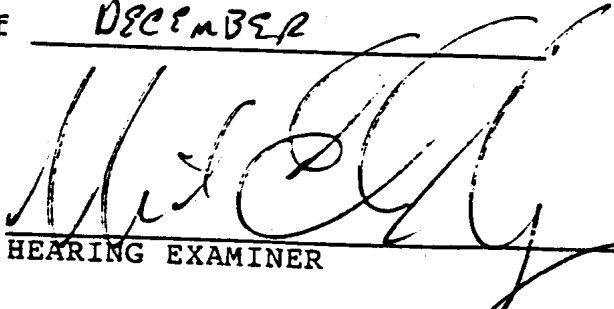
(3) By agreement, the parties deferred evidence on the issue of damages during the public hearing due to the fact that the class of individuals was large and wage computation very complicated. The parties should immediately begin computing these back pay figures and submit the same directly to the Commission after January 1, 1986 for approval.

Respondent shall not be deemed to have waived its objection to the decision underlying the award by its subsequent co-operation in determining such damages with lawful interest.

(4) After considering the affidavits of counsel for complainants, the hearing examiner finds that reasonable attorney fees payable by Respondent to such counsel to be in the amount of \$20,047.75 with costs in the amount of \$2,535.09, with lawful interest on each. It is the opinion of the hearing examiner that Complainant's counsel did an extraordinary job and a great service to the State of West Virginia.

(5) Inasmuch as, since 1983, the pay discrimination has been eliminated, a cease and desist order is not needed.

ENTER this 17 day of DECEMBER
1985.


HEARING EXAMINER