



Order

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

December 13, 1985

Paul R. Hull
Assistant Attorney General
State Capitol, Room 26-E
Charleston, WV 25305

John Richardson
Attorney for the
Human Rights Commission
1036 Quarrier Street
Charleston, WV 25301

Edward R. Bedget, Sr.
Rt. 2, Box 118
Bunker Hill, WV 25413

RE: The West Virginia Human Rights Commission
By its Chairman, Russell Van Cleve and
Edward R. Bedget, Sr. V State of WV Office of the
Adjutant General Operation and Maintenance Division
EA-282-82

Dear Mr. Hull, Mr. Richardson and Mr. Bedget:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of The West Virginia Human Rights Commission By its Chairman, Russell Van Cleve and Edward R. Bedget, Sr., V State of WV Office of the Adjutant General Operation and Maintenance Division.

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,

A handwritten signature in cursive script that reads "Howard D. Kenney".

Howard D. Kenney
Executive Director

HDK/kpv
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
BY ITS CHAIRMAN, RUSSELL VAN CLEVE AND
EDWARD R. BEDGET, SR.,

Complainant,

V

Docket No.: EA-282-82

STATE OF WV OFFICE OF THE ADJUTANT GENERAL
OPERATION AND MAINTENANCE DIVISION,

Respondent.

ORDER

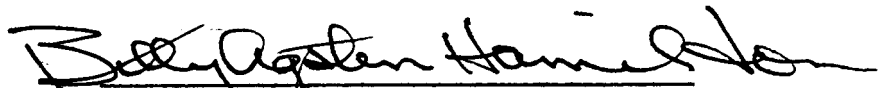
On the 14th day of November, 1985, the Commission reviewed Hearing Examiner, James Gerl's Findings of Fact and Conclusions of Law and Exceptions thereto. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

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.

By this Order, a copy of which to be sent by certified mail, 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 5 day of December, 1985.

RESPECTFULLY SUBMITTED,



CHAIR/VICE CHAIR
WEST VIRGINIA HUMAN RIGHTS
COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

SEP 26 1985

W.V. HUMAN RIGHTS COMM.

THE WEST VIRGINIA HUMAN RIGHTS
COMMISSION BY ITS CHAIRMAN,
RUSSELL VAN CLEVE, and
EDWARD R. BEDGET, SR.,

Complainants,

v.

DOCKET NO. EA-282-82

STATE OF WEST VIRGINIA OFFICE
OF THE ADJUTANT GENERAL/OPERATION
and MAINTENANCE DIVISION,

Respondents.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on April 15, 1985, in Charleston, West Virginia. The complaint was filed on December 14, 1981. A notice of hearing was served on December 10, 1984. An amended answer to the complaint was filed on March 20, 1985. A Status Conference was held on January 9, 1985. At the hearing, the motion of the Human Rights Commission to add itself as a party complainant was granted and the motion of Edward R. Bedget, Sr., to withdraw his complaint was granted. The parties notified the Hearing Examiner at the hearing that they would be able to stipulate to all facts concerning this matter and that no testimony or documentary evidence would have to be received at a

hearing. Because a full public hearing is very costly to the Commission the Hearing Examiner permitted the parties an extended period of time to file their stipulations and post hearing documents. Subsequent to the hearing, respondent and complainant submitted written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views 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 issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

CONTENTIONS OF THE PARTIES

The Human Rights Commission contends that respondent discriminates against its security guards on the basis of their age by requiring them to be removed from their position at age 60. Respondent maintains that membership in the Air National Guard is a bona fide occupational qualification for its security guards.

FINDINGS OF FACT

Based upon the parties joint stipulations of fact, the Hearing Examiner has made the following findings of fact:

1. The complainant, Edward R. Bedget, Sr., became 60 years of age on February 16, 1982, and was retired from the West Virginia Air National Guard and terminated from his employment with the respondent as a security guard.

2. The complainant, Edward R. Bedget, Sr., was an employee of the respondent and was employed as a security guard from May 8, 1976, to February 16, 1982.

3. The reason for Bedget's termination by respondent was that he became 60 years of age and respondent invoked its Regulation WVMR (AIR) 40-1, dated September 15, 1978.

4. Complainant was not terminated because he was mentally or physically unable to perform the job of security guard.

5. Policy of retirement at age 60 was only a recommended policy of the National Guard Bureau, but was made mandatory by respondent's Adjutant General by Regulation WVMR (AIR) 40-1, September 15, 1978.

6. The respondent herein sought a writ of prohibition upon the ground, among others, that the West Virginia Human Rights Commission had no jurisdiction, which writ was denied by the Kanawha County Circuit Court by its order dated January 27, 1982.

7. The complainant was a member of the base security guard program, employed as a base security guard, 167 Tactical Airlift Group, WVANG, Eastern West Virginia Regional Airport, Martinsburg, West Virginia.

8. The base security guard program falls within the ANG Operations and Maintenance (O & M) Agreement negotiated between the Adjutant General (State) and the Federal Government represented by the United States Property and Fiscal Officer and the National Guard Bureau, Washington, D.C.

9. At the time of complainant's termination, and presently, the WVANG has two bases in West Virginia, one in Martinsburg, West Virginia, and one in Charleston, West Virginia (130 TAG, Kanawha-Charleston). Each base has 11 federally authorized security guard positions.

10. On May 8, 1976, complainant was employed as a base security guard. He was a member of the WVANG at the time. Complainant received training in the performance of his base security duties as a result of his WVANG membership.

11. Effective prior to Bedget's dismissal, the National Guard Bureau established mandatory proficiency training for base security guards employed under the O & M Agreement.

12. By letter dated May 8, 1977, the National Guard Bureau established the requirement that base security guards would be

armed in the performance of their official on-base duties effective October 1, 1977.

13. The requirement that a civilian base security guard maintain, as a condition of his employment, membership in the WVANG is a recommended qualification by the National Guard Bureau.

14. A member of the WVANG, security section, receives the following training and equipment which is required by the National Guard Bureau: (1) proficiency training; (2) weapons training; (3) physical standards; (4) military uniforms; (5) basic and specialized training; (6) annual training; and (7) monthly drill training.

15. The ANG security guard retirement policy permits continued employment in other State positions upon retirement from the position of ANG security guard, but does not guarantee such employment.

Based upon a preponderance of the evidence the Hearing Examiner has made the following findings of fact:

16. The duties, qualifications, and physical requirements for the position of security guard at respondent are set forth in a job description attached hereto as Exhibit I and incorporated by reference herein.

17. Because of his responsibilities and duties, a security

guard at ANG installations must carry a firearm, be proficient in the safe use of the firearm he is assigned to carry, and be licensed to carry same.

18. It is necessary for security guards to provide armed security in order to protect ANG aircraft, property, and facilities from an increasing number of incidents involving terrorism, violence, and destruction.

19. Respondent's security guards must receive security proficiency training and firearms training.

20. The use of deadly force is an extremely serious matter, and training and education are vital to ensure that deadly force will not be used improperly. The use of deadly force may be made available as an alternative only to personnel who are highly trained as to the circumstances of its use and are highly trained in recognizing and availing themselves of nonlethal alternatives.

21. Respondent's decision to require that its security guards be members of West Virginia Air National Guard was made in order to save respondent money which would otherwise have to be spent on security proficiency training, weapons training, physical examinations, and uniforms.

22. As of April 3, 1980, Edward R. Bedget, Sr., was in good health and was taking no medications.

23. Respondent's security guards are terminated at age 60 solely because of their age.

24. The complainant, Edward R. Bedget, Sr., does not seek an award of damages by way of backpay because of his subsequent employment more than mitigated the amount lost by way of wages.

CONCLUSIONS OF LAW

1. Edward R. Bedget, Sr., has withdrawn his complaint herein, and, accordingly is entitled to no relief.

2. The Human Rights Commission and its former Chairman Russell Van Cleve have been properly substituted as parties' complainant herein.

3. State of West Virginia, Office of the Adjutant General, is an employer as defined in West Virginia Code, Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

4. Respondent is subject to the administrative procedures established by the Human Rights Act.

5. Respondent has not established that its security guards being age 59 or less is reasonably necessary to its security business; or that respondent had a factual basis for believing that all persons 60 or older could not safely and efficiently perform the duties of a security guard; or that it would be impossible

or highly impractical for respondent to afford individualized treatment to its security guards as they reach their 60th birthday.

6. Respondent has not established that being age 59 or less is a bona fide occupational qualification for its security guards.

7. Respondent discriminates against its security guards on the basis of their age by not permitting them to remain in their positions as security guards subsequent to their 60th birthdays.

DETERMINATION

The preponderance of the evidence in this matter sustains the complaint.

DISCUSSION

Prior to the hearing, respondent filed motions to dismiss alleging that the complaint was not timely filed and asserting the defense of laches. Such motions were denied at the outset of the hearing herein. The rulings denying said motions are incorporated by reference herein.

Respondent claims that it is not subject to be sued because it is a state agency. This matter, however, is not a suit at law or in equity in a court as required by the constitutional

provision cited by respondent, but rather, an administrative hearing. Moreover, the legislature has expressly provided that the State of West Virginia may be a party respondent in hearings before the Human Rights Commission. West Virginia Code, Section 5-11-3(d).

Additionally, respondent maintains that the Human Rights Act does not apply to persons in military service. Respondent cites no authority for this proposition. The Human Rights Act clearly applies to the employees of the State of West Virginia. The Hearing Examiner knows of no rule that people in military or security jobs are immune from the protections of the Human Rights Act.

Respondent asserts that because a federal regulation is involved in this matter the Human Rights Commission has no jurisdiction. It should be noted, however, that the Federal government does not require that security guards be removed or retired at age 60. It is merely a recommendation as the parties have stipulated. Thus, respondent's preemption argument is without merit.

The principal defense raised by respondent is its bona fide occupational qualification argument. It should be noted at the outset that respondent misstates the issue. The question

is not whether required membership in the Air National Guard in general is unlawful. Rather, the question is whether required membership in the Air National Guard which indirectly mandates automatic retirement or removal of security guards at age 60 is unlawful. Thus, it is only when the requirement is applied in a manner that forces retirement at age 60 that the age discrimination issue arises. No issue has been raised that challenges the validity of the requirement that security guards be members of the Air National Guard until the age 60.

The Fair Employment Laws express a preference for individual evaluation; employers are to evaluate employees who are 40 years of age or older on their merits and not their age. Western Airlines, Inc. v. Criswell, U.S. 105 S.Ct. 2717, 86 L.Ed.2d 321, 338-339 (June 17, 1985). Accordingly, the bona fide occupational qualification exception to the rules against discrimination is meant to be an extremely narrow exception. Id.; Dothard v. Rawlinson 433 U.S. 321, 14 E.P.D. Paragraph 7632 at 5107 (1977). The burden of proving that an otherwise illegal classification or distinction is a bona fide occupational qualification rests upon the party seeking to rely upon the bona fide occupational qualification defense. Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228, 1 E.P.D. Paragraph 9970 at 1505 (5th Cir. 1969).

In order to successfully assert a bona fide occupational qualification defense, an employer must validate any discrimination as reasonably necessary to the normal operation of its particular business. Western Airlines, Inc. v. Criswell, supra, 86 L.E.2d at 339. An employer may establish such reasonable necessity either by proving that it had reasonable cause to believe, that is a factual basis for believing, that all or substantially all employees above a certain age would be unable to safely and efficiently perform the duties of the job, or, alternatively an employer may show that age is a legitimate proxy for safety-related qualifications by proving that it is impossible or highly impractical for the employer to deal with the older employees on an individualized basis.

In the instant case, respondent has not met its burden. Respondent has not shown that it is reasonably necessary to its security business that its guards retire at age 60. It should be noted that respondent, in its brief, misstates the test to be applied. Respondent claims that it was "reasonable for it to believe." The test, however, is an objective standard, and the reasonableness of the respondent's belief is not sufficient to establish a bona fide occupational qualification defense.

Respondent does not, and indeed could not maintain that it has a factual basis to believe that all, or substantially all,

persons 60 years of age or more could not safely and efficiently perform the duties of security guard. For example, Bedget, who filed the initial complaint herein, was in good health and taking no medications according to his medical examination records. The parties have stipulated that he was removed from his security guard position despite the fact that he was physically and mentally capable of doing the job.

Similarly, respondent has not established that it would be impossible or highly impractical for it to afford security guards over 59 years of age individualized treatment. Respondent contends that the factors leading to its decision to make Air National Guard membership mandatory were the availability of security proficiency training, weapons training, physical examinations and uniforms. As the January 29, 1982, letter from Wilson clearly indicates, cost is the overriding concern of respondent in establishing the requirement. By requiring membership in ANG, respondent saved money for proficiency training, money for firearms training and money for uniforms. It must be noted that respondent is clearly free to require ANG membership until age 60 and not require ANG membership after age 60. That way respondent could have ANG pay for the necessary firearms training, the initial course in security proficiency, all

follow up courses in security proficiency until the guard reaches age 60 and is removed from ANG, the initial physical examination, all follow up physical exams until age 60 and all uniform costs until age 60. In that way, respondent would only be required to pay for follow up proficiency training, periodic physical exams and uniforms from the time a guard reaches age 60 until he becomes 65. Moreover, it should be noted that there are only eleven guards at each of two bases in West Virginia, for a total of only twenty-two guards. Thus, the cost to respondent would not be substantial. In any event, cost should not outweigh or override the principle of non-discrimination.

Respondent also contends that standardization of uniforms is necessary to preclude problems. Respondent does not specify the problems that standardization of uniforms would preclude. So long as a security guard is wearing some military-type uniform even if not the uniform of the United State Air Force, it is difficult to imagine how security might be impaired.

Respondent has also claimed that membership in ANG is necessary because if a National Guard unit were called to active duty and some members were civilians, the unit would be short-handed. ANG is free to hire persons other than those employed by respondent. If ANG maintains a discriminatory age requirement, it should take it upon itself to hire additional personnel to

fill-in in the event of activation. Even if ANG could not hire others, it can not ~~claim~~ a disadvantage if such disadvantage is caused by unlawful discrimination. Such a disadvantage does not outweigh strong policy against discrimination contained in the Human Rights Act. Allen, et al v. Human Rights Commission S.E.2d (1984).

The appropriate relief in the matter is the cease and desist order prayed for by the Human Rights Commission. No relief for Badget is appropriate. Incidental damages for humiliation, etc., are not proper because he has not prosecuted his complaint. The Hearing Examiner made this point clear at the hearing held herein when the Human Rights Commission's motion to amend complaint was granted and Badget's withdrawal was granted.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner hereby recommends the following:

1. That the complaint of the West Virginia Human Rights Commission by its chairman, Russell Van Cleve, and Edward R. Badget, Sr., Docket No. EA-282-82 be sustained.

2. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their age by forcing its security guards to retire or be removed from

their position as security guards at age 60;

3. That respondent report to the Commission within 90 days following the entry of its Order, the steps respondent has taken to comply with the Order.



James Gerl
Hearing Examiner

ENTERED: September 25, 1985

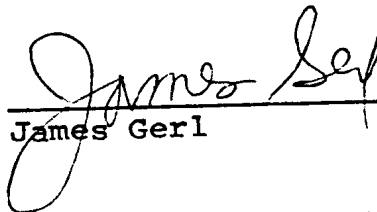
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing PROPOSED ORDER AND DECISION by placing true and correct copies thereof in the United States Mail, postage prepaid, addressed to the following:

Paul R. Hull
Asst. A G
State Capitol, Rm 26-E
Charleston, WV 25305

John Richardson
Human Rights Commission
1036 Quarrier Street
Charleston, WV 25301

on this 25th day of September, 1985.



James Gerl